

# HIGHER EDUCATION IMPLICATIONS OF *PARENTS INVOLVED IN COMMUNITY SCHOOLS*

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## I. INTRODUCTION

The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved)*,<sup>1</sup> a case which struck down race-conscious student admissions plans in Seattle, Washington, and Louisville, Kentucky, brought the contentious topic of race-conscious remedies back into the headlines. In invalidating both programs, the Court observed that Seattle had never operated segregated schools for students of different races nor had it ever been subject to a court-ordered desegregation order.<sup>2</sup> Further, the Court noted that Louisville's schools had been declared unitary and released from judicial supervision eight years earlier.<sup>3</sup> In *Parents Involved*, the Court concluded that educational officials in both school systems not only failed to demonstrate that the use of racial classifications in their student assignment plans was necessary to achieve the goal of racial diversity, but also failed to consider alternative approaches adequately.<sup>4</sup>

Part II of this Article provides a brief overview of racial preferences and related litigation, both inside and outside the world of education. Part III of the Article examines the judicial history of the *Parents Involved* cases and goes on to analyze the opinions of the Supreme Court majority and dissenters in the *Parents Involved* decision. Part IV provides a brief retrospective on race-conscious remedies. Finally, Part V of the Article considers the potential implications of *Parents Involved* for colleges and universities that are seeking to diversify their populations of students, faculty, and staff.

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1. 127 S. Ct. 2738 (2007).

2. *Id.* at 2742.

3. *Id.* at 2749.

4. *Id.* at 2767–68.

## II. RACIAL PREFERENCES AND RELATED LITIGATION

The term “affirmative action” entered the American legal lexicon in 1961 in President John F. Kennedy’s Executive Order 10,925.<sup>5</sup> Issued on March 6, 1961, this order created the Committee of Equal Employment Opportunity and directed administrators in federally funded projects to “take affirmative action” to eliminate racial discrimination in hiring and employment practices.<sup>6</sup> More specifically, the Order declared that “it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts.”<sup>7</sup>

The subsequent enactment of Title VII of the Civil Rights Act of 1964, signed into law by President Lyndon Johnson on June 2, 1964, codified the prohibitions against racial discrimination in employment,<sup>8</sup> but made no reference to education or affirmative action. The remainder of this section briefly reviews the Supreme Court’s judgments on race-conscious remedies.

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5. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (“The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”).

6. *Id.*

7. *Id.*

8. Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2(a) (2000).

(a) Employer Practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. §§ 2000(e)-2(a). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court interpreted Title VII as prohibiting not only overt discrimination based on race, but also practices that seemed to be fair on their face but have a discriminatory impact. *Id.* at 431. Put another way, the Court forbade employers from applying what seemed to be neutral criteria that are often proven, by using quantitative data, to have a disparate impact on members of particular groups or classes. The Court later clarified the parameters of disparate impact in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding that plaintiffs in Title VII cases did not have to demonstrate that employers acted with discriminatory intent in cases involving allegations of disparate impact).

### A. Racial Preferences in Higher Education Admissions

In its first case involving race as an admissions criterion in higher education, the Supreme Court side-stepped the merits of the underlying claim. At issue was a dispute from Washington where a white applicant to a state law school filed suit claiming that he was denied admission in favor of a less qualified minority applicant pursuant to the school's "affirmative action" plan.<sup>9</sup> After a state trial court, in an unpublished opinion, directed law school officials to admit the plaintiff because he was fully qualified, the Supreme Court of Washington reversed and upheld the law school's affirmative action plan, but did not require the plaintiff to terminate his studies based on its order.<sup>10</sup> The court explained that "[i]n light of the serious underrepresentation of minority groups in the law schools . . . [and finding] the [state's] interest in eliminating racial imbalance within public legal education to be compelling," the plan passed constitutional muster.<sup>11</sup>

In *DeFunis v. Odegaard*,<sup>12</sup> the Supreme Court first granted certiorari but then vacated the case as moot in a per curiam opinion since the student was in his final quarter of law school and would be permitted to complete his studies regardless of the outcome of the litigation.<sup>13</sup> On remand, the Supreme Court of Washington rejected the plaintiff's motion to act on behalf of the class of individuals who claimed to have been denied admission in favor of less qualified minorities.<sup>14</sup> The court refused to let the plaintiff become involved because he could not properly represent their interests insofar as any interest that he might have had in the litigation would have been too small based on the fact that he had already graduated from law school.<sup>15</sup> Moreover, the court reconsidered its earlier order and, in light of its broad public import, reinstated its earlier judgment upholding the admissions policy.<sup>16</sup>

The Supreme Court addressed the substantive use of race as a criterion for admission into an educational program for the first time in a dispute from California wherein a white applicant who was twice denied admission to a public medical school filed suit challenging the school's use of a race-

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9. *DeFunis v. Odegaard*, 507 P.2d 1169, 1176–77 (Wash. 1973), *vacated* 416 U.S. 312 (1974). The record revealed that under the rubric that officials used in evaluating applicants, the plaintiff had a higher Predicated First-Year Average, the standard used for admissions, than most of the minority applicants who were admitted in his stead. *Id.* at 1173–77.

10. *See id.* at 1188.

11. *Id.* at 1182.

12. 416 U.S. 312 (1974).

13. *Id.* at 319–20.

14. *DeFunis v. Odegaard*, 529 P.2d 438, 441 (Wash. 1974).

15. *Id.* at 442.

16. *Id.* at 445. For a later case from Washington upholding a race-conscious admissions plan to medical school, see *McDonald v. Hogness*, 598 P.2d 707 (Wash. 1979).

conscious admissions plan.<sup>17</sup> The plaintiff alleged that the admissions plan violated Title VI of the Civil Rights Act of 1964<sup>18</sup> and the Fourteenth Amendment's Equal Protection Clause.<sup>19</sup> Under the plan, university officials set aside a specified number of seats for various minority applicants while allowing them to also compete in the larger pool.<sup>20</sup> A trial court, in an unpublished opinion, struck down the plan as unconstitutional but refused to grant the plaintiff's request for an order compelling his admission because the court did not believe that the plaintiff established that he would have been admitted but for the constitutional and statutory violations.<sup>21</sup> On appeals by both parties, the Supreme Court of California affirmed, holding that the admissions program was unconstitutional because it violated the rights of non-minority applicants by affording minority applicants a race-based advantage in the admissions process even though, in light of the university's own standards, they were not as qualified for the study of medicine as non-minority applicants who were denied admission.<sup>22</sup>

After granting a stay,<sup>23</sup> the United States Supreme Court agreed to hear the case on appeal,<sup>24</sup> and on further review in *Regents of the University of California v. Bakke*,<sup>25</sup> a splintered United States Supreme Court reached two important conclusions.<sup>26</sup> First, the Court held that the policy was invalid.<sup>27</sup> Four justices—Justice Stevens, joined by Chief Justice Burger

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17. *Regents v. Bakke*, 438 U.S. 265 (1978).

18. Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2000).

19. *Bakke*, 438 U.S. at 278.

20. *Id.* at 274–75.

21. *Id.* at 270. Bakke was eventually admitted to medical school and practiced as an anesthesiologist in Minnesota. See *Allan Bakke Working As a Doctor*, S.F. CHRON., Nov. 3, 1986, at B2; see also Jeff Jacoby, *Affirmative Action Can Sometimes Be Fatal*, BOSTON GLOBE, Aug. 14, 1997, at A19 (chronicling the career of Allan Bakke and another graduate of the medical school he attended).

22. *Bakke v. Regents*, 553 P.2d 1152 (Cal. 1976).

23. *Regents v. Bakke*, 429 U.S. 953 (1976).

24. *Regents v. Bakke*, 429 U.S. 1090 (1977).

25. *Bakke*, 438 U.S. 265.

26. For representative commentary on *Bakke*, see, e.g., Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341 (2001); John C. Jeffries, Jr., *Bakke Revisited*, 55 SUP. CT. REV. 1 (2003); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002); Michael Rosman, *Thoughts on Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45 (2002); Jeff Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, 92 KY. L.J. 219 (2003); Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 (1999); Laurence H. Tribe, Comment, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Peter Widulski, *Bakke, Grutter, and the Principle of Subsidiarity*, 32 HASTINGS CONST. L.Q. 847 (2005).

27. *Bakke*, 438 U.S. at 271.

and Justices Stewart and Rehnquist—believed that the policy, which set aside seats for certain racial groups, violated Title VI of the Civil Rights Act of 1964 and did not address the constitutional issue.<sup>28</sup> Justice Powell believed that the policy violated the Equal Protection Clause of the Constitution.<sup>29</sup> Second, the Court maintained that the Constitution permitted the indirect consideration of race as one factor among many.<sup>30</sup> That portion of Justice Powell’s opinion discussing why the Constitution permitted the indirect consideration of race was joined by Justices Brennan, White, Marshall, and Blackmun.<sup>31</sup> In addition, Justice Powell, writing only for himself, stated that the achievement of a diverse student body was a compelling governmental interest.<sup>32</sup>

On the same day that it announced its judgment, the Court also vacated its earlier stay.<sup>33</sup> Moreover, although *Bakke* was a plurality, it has become a bellwether that has led to a steady stream of litigation over race-conscious remedies in a variety of settings outside of education in addition to admissions policies in both K–12 and higher education settings.

## B. Racial Preferences in Non-Educational Settings

Beginning a year after *Bakke*, the Supreme Court examined non-educational disputes involving employment, minority set-aside programs, and voting. The Court also considered additional education-related litigation on race-conscious remedies in employment and race-conscious admissions plans. Accordingly, the next two subsections briefly review the Court’s resolution of litigation on race-conscious remedies as a backdrop for how it has resolved the most recent school-related litigation.

### 1. Employment

In the term following *Bakke*, in *United Steelworkers of America v.*

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28. *Id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Powell, author of the Court’s opinion, was the sole member of the Court who based his analysis on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 287 (opinion for the Court).

29. *Id.* at 320.

30. *Id.*

31. *Id.* (“In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.”). The largest part of the plurality was formed by Justice Brennan’s opinion. *See id.* at 272 (Brennan, J., concurring in part and dissenting in part).

32. *Id.* at 315 (majority opinion).

33. *Regents v. Bakke*, 438 U.S. 912 (1978).

*Weber*,<sup>34</sup> the Court ruled that the prohibition against racial discrimination in Title VII did not condemn all private, voluntary, race-conscious plans.<sup>35</sup> The Court found that the plan at issue, which granted preferences to African Americans over whites to make up for past discrimination, was constitutionally permissible since it was developed pursuant to a collective bargaining agreement between the employer and its employees.<sup>36</sup> The Court was convinced that a provision in the agreement that set aside fifty percent of the openings in an in-plant craft-training program until the percentage of African Americans there was commensurate with that of African Americans in the local labor force did not violate Title VII.<sup>37</sup> The Court posited that the agreement met the mandates of Title VII because its purposes mirrored those of the statute, it did not unnecessarily override the interests of white employees, and it was a temporary measure that was not intended to preserve a racial balance but to eliminate a manifest racial imbalance.<sup>38</sup>

At issue in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*<sup>39</sup> was a union's challenge to an order that it violated Title VII and the rights of minorities in recruitment, selection, training, and admission to membership and an apprentice training program.<sup>40</sup> In addition, the union disputed the lower courts' imposing fines on it for civil contempt and directing its officials to develop, and implement, membership goals for minorities.<sup>41</sup> The Supreme Court affirmed that Title VII's remedial provisions did not preclude the imposition of preferential relief to benefit individuals who were not actual victims of discrimination.<sup>42</sup> Additionally, the Court determined that using the fines to create a special fund to increase nonwhite membership in the union and its apprenticeship program were proper remedies for civil contempt.<sup>43</sup> The Court concluded that neither the imposition of the membership goal nor the fund order violated Title VII or the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>44</sup>

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34. 443 U.S. 193 (1979).

35. *Id.* at 209.

36. *Id.* at 207.

37. *Id.*

38. *Id.*

39. 478 U.S. 421 (1986).

40. *Id.* at 429.

41. *Id.* at 439-40; *see also* EEOC v. Local 638 and Local 28 Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172 (2d Cir. 1985).

42. *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 471.

43. *Id.* at 443-44.

44. *Id.* at 483. The Court addressed the Fifth, rather than the Fourteenth, Amendment because the former applies to the federal government and its agencies. For another case under the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497 (1954) (striking down segregation in the public schools of Washington, D.C.).

*United States v. Paradise*<sup>45</sup> involved a dispute from Alabama over the creation of procedures for the selection of new state trooper corporals.<sup>46</sup> A federal trial court mandated that fifty percent of promotions go to African Americans until either they filled approximately twenty-five percent of the rank of corporal or officials developed and implemented a promotion plan that conformed with prior orders and decrees.<sup>47</sup> On appeal, the Eleventh Circuit affirmed, holding that the policy did not violate Title VII.<sup>48</sup> The Supreme Court, in turn, affirmed that the percent promotion requirement was permissible under the Equal Protection Clause since it was justified by the compelling governmental interest in eradicating the past discriminatory exclusion of African Americans from positions as state troopers and was narrowly tailored to serve its stated purposes.<sup>49</sup>

When a male employee of a county transportation agency with a higher interview score on an examination was passed over for a promotion in favor of a female colleague with a lesser score under a plan directing that sex or race be considered for the purpose of remedying the underrepresentation of women and minorities in traditionally segregated job categories, he filed suit under Title VII.<sup>50</sup> After a federal trial court in California found that the county agency violated Title VII,<sup>51</sup> the Ninth Circuit reversed, upholding the constitutionality of the plan.<sup>52</sup> In finding that the plan did not violate Title VII, the Supreme Court held in *Johnson v. Transportation Agency*<sup>53</sup> that since the plan was designed to remedy a situation wherein women and minorities were underrepresented, it did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement.<sup>54</sup>

## 2. Minority Set-Aside Programs

In *Fullilove v. Klutznick*,<sup>55</sup> the Supreme Court reviewed a dispute from New York wherein associations of construction contractors, subcontractors, and others unsuccessfully sought to enjoin the enforcement of a federal set-aside program for minority business enterprises.<sup>56</sup> After a federal trial

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45. 480 U.S. 149 (1987).

46. *Id.*

47. *Paradise v. Prescott*, 585 F. Supp. 72, 73–74 (M.D. Ala. 1983).

48. *Paradise v. Prescott*, 767 F.2d 1514, 1538 (11th Cir. 1985).

49. *Paradise*, 480 U.S. at 185–86.

50. *Johnson v. Transp. Agency*, 480 U.S. 616, 623–25 (1987). Although the case dealt directly with sex, the case is treated as dealing with a race-conscious hiring plan since it explicitly included race within its provisions.

51. *Id.* at 625.

52. *Johnson v. Transp. Agency*, 770 F.2d 752 (9th Cir. 1984).

53. *Johnson*, 480 U.S. 616.

54. *Id.* at 637–40.

55. 448 U.S. 448 (1980).

56. *Id.*

court<sup>57</sup> and the Second Circuit<sup>58</sup> denied relief, the Supreme Court sustained the statute's constitutionality.<sup>59</sup> In another plurality decision, in which none of the Court's five opinions could gather the support of more than three justices, the Court upheld the statute on the basis that Congress had the authority to employ racial or ethnic classifications in exercising its spending or other legislative powers.<sup>60</sup>

*City of Richmond v. J.A. Croson Co.*<sup>61</sup> was the first of three cases on race-conscious remedies to make two trips to the Supreme Court.<sup>62</sup> Only in the second round of litigation did the justices reach a substantive outcome.<sup>63</sup> At issue was a challenge to a plan that required prime contractors who were awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more minority businesses.<sup>64</sup> After a federal trial court in Virginia<sup>65</sup> and the Fourth Circuit<sup>66</sup> upheld the plan, the Supreme Court summarily vacated for further review.<sup>67</sup> On remand, the Fourth Circuit invalidated the plan for violating the Equal Protection Clause.<sup>68</sup> Subsequently, the Supreme Court affirmed, stating that the plan was unconstitutional because city officials failed to demonstrate a compelling governmental interest justifying its adoption, and the plan was not narrowly tailored to remedy effects of prior discrimination.<sup>69</sup>

A year later, in *Metro Broadcasting, Inc. v. Federal Communications Commission (Metro Broadcasting)*,<sup>70</sup> the Court upheld a constitutionally mandated preference policy with regard to minority ownership of new radio or television stations.<sup>71</sup> The Court ruled that this plan was acceptable both because it bore a substantial relationship to the important congressional interest in broadcasting diversity and because it did not impose impermissible burdens on those who were not minorities.<sup>72</sup>

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57. *Fullilove v. Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977).

58. *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978).

59. *Fullilove*, 448 U.S. at 492.

60. *Id.* at 490.

61. 488 U.S. 469 (1989).

62. *Id.*; see also *Abrams v. Johnson*, 521 U.S. 74 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *infra* notes 85–97 and accompanying text.

63. See *J.A. Croson Co.*, 488 U.S. 469.

64. *Id.* at 477.

65. *Id.* at 483.

66. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985).

67. *J.A. Croson Co. v. City of Richmond*, 478 U.S. 1016 (1986).

68. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987).

69. *J.A. Croson Co.*, 488 U.S. at 505–07.

70. 497 U.S. 547 (1990).

71. *Id.*

72. *Id.* at 569, 598.



Five years later, in *Adarand Constructors, Inc. v. Peña (Adarand)*,<sup>73</sup> a closely divided Supreme Court vacated an earlier order upholding a grant of summary judgment in favor of the federal government.<sup>74</sup> The suit arose when a subcontracting firm in Colorado challenged not being awarded the guardrail portion of a federal highway project even though it submitted the lowest bid under a federal program designed to provide opportunities for disadvantaged business enterprises.<sup>75</sup> The firm claimed that the denial violated its rights under the equal protection component of the Fifth Amendment's Due Process Clause.<sup>76</sup>

As an initial matter in *Adarand*, the Court explained that the subcontracting firm had standing to seek forward-looking declaratory and injunctive relief.<sup>77</sup> As to the heart of its judgment, in overruling *Metro Broadcasting*, the Court reasoned that since all racial classifications, regardless of the level of government, were subject to strict scrutiny, the case had to be remanded for a consideration of whether the program at issue met this standard.<sup>78</sup> Following another six years of litigation, the Supreme Court, in a per curiam judgment, refused to hear the prime contractor's challenge to the Department of Transportation's race-based programs since the Tenth Circuit decided that the contractor lacked standing to present its challenge and the contractor did not contest this finding in its petition for certiorari.<sup>79</sup>

### 3. Voting

The Supreme Court has been unenthusiastic about the use of race as a factor in creating legislative districts. Even so, in a case predating *Bakke*, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,<sup>80</sup> a plurality sustained an order of the Second Circuit that a reapportionment plan authorized by a New York State statute that created districts in which minority voters were in the majority passed constitutional muster.<sup>81</sup> The justices were satisfied that the permissible use of racial criteria in redistricting was not limited to eliminating the effects of past discrimination in the creation or apportionment of districts.<sup>82</sup> The Court added that the plan did not violate the Fourteenth or Fifteenth Amendment

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73. 515 U.S. 200 (1995).

74. *Id.* at 210, 239.

75. *Id.* at 200.

76. *Id.* at 210.

77. *Id.* at 210–12.

78. *Id.* at 226–27.

79. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

80. 430 U.S. 144 (1977).

81. *Id.* at 168.

82. *Id.* at 161.

rights of white voters<sup>83</sup> and that the legislature had the authority to draw district lines in such a way that the percentage of districts with nonwhite majorities roughly approximated the percentage of nonwhites in the county.<sup>84</sup>

Twenty years later, a dispute from North Carolina made two trips to the Supreme Court. In the first round of litigation, *Shaw v. Reno*,<sup>85</sup> the justices determined that legislative action was subject to strict scrutiny where the state legislature took race into consideration in creating congressional districts with bizarre boundaries in an attempt to have minorities constitute a majority of voters in some districts.<sup>86</sup> When the case returned to the Court as *Shaw v. Hunt*,<sup>87</sup> the justices found that the statute was subject to strict scrutiny since voters who were opposed to the plan proved that race was the predominant reason for creating the districts.<sup>88</sup> The Court then invalidated the plan since it was insufficiently narrowly tailored to correct past instances of governmental discrimination against minorities.<sup>89</sup>

In *Miller v. Johnson*,<sup>90</sup> the Supreme Court struck down a legislative plan from Georgia which would have created a gerrymandered congressional district with unusual boundaries that were designed to maximize the number of African American voters in that district.<sup>91</sup> The Court found that the legislative scheme was unconstitutional absent proof that it was narrowly tailored to achieve a compelling governmental interest.<sup>92</sup> On remand, in approving a plan with only one majority African American district due to the legislature's inability to create its own scheme, the federal trial court rejected the notion that this redistricting failed to protect the interests of African Americans.<sup>93</sup> When the case returned to the Court as *Abrams v. Johnson*,<sup>94</sup> the Court affirmed that the trial court neither exceeded its remedial powers nor violated the Voting Rights Act<sup>95</sup> by causing the position of African American voters to regress.<sup>96</sup> In addition, the justices agreed that the trial court had not ignored the principle of one

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83. *Id.* at 167.

84. *Id.* at 163–64.

85. 509 U.S. 630 (1993).

86. *Id.* at 644, 659.

87. 517 U.S. 899 (1996).

88. *Id.* at 905–08.

89. *Id.* at 918.

90. 515 U.S. 900 (1995).

91. *Id.* at 905–10.

92. *Id.* at 920–21.

93. *Johnson v. Miller*, 922 F. Supp. 1552, 1566 (S.D. Ga. 1995).

94. 521 U.S. 74 (1997).

95. 42 U.S.C. § 1973 (2000).

96. *Abrams*, 521 U.S. at 97 (“Appellants have not shown that black voters in any particular district suffered a retrogression in their voting strength under the court plan measured against the 1982 plan.”).

person, one vote.<sup>97</sup>

Finally, in *Bush v. Vera*,<sup>98</sup> another plurality decision, the Supreme Court invalidated the creation of three congressional districts in Texas where race was a key factor.<sup>99</sup> Those justices who supported the outcome in *Miller* also supported the outcome in *Bush*, just as those justices who dissented in the outcome in *Miller* also dissented in the outcome in *Bush*.<sup>100</sup>

### C. Later Cases in Education

#### 1. Employment

The Supreme Court's only case on the merits of racial preferences involving employment in education, *Wygant v. Jackson Board of Education*,<sup>101</sup> concerned the attempt of a school board in Michigan to maintain a racially integrated faculty during a reduction-in-force (RIF).<sup>102</sup> The dispute arose when non-minority educators filed suit challenging a provision in their collective bargaining agreement that allowed the board to retain minorities with less seniority.<sup>103</sup> Ordinarily, the primary goal of seniority provisions in bargaining contracts is protecting workers who have been on the job longer.<sup>104</sup> A plurality of the Court was unwilling to allow the school board to rely on race as the crucial factor in evaluating who could be retained, explaining that a layoff of non-minority teachers based solely on race violated equal protection since it was insufficiently narrowly tailored to achieve the goal of eliminating societal discrimination.<sup>105</sup> In dicta, the Court suggested that the board could have attempted to use less intrusive means of eliminating discrimination such as hiring goals for minority teachers.<sup>106</sup>

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97. *Id.* at 98–101.

98. 517 U.S. 952 (1996).

99. *Id.* at 959–62.

100. Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas supported the outcome in both cases. Justices Stevens, Breyer, Souter, and Ginsburg dissented in both cases.

101. 476 U.S. 267 (1986).

102. *Id.* at 270.

103. *Id.* at 272.

104. *See id.* at 270, n.1.

105. *Id.* at 276 (“But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.” (emphasis in original)); *see also id.* at 274 (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”).

106. *Id.* at 283–84. *But see* *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100 (6th

Another case involving school employment, *Taxman v. Board of Education of the Township of Piscataway*,<sup>107</sup> almost made its way to the Supreme Court. At issue was a dispute from New Jersey in which a school board, erroneously acting on the belief that its race-conscious employment plan required it to terminate the contract of a white, rather than an African American, teacher based solely on race, dismissed the white woman even though the two had virtually identical credentials.<sup>108</sup> An en banc Third Circuit found that since the board's RIF plan, which was adopted for the purpose of promoting racial diversity rather than remedying discrimination or the effects of past discrimination, trammelled the rights of non-minorities, it was unconstitutional.<sup>109</sup> The case was days from oral argument before the Supreme Court when the parties reached a settlement, thereby leaving the status of race-conscious plans further in doubt.<sup>110</sup>

## 2. Racial Preferences in School Admissions: Higher Education

Turning to higher education, between 1994 and 2000, the Fourth, Fifth, and Eleventh Circuits struck down race-conscious admissions plans while the Sixth (at least partially) and Ninth Circuits rejected challenges to such plans. The Fourth Circuit invalidated a scholarship program at the University of Maryland that was open only to African American students as violating the Equal Protection Clause.<sup>111</sup> The court reasoned that the goals of the race-conscious scholarship program did not justify lowering the effective minimum acceptance criteria in creating an applicant pool which rendered only African American students eligible to receive scholarships.<sup>112</sup> The court held that the plan was insufficiently narrowly tailored to meet the university's goal absent evidence that officials tried, without success, to use a race-neutral solution.<sup>113</sup>

The Fifth Circuit, in like fashion, invalidated an admissions plan at the University of Texas School of Law that granted substantial preferences to racial minorities.<sup>114</sup> The court held that a preference system based on race did not survive strict scrutiny under equal protection.<sup>115</sup> On remand, a federal trial court decided that evidence in the record was sufficient to warrant the finding that the plaintiffs who challenged the program would

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Cir. 1992) (permitting race to be a factor in faculty assignments).

107. 91 F.3d 1547 (3d Cir. 1996).

108. *Id.* at 1551-52.

109. *Id.* at 1563-65.

110. Mark Walsh, *N.J. District Settles Case on Race Bias: Action Heads off High Court Review*, EDUC. WEEK (Bethesda, Md.), Nov. 26, 1997, at 1.

111. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

112. *Id.* at 160.

113. *Id.* at 161.

114. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

115. *Id.* at 951.

not have had a reasonable chance of acceptance even under a system that did not employ racial preferences.<sup>116</sup>

In another case, the Eleventh Circuit ruled that the admissions policy of a state university in Georgia was unconstitutional.<sup>117</sup> The court affirmed that the plan, which awarded an arbitrary, but fixed, numerical diversity bonus to nonwhite applicants at a decisive stage in the admissions process, failed the strict scrutiny test.<sup>118</sup>

On the other hand, the Ninth Circuit rejected a challenge from unsuccessful white applicants who claimed that a state law school in Washington used racially discriminatory admissions practices.<sup>119</sup> The court agreed that when voters enacted an initiative prohibiting the state from granting preferential treatment to individuals or groups based on race, sex, color, ethnicity, or national origin, it rendered the students' claim moot, thereby concluding that their class action suit was properly decertified.<sup>120</sup>

The Supreme Court's most recent rulings on race-conscious admissions policies in higher education, *Grutter v. Bollinger*<sup>121</sup> and *Gratz v. Bollinger*,<sup>122</sup> both originated at the University of Michigan.<sup>123</sup> *Grutter* was filed by an unsuccessful forty-three-year-old white female applicant who was in the eighty-sixth percentile nationally on the Law School Admissions Test and challenged the Law School's use of race as a factor in admissions.<sup>124</sup> During the litigation, officials at the University of Michigan conceded that the plaintiff probably would have been admitted had she been a member of one of the underrepresented minority groups, which the

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116. *Hopwood v. Texas*, 999 F. Supp. 872, 897 (W.D. Tex. 1998).

117. *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001).

118. *Id.* at 1254.

119. *Smith v. Univ. of Wash.*, 233 F.3d 1188 (9th Cir. 2000).

120. *Id.* at 1195.

121. 539 U.S. 306 (2003).

122. 539 U.S. 244 (2003).

123. For representative commentaries on the impact of these decisions see, e.g., Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503 (2004); Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004); J. Kevin Jenkins, *Grutter, Diversity, & Public K-12 Schools*, 182 EDUC. L. REP. 353 (2004); Ralph D. Mawdsley & Charles J. Russo, *Supreme Court Dissenting Opinions in Grutter: Has the Majority Created a Nation Divided Against Itself?*, 180 EDUC. L. REP. 417 (2003); Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1 (2005); Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, As Shown By Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583 (2004); William E. Thro, *Commentary, No Direct Consideration of Race: The Lessons of the University of Michigan Decisions*, 196 EDUC. L. REP. 755 (2005).

124. *See Grutter*, 539 U.S. at 316-17.

plan defined as African Americans, Hispanics, and Native Americans.<sup>125</sup> Ultimately, the Sixth Circuit upheld the policy since it thought that it was narrowly tailored to achieving the law school's goal of a diverse student body.<sup>126</sup>

*Gratz* was filed by two unsuccessful white applicants, one female, the other male, to undergraduate programs at the University of Michigan.<sup>127</sup> The students claimed that the use of race as a factor in admissions meant that a more stringent standard was applied to non-minorities.<sup>128</sup> During the year that the female sought admission, university officials accepted all forty-six applicants from the preferred minority group with the same adjusted grade point average and test scores as non-preferred candidates, less than one-third of whom were admitted.<sup>129</sup> Further, the policy gave members of the same minority groups as in *Grutter* a bonus of 20 points on a 150-point admissions scale, an amount roughly equivalent to one full grade on a four point GPA.<sup>130</sup> Yet, this scale awarded only twelve points for a perfect score of 1,600 on the Scholastic Aptitude Test.<sup>131</sup>

A federal trial court in *Gratz*<sup>132</sup> struck down the race-conscious admissions policy on the basis that it was an insufficiently narrowly tailored means of achieving the government's interest in remedying the current effects of past discrimination or the discriminatory impact of other admissions criteria.<sup>133</sup> Before the Sixth Circuit could act, the Supreme Court agreed to hear the University's appeal in both cases.<sup>134</sup>

Writing for the majority in *Grutter*, Justice O'Connor found it unnecessary to consider whether diversity is a compelling state interest since her opinion on behalf of the Court endorsed Justice Powell's concurrence in *Bakke* which established this premise.<sup>135</sup> The Court declared that insofar as diversity is a compelling state interest, and officials at the law school narrowly tailored their plans to achieve a "critical mass"<sup>136</sup> of underrepresented racial and ethnic minorities in the student

125. *Grutter v. Bollinger*, 288 F.3d 732, 790 (6th Cir. 2002) (Boggs, J., dissenting).

126. *Id.* at 752 (majority opinion).

127. *Gratz*, 539 U.S. at 251.

128. *Id.* at 252.

129. Petition for Writ of Certiorari, 8, *Gratz*, 539 U.S. 244 (No. 02-516).

130. *Id.* at 8-9.

131. *Id.* at 8.

132. *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

133. *Id.* at 802 ("Furthermore, the Court is satisfied that the LSA's [College of Literature, Science, and the Arts] race-conscious admissions programs cannot be justified as measures to remedy either the current effects of past discrimination, or the discriminatory impact of the LSA's other admissions criteria."); *id.* at 795 ("[T]he University Defendants have never claimed that the challenged programs were implemented as a means to remedy past discrimination.").

134. See *Grutter v. Bollinger*, 537 U.S. 1043 (2002).

135. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

136. *Id.* at 316.

body, they could use race as a “plus” factor in admissions decisions.<sup>137</sup> The Court added that diversity could be used as a factor as long as officials did not apply a quota system.<sup>138</sup> Insofar as all candidates for admission to the law school were subject to “a highly individualized, holistic review of each applicant’s file,” the Court was satisfied that the law school’s race-conscious admissions policy passed constitutional muster.<sup>139</sup> The Court concluded its opinion by professing the hope that racial preferences will no longer be necessary in twenty-five years.<sup>140</sup> Unfortunately, the Court neither justified the time frame that it established nor addressed the circumstances under which race-conscious plans should terminate or how courts and educational officials could evaluate whether they achieved their goals.

As author of the majority opinion in *Gratz*, Chief Justice Rehnquist agreed that diversity can constitute a compelling state interest.<sup>141</sup> Even so, the Court struck down the admissions policy at issue as insufficiently narrowly tailored to achieve the state’s compelling interest of achieving a diverse student body.<sup>142</sup> More specifically, the Court invalidated the policy since it failed to provide the individualized consideration that the Court described in *Grutter*.<sup>143</sup>

### 3. Racial Preferences in School Admissions: Elementary and Secondary Education

As reflected in the brief review in this section, courts have reached mixed results when public school systems employ race-based admissions criteria at the elementary and secondary level. In a case that had reached the Supreme Court twenty-two years earlier,<sup>144</sup> school district officials in Denver asked a federal trial court to terminate judicial oversight of school desegregation efforts and declare unitary status.<sup>145</sup> In doing so, the board

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137. *Id.* at 334.

138. *Id.*

139. *Id.* at 337.

140. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

141. *Gratz v. Bollinger*, 539 U.S. 244, 261 n.18 (2003).

142. *Id.* at 275.

143. *Id.*

144. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). In *Keyes*, the Supreme Court’s first case dealing with a minority group other than African Americans (individuals of Mexican heritage), the Court created a spatial presumption in defining segregation in an urban context.

145. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1275 (D. Colo. 1995). One of this article’s authors, William E. Thro, represented the State of Colorado as second chair in the case. Judge Timothy M. Tymkovich of the Tenth Circuit was the first chair; he was Solicitor General of the State of Colorado at the time that the case was litigated.

indicated its desire to continue assigning students on the basis of race despite the fact that language in the Colorado Constitution prohibited student assignments for the purpose of achieving particular racial balances.<sup>146</sup> The board thus also challenged the federal constitutionality of the state provision. In rejecting the board's arguments, the district court upheld the state constitutional provision while suggesting that the federal constitution also prohibited race-based student assignments.<sup>147</sup> After the school board announced that it had no intention of assigning students on the basis of race, the Tenth Circuit dismissed the appeal as moot.<sup>148</sup>

In another case, a group of white parents whose children were enrolled in the examination-based Boston Latin School challenged an admissions policy that took race and ethnicity into consideration.<sup>149</sup> On further review of a judgment in favor of the Boston School Committee,<sup>150</sup> the First Circuit reversed in favor of the parents.<sup>151</sup> The First Circuit invalidated the policy, rejecting the claim of school officials that it was designed to remedy the vestiges of past discrimination.<sup>152</sup> The court posited that since diversity was not a compelling interest, educational officials had to admit a white student because the policy violated her right to equal protection insofar as her score was higher than those of the minority applicants that were admitted in her place.<sup>153</sup>

Along the same line, in a 1999 case from Maryland, the Fourth Circuit ruled in favor of the parents of a first grade student who questioned the constitutionality of a policy at a magnet school that used race and ethnicity as factors in considering whether students could transfer into the program.<sup>154</sup> The court directed the board to admit the child to the magnet school, acknowledging that the use of race as a factor in the transfer policy violated equal protection because it was insufficiently narrowly tailored to achieve the goal of a diversified student body.<sup>155</sup>

Conversely, in the same year, the Ninth Circuit upheld a policy from California that allowed race and ethnicity to be employed as criteria in admitting students to a university's laboratory school.<sup>156</sup> The court held that the state had a compelling interest in providing effective education in urban schools and its use of race was narrowly tailored to achieve this

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146. *Id.* at 1276.

147. *Id.* at 1285.

148. *Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437 (10th Cir. 1997).

149. *Id.* at 1140.

150. *Wessmann v. Boston Sch. Comm.*, 996 F. Supp. 120 (D. Mass. 1998).

151. *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

152. *Id.* at 800.

153. *Id.* at 800, 793-94.

154. *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 133-34 (4th Cir. 1999).

155. *Id.* at 131.

156. *Hunter ex rel. Brandt v. Regents*, 190 F.3d 1061, 1067 (9th Cir. 1999).



goal.<sup>157</sup>

In a case from Louisiana initially involving a consent decree, a magnet school, and a court-ordered desegregation plan, the Fifth Circuit held that a school board's race-based admissions policy was not narrowly tailored enough to remedy the present effects of past segregation.<sup>158</sup> Without citing either *Grutter* or *Gratz*, the court rejected the plan as unacceptable absent additional evidence that educational officials considered race-neutral means of selecting students who might have increased participation by African Americans in the school.<sup>159</sup> The court also rejected the argument that the quota system complied with the dictates of the earlier consent decree.<sup>160</sup>

Later that same year, the First Circuit reached the opposite result when parents in Massachusetts whose children were denied race-conscious transfers filed a discrimination claim against school officials.<sup>161</sup> Sitting en banc, the First Circuit found the plan was sufficiently narrowly tailored to meet the school committee's compelling interest in achieving the benefits of educational diversity, and was thus constitutional.<sup>162</sup>

### III. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DIST. NO. 1

*Parents Involved* involved two separate cases that were argued together before the Supreme Court. This section reviews the judicial histories of the two cases before examining the opinions of the justices in *Parents Involved*.

#### A. *McFarland ex rel. McFarland v. Jefferson County Public Schools*<sup>163</sup>

A dispute arose in Louisville, Kentucky, the twenty-eighth largest school system in the United States, home to 97,000 students,<sup>164</sup> when dissatisfied

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157. *Id.*; see also *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) (commenting, in upholding an urban-suburban inter-district transfer program, that "indeed, such [voluntary racial] integration serves important societal functions").

158. *Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 260 (5th Cir. 2005).

159. *Id.*

160. *Id.*

161. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

162. Shortly after the Supreme Court rendered its judgment in *Parents Involved*, the Lynn parents sought to re-open the case. See Mark Walsh, *Use of Race Uncertain for Schools*, EDUC. WEEK (Bethesda, Md.), July 18, 2007, at 1. The federal trial court in Massachusetts has since denied the parents' request for relief from the final judgment, essentially dismissing their claim. *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 541 F. Supp. 2d 429 (D. Mass. 2008).

163. 330 F. Supp. 2d 834 (W.D. Ky. 2004).

164. *Id.* at 839.

parents challenged a district-wide, race-conscious school choice plan.<sup>165</sup> Officials implemented the plan even though the district had been released from judicial supervision for school desegregation in 2000.<sup>166</sup> On further review of an order upholding the plan,<sup>167</sup> the Sixth Circuit affirmed in *McFarland ex rel. McFarland v. Jefferson County Public Schools*.<sup>168</sup> In a one paragraph opinion, the court agreed that the plan was acceptable because the school board had a compelling interest in using racial guidelines and applied them in a manner that was narrowly tailored to realize its goals.<sup>169</sup> The court explained that since the plan was narrowly tailored to achieve the compelling governmental interest of preserving the presence of minority students in each school as a means of successfully implementing racial integration, it passed constitutional muster.<sup>170</sup>

B. *Parents Involved in Community Schools v. Seattle School District No. 1*

*Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>171</sup> a procedurally complex case involving a Seattle, Washington, school system which had never been segregated by law,<sup>172</sup> began prior to *Grutter* and *Gratz*.<sup>173</sup> In 2000, pursuant to their espoused desire to eliminate what they described as thirty years of racial isolation in the city's public schools,<sup>174</sup> educational leaders in the 46,000 student school system<sup>175</sup>

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165. *Id.* at 836.

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

167. *McFarland*, 330 F. Supp. 2d at 864.

168. 416 F.3d 513 (6th Cir. 2005).

169. *Id.* at 574.

170. *Id.*

171. 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

172. Although Seattle had never been under judicial oversight for segregation, it had its share of controversy with regard to use of bussing to achieve racial balances in schools. In *Citizens Against Mandatory Bussing v. Palmason*, 495 P.2d 657 (Wash. 1972), the Supreme Court of Washington refused to invalidate a plan from the school board for equalizing educational opportunities for all students based on the concern of some parents who feared that their children would have been disadvantaged by attending schools outside of their immediate neighborhoods. *Id.* at 666. The court also rejected the parents' claim that they had the right to select public school for their children. *Id.* at 665–66. Further, in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Supreme Court struck down a voter initiative that would have forbidden local boards from requiring students to attend schools other than one of the two closest to their homes and from using a number of assignment methods such as redefining attendance zones and pairing schools. *Id.* at 487. The Court held that since the initiative impermissibly classified individuals based on race and sought to end bussing to achieve racial integration, it violated the equal protection rights of minority students. *Id.* at 471–72.

173. *See Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d 1224.

174. *Id.* at 1225.

developed an “open choice” plan to attempt to redress inequities in student assignments.<sup>176</sup>

A group of parents sued the school board over the “open choice” assignment plan claiming that it violated the Equal Protection Clause and state laws by unconstitutionally relying on race as the tiebreaker in assigning students to oversubscribed high schools.<sup>177</sup> In the initial round of litigation, a federal district court granted the school board’s motion for summary judgment, finding that the use of race as a tiebreaker did not violate the Equal Protection Clause because it was narrowly tailored to serve a compelling governmental interest.<sup>178</sup> On further review, the Ninth Circuit reversed in favor of the parents,<sup>179</sup> but withdrew its opinion when it agreed to a rehearing while certifying the question to the Supreme Court of Washington.<sup>180</sup> The panel requested that the Supreme Court of Washington consider whether use of a racial tiebreaker in making high school assignments violated a state law against discriminating against, or granting preferential treatment to, individuals or groups due to race, color, ethnicity, or national origin in the operation of public schools.<sup>181</sup>

According to the Supreme Court of Washington, the open choice plan tie breaker did not violate state law “so long as it remain[ed] neutral on race and ethnicity and [did not] promote a less qualified minority applicant over a more qualified applicant.”<sup>182</sup> While the Ninth Circuit had originally been persuaded that the racial integration tiebreaker violated Washington’s state law prohibiting the preferential use of race in public education, the panel changed its decision based on the Supreme Court of Washington’s holding to the contrary.<sup>183</sup> Subsequently, an en banc panel of the Ninth Circuit, relying on *Gratz* and *Grutter*, held that the plan did not violate equal protection since its use of race was sufficiently narrowly tailored to achieve the compelling state interest of avoiding racial isolation while increasing diversity.<sup>184</sup> The court concluded that the plan was constitutionally acceptable because it met the requirements of *Grutter* and *Gratz* insofar as

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175. Walsh, *supra* note 162, at 26.

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

177. *Id.* at 1226.

178. *Id.* at 1240.

179. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236 (9th Cir. 2002).

180. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1084 (9th Cir. 2002).

181. *Id.* at 1085.

182. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 166 (Wash. 2003).

183. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 957 (9th Cir. 2004).

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

the school board engaged in a good faith consideration of race-neutral alternatives.<sup>185</sup>

On further review in a non-consolidated appeal wherein the cases were argued together and addressed in a single opinion, *Parents Involved*, a bitterly divided Supreme Court struck down plans from Seattle and Louisville that classified students by race in making school assignments.<sup>186</sup>

As author of the Supreme Court's judgment, Chief Justice Roberts made the declaration that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>187</sup> Chief Justice Roberts, joined in parts by Justices Scalia, Kennedy, Thomas, and Alito, wrote the majority opinion as a reflection of his taking a greater leadership role on the High Court bench.<sup>188</sup> At the outset, the Court defined the issue as "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."<sup>189</sup> The Court then reviewed the facts of the cases and declared that it had jurisdiction to resolve the dispute.<sup>190</sup>

The Supreme Court utilized the familiar strict scrutiny analytical framework but did so in such a way that it represents a significant development in many respects.<sup>191</sup> Initially, the Court held that correcting a

185. *Id.* at 1188.

186. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007). For representative commentary on *Parents Involved*, both before and after the Court ruled, see, e.g., Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491 (2008); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1 (2007); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006); William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions in Parents Involved for [sic] Community Schools*, 231 EDUC. L. REP. 495 (2008); J. Harvie Wilkinson III, *The Seattle and Louisville Cases: There Is No Other Way*, 121 HARV. L. REV. 158 (2007).

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

188. For reflections on the current state of the Court, see William E. Thro, Commentary, *The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 EDUC. L. REP. 491 (2007).

189. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2746.

190. *Id.* at 2741, 2751. For a related discussion on standing, see *infra* notes 198 and 240.

191. See *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2751–61. The Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." *Johnson v. Cal.*, 543 U.S. 499, 505 (2005) (citations omitted). See also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995)

racial imbalance in elementary and secondary schools was not, without more, a compelling governmental interest.<sup>192</sup> In doing so, the Court emphasized that a racial imbalance was of no constitutional consequence.<sup>193</sup>

The Supreme Court next reasoned that obtaining the educational benefits of a diverse student body is simply not a compelling interest in the K–12 context.<sup>194</sup> This part of the opinion stands in strong contradistinction to the University of Michigan racial preference cases, *Grutter* and *Gratz*, wherein, a mere four years earlier, the justices decreed that obtaining the educational benefits of a diverse student body was a compelling governmental interest in the higher education context.<sup>195</sup> In refusing to apply a diversity rationale in the context of K–12 schooling, the Court emphasized the unique nature of higher education.<sup>196</sup> The justices thus indicated that the disputed school board policies inappropriately treated race as the decisive factor rather than merely as one factor among many.<sup>197</sup>

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(applying strict scrutiny “despite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign . . . .’” (quoting *Regents v. Bakke*, 438 U.S. 265, 298 (1978))); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“But the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”).

192. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2752. As the Court observed:

We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that “the Constitution is not violated by racial imbalance in the schools, without more.” Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

*Id.* (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.4 (1977)) (citations omitted).

193. *Id.*

194. *Id.* at 2754.

195. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

196. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754. As the Chief Justice remarked:

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting 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.” The Court explained that “[c]ontext matters” in applying strict scrutiny, and repeatedly noted that it was addressing the use of race “in the context of higher education.” The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

*Id.* (quoting *Grutter*, 539 U.S. at 329, 327, 328, 334) (internal citations omitted).

197. *Id.* at 2753. Chief Justice Roberts articulated the differences as follows:

In fact, the Court admonished local school officials for viewing “race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms” in Kentucky.<sup>198</sup>

The Supreme Court went on to reemphasize that if racial classifications are going to survive strict scrutiny, then they must be effective in achieving a compelling governmental interest.<sup>199</sup> The Court pointed out that “the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”<sup>200</sup> The Court expanded this rationale in noting that “[c]lassifying and assigning schoolchildren according to a binary conception of race is an extreme approach” that “requires more than such an amorphous end to justify it.”<sup>201</sup> By demanding that racial classifications *actually achieve* the compelling objective, the Court made it more difficult for the government to pursue the use of race in school admissions.

Rounding out its analysis, the Supreme Court strengthened the requirement that the government consider race-neutral alternatives before utilizing racial classifications.<sup>202</sup> At this point, the justices conceded that they deferred to the University of Michigan’s assertions in *Grutter* that

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The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a “highly individualized, holistic review.”

*Id.* (quoting *Grutter*, 539 U.S. at 337). He continued,

“[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount.” The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be “patently unconstitutional.”

In the present cases, by contrast, race is not considered as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints;” race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here “do not provide for a meaningful individualized review of applicants” but instead rely on racial classifications in a “nonindividualized, mechanical” way.

*Id.* at 2753–54 (quoting *Grutter*, 539 U.S. at 337, 330; *Gratz v. Bollinger*, 539 U.S. 244, 276 (O’Connor, J., concurring)) (internal citations omitted) (emphasis in original).

198. *Id.* at 2754.

199. *Id.* at 2773.

200. *Id.* at 2760.

201. *Id.*

202. *Id.* at 2761.

race-neutral alternatives would be ineffective.<sup>203</sup> However, the Court abandoned this deference in K–12 public education,<sup>204</sup> responding that local school officials “failed to show that they considered methods other than explicit racial classifications to achieve their stated goals.”<sup>205</sup>

In sum, the Supreme Court’s analysis signals the majority’s reaffirmation of the principle that the Equal Protection Clause prevents the government from treating people differently due to race.<sup>206</sup> In refusing to allow racial preferences in order to achieve racial balances, the Court rejected racial balancing in K–12 education as a compelling interest, limited the pursuit of diversity to higher education, demanded that racial classifications actually work, and directed educational officials to consider non-racial alternatives in student assignments. In this way, the Court made it more difficult for governmental agencies to pursue racial balancing.

The Roberts plurality, that portion of the Chief Justice’s opinion that was not joined by Justice Kennedy but had the support of Justices Scalia, Thomas, and Alito, effectively adopted the first Justice Harlan’s view from *Plessy v. Ferguson*<sup>207</sup> that the Constitution is color-blind.<sup>208</sup> Roberts asserted that “accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society.”<sup>209</sup> Moreover, Roberts determined that “[a]llowing racial balancing as a compelling end in itself” would ensure “that race will always be relevant in American life” and “would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.”<sup>210</sup> Roberts added that “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”<sup>211</sup>

Next, the Roberts plurality insisted that *Brown v. Board of Education*<sup>212</sup> stands for the proposition that “segregation deprived black children of

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203. See *id.* at 2760; see also *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

204. For an interesting article on judicial deference, see Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008).

205. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2760.

206. Of course, differing treatment is allowed if it is a narrowly tailored means of remedying the present day effects of past intentional discrimination by the government. Moreover, in the higher education context, differing treatment is allowed if it is a narrowly tailored means of achieving the educational benefits of a diverse student body.

207. 163 U.S. 537 (1896).

208. *Id.* at 559 (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”).

209. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2757.

210. *Id.* at 2758.

211. *Id.*

212. 349 U.S. 294 (1955).

equal educational opportunities . . . because government classification and separation on grounds of race themselves denoted inferiority.”<sup>213</sup> Roberts made it clear that if school boards are “to achieve a system of determining admission to the public schools on a nonracial basis,” then boards must “stop assigning students on a racial basis.”<sup>214</sup> The Chief Justice thus viewed non-discrimination as the constitutional command.

In dealing with issues of educational equality, it is worth noting at this point that historically, the courts “have utilized two competing ‘paradigms’ of educational equality.”<sup>215</sup> First, the “‘Numerical Parity Paradigm’ . . . focuses on insuring that racial and gender groups are adequately represented.”<sup>216</sup> This paradigm concerns

disparate impact and insuring that traditionally excluded groups such as racial minorities, women, and the poorer economic classes are adequately, if not proportionally, represented. Implicit in this paradigm is the assumption that one group must be advantaged, at least on a temporary basis, to atone for the previous sins against it. This paradigm focuses on objective criteria such as number of participants and assumes, at least implicitly, that all groups have an equal desire to pursue certain opportunities. When taken to its logical conclusion, the Numerical Parity Paradigm results in numerical or financial quotas. In the Numerical Parity Paradigm at its extreme, change is brought about by forcing educational institutions to adopt rigid numerical quotas for each gender and then finding persons of the appropriate gender to fill the quotas. [Under this approach, p]ersons are valued not so much for their individuality as for their membership in a particular gender group. Moreover, in the numerical parity paradigm, the emphasis is on the impact of a policy or decision. The fact that no one made a conscious choice to discriminate is irrelevant. What matters is that one group was disadvantaged more than another . . . .

Second, the courts have utilized a “Non-Discrimination Paradigm” which focuses on insuring that one’s race is never a consideration in any educational decision and that all students have an opportunity to attend a quality school. Implicit in this

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213. *Id.*

214. *Id.* at 2768.

215. William E. Thro, *Judicial Paradigms of Educational Equality*, 174 EDUC. L. REP. 1, 6 (2003); see also Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL’Y 1 (1996); William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions In Parents Involved for Community Schools*, 231 EDUC. L. REP. 495 (2008) [hereinafter Thro, *Majority and Concurring Opinions*].

216. Thro, *supra* note 215, at 7.



paradigm is the assumption that individuals, regardless of race, should be treated the same. This paradigm ensures that there is no overt or covert gender discrimination in either participation opportunities or treatment. Instead of focusing on equality of numbers, the non-discrimination paradigm focuses on equality of treatment. As such, the paradigm acknowledges that individuals may place different values on a given program. Thus, this paradigm would require that no student be treated differently or excluded simply because of race, gender, or economic status. In the non-discrimination paradigm, change is brought about by forcing the educational institutions to take affirmative steps to promote full acceptance of persons as individuals, not as members of a group, and encouraging all persons to maximize the use of their particular talents and to pursue their specific interests in sports and other activities. [Under this approach, p]ersons are treated as *individuals*, are accorded dignity and respect, and are permitted to meet their personal objectives. Because of the non-discrimination paradigm's emphasis on the "marketplace" of desires and respect for individual differences, change is much slower than in the quota driven numerical parity paradigm. Moreover, in the non-discrimination paradigm, the emphasis is on conscious decisions to exclude or to treat differently. The fact that a neutral policy may have the unintended consequence of affecting one group more than another is considered irrelevant [under this paradigm].<sup>217</sup>

In conclusion, the Roberts plurality asserted that race has no role in governmental decision-making except when it is used remedially as in *Paradise*. While the majority opinion effectively prohibited the *direct* consideration of race, the Roberts plurality effectively forbade the *indirect* consideration of race.

The distinction between the indirect and direct consideration of race also formed the basis for Justice Kennedy's concurrence.<sup>218</sup> Even so, Justice Kennedy viewed the Roberts plurality's endorsement of a color-blind constitution as "inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause."<sup>219</sup> In particular, Kennedy would have permitted local school board officials "to

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217. *Id.* at 9–10 (emphasis in original).

218. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2788–97 (Kennedy, J., concurring). Justice Kennedy's distinction between direct and indirect consideration of race is consistent with the results in the University of Michigan decisions. See Thro, *supra* note 123; see also Elizabeth B. Meers & William E. Thro, RACE CONSCIOUS ADMISSIONS & FINANCIAL AID AFTER THE UNIVERSITY OF MICHIGAN DECISIONS (National Association of College & University Attorneys 2004).

219. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2788.

consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition” as long as officials avoided “treating each student in different fashion solely on the basis of a systematic, individual typing by race.”<sup>220</sup> Accordingly, Kennedy’s opinion stands for the proposition that school board officials can consider race in building new schools, drawing attendance boundaries, allocating resources, and recruiting students for special programs.<sup>221</sup> He further ascertained that “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”<sup>222</sup>

While Justice Kennedy refused to accept a color-blind constitution,<sup>223</sup> he found the dissent’s embrace of racial balancing to be “a misuse and mistaken interpretation of our precedents [leading] it to advance propositions that . . . are both erroneous and in fundamental conflict with basic equal protection principles.”<sup>224</sup>

Unlike Justice Kennedy, Justice Thomas joined all aspects of the Roberts plurality.<sup>225</sup> Nevertheless, he was compelled to write separately to address Justice Breyer’s dissent.<sup>226</sup> Justice Thomas emphasized the constitutional equivalence between race-based assignments designed to help racial minorities and race-based assignments designed to hinder minorities.<sup>227</sup> He also set out a comprehensive explanation as to why he

220. *Id.* at 2792.

221. *Id.*

222. *Id.*

223. Of course, Justice Kennedy joined four other Justices to form an opinion of the Court that adopts the Non-Discrimination Paradigm and rejects the Numerical Parity Paradigm.

224. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2788.

225. *Id.* at 2746.

226. *Id.* at 2768 (Thomas, J., concurring). As Justice Thomas explained:

Contrary to the dissent’s arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*. This approach is just as wrong today as it was a half-century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

*Id.* (internal citations omitted).

227. *Id.* at 2774. Responding to the dissent’s argument that the student assignment plans should be subjected to a lesser standard, Justice Thomas observed:

These arguments are inimical to the Constitution and to this Court’s

believes that the color-blind interpretation of the Constitution is correct.<sup>228</sup>

In a brief, but biting, dissent Justice Stevens stated that he joined Justice Breyer's dissent in full.<sup>229</sup> Even so, he wrote a separate opinion expressing his contention that the current majority had turned its back on *Brown*.<sup>230</sup>

Justice Breyer's lengthy dissent, which was joined by Justices Stevens, Souter, and Ginsburg, maintained that since the plans at issue were sufficiently narrowly tailored, especially since they were developed by democratically elected school boards,<sup>231</sup> they should have been upheld.<sup>232</sup> Not unlike Justice Stevens, he feared that the outcome in *Parents Involved* threatened the legacy of *Brown*.<sup>233</sup>

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precedents. We have made it unusually clear that strict scrutiny applies to every racial classification . . . . There are good reasons not to apply a lesser standard to these cases. The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking. Purportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking.

*Id.* (internal citations omitted) (emphasis in original).

228. *Id.* at 2782–83. Justice Thomas continues to speak out in favor of color-blind programs, stating that they better serve African Americans than affirmative action. Speaking to a gathering of leaders of historically black colleges, he said that affirmative action “has become this mantra and there almost has become this secular religiosity about it. I think it almost trumps thinking.” *Thomas Says Constitution Forbids Racial Preference*, ABC NEWS, Sept. 9, 2008, <http://abcnews.go.com/TheLaw/SupremeCourt/wireStory?id=5762883>.

229. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2797 (Stevens, J., dissenting).

230. *Id.* at 2800 (“The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”).

231. As important as it is to keep the democratic process in mind, and readily acknowledging that the issues are significantly different, it is worth recalling that as of 1964, a full ten years after *Brown*, only 2.14% of African American students in seven of the eleven Southern states attended desegregated schools; the only progress was made in Kentucky, Mississippi, Oklahoma, and West Virginia. HAROLD W. HOROWITZ, KENNETH L. KARST, & WARREN D. BRACY, *LAW, LAWYERS, AND SOCIAL CHANGE: CASES AND MATERIALS ON THE ABOLITION OF SLAVERY, RACIAL SEGREGATION, AND INEQUALITY OF EDUCATIONAL OPPORTUNITY* 240 (1969). By the 1968–69 school year, this figure increased to 20.3% in schools with at least 50% white students. *Id.* at 239.

As to the democratic nature of decision making, Justice O’Connor’s salient observation in her concurrence in *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (O’Connor, J., concurring), that “we do not count heads before enforcing the First Amendment” should serve as a strong counter-balance to the argument that a majority, even a democratic majority, is always correct. *Id.* at 884.

232. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2800 (Breyer, J., dissenting).

233. *Id.*

## IV. THE COURT AND RACIAL PREFERENCES: A QUICK RETROSPECTIVE

As revealed in this review of its litigation, the Supreme Court has been so overtly polarized by the issue of racial preferences that it has been unable to reach majority opinions in almost one-third of its cases on this contentious topic. These differences are starkly reflected in the fact that an examination of the nineteen cases that the Court addressed on race-conscious remedies, starting with its first substantive judgment in *Bakke* and culminating with its most recent in *Parents Involved*, reveals that these suits have generated the amazing total of ninety-two different judicial opinions, an average of 4.84 opinions per judgment. Moreover only one case (*Abrams*) had as few as two opinions, five generated six opinions (*Bakke*, *Croson*, *Adarand*, *Vera*, and *Grutter*), one rendered an incredible seven (*Gratz*), and six resulted in full pluralities (*Bakke*, *Paradise*, *Fullilove*, *Croson*, *Carey*, and *Wygant*) while one (*Parents Involved*) included a partial plurality.

It is also worth noting that judicial attitudes towards racial preferences that are designed to help minorities seem to be absolutist. Put another way, as reflected by even a cursory examinations of the votes in these cases, justices tend either never to tolerate race-based preferences or almost always to support their use.

## V. IMPLICATIONS

*Parents Involved* dealt with K–12 education. Even so, *Parents Involved* raises significant implications for higher education, particularly with respect to admissions and financial assistance.

In *Parents Involved*, the Supreme Court held that gaining the educational benefits of a diverse student body was not a compelling interest in the K–12 context.<sup>234</sup> A mere four years earlier, in the University of Michigan racial preference cases, the Court ruled that procuring the educational benefits of a diverse student was a compelling governmental interest in the context of higher education.<sup>235</sup> In rejecting the application of diversity in elementary and secondary schools, the Court emphasized the unique nature of higher education.<sup>236</sup> The Court also found that school board policies in Seattle and Louisville impermissibly made race the decisive factor rather than merely one factor among many.<sup>237</sup> Consequently, the Court admonished the school board officials for viewing “race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms.”<sup>238</sup> Thus, according to the Court, a desire merely to have a particular minority

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234. *Id.* at 2752 (majority opinion).

235. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

236. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754; *see also supra* note 196.

237. *Parents Involved in Cmty. Sch.*, S. Ct. at 2753–54; *see also supra* note 197.

238. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754.

represented in public schools is not compelling. This aspect of *Parents Involved* is particularly significant for institutions of higher learning that do not have well-developed definitions of diversity or that have failed to tie this definition and interest closely to their educational missions. In other words, after *Parents Involved*, it is essential that officials in colleges and universities remain focused on *Grutter*'s broad definition of diversity and its emphasis on race being one factor among many.

As part of its analysis in *Parents Involved* the Supreme Court, in distinguishing the K–12 context from higher education, refused to apply the *Grutter* rationale based on the educational benefits of diversity.<sup>239</sup> Consequently, *Parents Involved* casts serious doubt on whether the present Supreme Court would treat diversity as a compelling governmental interest outside of contexts directly related to university admissions, possibly including, for example, the faculty-hiring context.

The Supreme Court's rationale in *Parents Involved* reemphasized that if racial classifications are to survive strict scrutiny, then such plans must be effective in achieving a compelling governmental interest.<sup>240</sup> Indeed, "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."<sup>241</sup> Not surprisingly, the Court reasoned that "[c]lassifying and assigning school children according to a binary conception of race is an extreme approach" that "requires more than such an amorphous end to justify it."<sup>242</sup>

By demanding that racial classifications *actually achieve* their compelling objective, the Supreme Court made it more difficult for the government to pursue the use of race as a mere palliative when addressing racial discrimination. This means that under the majority's analysis in *Parents Involved*, a racial classification that does little or nothing to achieve diversity would not survive judicial scrutiny. This holding could be particularly significant in the contexts of scholarship and outreach in public colleges and universities as colleges and universities may have to provide detailed plans and objectives for the use of race when engaged in these activities.

At the same time, the Supreme Court strengthened the requirement that the government consider race-neutral alternatives before utilizing racial classifications.<sup>243</sup> In *Grutter*, the Court had deferred to the University of Michigan's assertions that race-neutral alternatives would be ineffective.<sup>244</sup> Yet, in *Parents Involved* the Court abandoned deference in pointing out that the school board preference plans were constitutionally impermissible

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239. *Id.*

240. *Id.* at 2760.

241. *Id.*

242. *Id.*

243. See *id.* at 2792 for a list of possible alternatives.

244. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

because local school officials “failed to show that they considered methods other than explicit racial classifications to achieve their stated goals.”<sup>245</sup> This portion of *Parents Involved* creates a greater hurdle for officials in institutions of higher learning if they try to justify the use of race in the contexts of scholarship and outreach without first having seriously considered other approaches, perhaps such as socioeconomic status, that do not directly implicate race.<sup>246</sup> The use of socioeconomic status could be particularly valuable for college and university officials who wish to diversify their campuses, especially if they are interested in a broader sample of students who were raised in rural and suburban poverty, such as students who hail from such typically economically deprived regions as Appalachia.

It is significant that a four justice plurality consisting of Chief Justice Roberts and Justices Scalia, Thomas, and Alito, effectively adopted the first Justice Harlan’s view that the Constitution is color-blind<sup>247</sup> in its declaration that “[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society.”<sup>248</sup> In short, since the view of these four justices seems intolerant of any voluntary use of race by government, officials in colleges and universities would be well advised to keep this in mind as they deal with diversity policies based on race.

In his concurrence, Justice Kennedy did not embrace the idea of a color-blind Constitution.<sup>249</sup> Moreover, he suggested that boards wishing to deal with diversity might take a variety of alternatives into account, including “strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race,”<sup>250</sup> techniques (other than the first) that may work well in higher education.

Justice Kennedy’s comments are consistent with his view in *Grutter* that while diversity is a compelling interest in higher education, it simply does not rise to that level in public elementary and secondary education.<sup>251</sup> In sum, Justice Kennedy, like the members of the plurality, seems to be extremely skeptical of any voluntary use of race, but has not shut the door

245. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2760.

246. For an update on the situation in Louisville, see Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAGAZINE, July 20, 2008, at 38.

247. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”).

248. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2757; see also *supra* notes 208–214 and accompanying text.

249. See *supra* notes 218–224 and accompanying text.

250. *Id.*

251. *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., concurring).

on all tightly defined programs in which the use of race is carefully justified in light of all the facts and circumstances.

College and university counsel, other attorneys who work in higher education, administrators, and faculty members, among others, may be reassured by Justice Kennedy's continued embrace of the indirect consideration of race. Yet, they must concomitantly be aware that Justice Kennedy dissented in *Grutter* because he believed that the University of Michigan's use of race was not narrowly tailored. If confronted with a case involving racial preferences in admissions or financial aid, Justice Kennedy is likely to be equally as highly skeptical of the use of race in this context. Thus, college and university officials will have to devise creative new policies if they continue to define diversity based almost entirely on race since a majority of the justices on the Supreme Court have signaled that they are apparently unwilling to allow educators to continue to engage in business as usual.

#### VI. CONCLUSION

In *Grutter*, the Supreme Court ruled that, in narrow circumstances, colleges and universities may consider race as a factor in student admissions but also suggested that such racial preferences would be unnecessary in twenty-five years.<sup>252</sup> Yet, the Court made no effort to justify or explain why it set this time frame. While *Parents Involved* did not disturb *Grutter*'s core holding, it did impose additional limitations on the ability of college and university officials to consider race in admissions and, presumably, financial assistance. Moreover, four justices, including the three youngest, embraced a color-blind Constitution, a vision that is incompatible with any consideration of race except to remedy prior racial discrimination in the governmental entities in question. Even though Justice Kennedy refused to embrace this vision and emphasized that he would tolerate the indirect consideration of race, he remains skeptical that even the indirect use of race in educational settings can be narrowly tailored. Indeed, since Justice Kennedy was a dissenter in *Grutter*, after *Parents Involved*, officials in colleges and universities should be especially careful in their use of race-conscious remedies.

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252. *Id.* at 337 (majority opinion).