

Race and Education The Future of Desegregation Programs in the United States

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Introduction

Racism has been a part of American society since its conception. In 1641, Massachusetts passed legislation that made the enslavement of Africans legal.¹ It was not until 1865, and the ratification of the Thirteenth Amendment, that slavery was formally abolished in the United States.² The institution of slavery was replaced by segregation, and the newly freed slaves were treated as second-class citizens in a country that they helped build. Segregation touched every aspect of life from 1870 to the 1950s. In the area of education, segregation was used to hinder the advancement of black children. These were “segregated school[s] so crowded and so poor that . . . [most fourth graders] were reading at the second grade level.”³ However, not everyone believed that this was permissible. In 1900, Gov. Theodore Roosevelt approved a legislative act that provided “no person shall be excluded from any public school in the state of New York on the account of race or color.”⁴ While this was an important step, it took years before a similar stance was taken by the Nation.

In the 1950s, with the *Brown v. Board of Education*⁵ decision the Supreme Court of the United States of America held that segregation based on race “generates a feeling of inferiority as to [the black students] in the community that may affect their minds and hearts in a way unlikely ever to be undone.”⁶ Therefore, the separate but equal doctrine established by *Plessy* was overruled.⁷ Schools were directed to integrate, and provide an equal education to black students. Despite *Brown* and the position taken by Gov. Roosevelt, in 2006 Far Rockaway High School, a public high school located in Queens, NY, had a

¹ Melvin Sylvester, *The African American: A Journey from Slavery to Freedom*, <http://www.cwpost.liunet.edu/cwis/cwp/library/aaslavry.htm#beginning> (last visited Jan. 12, 2009).

² *Id.*

³ JONATHAN KOZOL, *SAVAGE INEQUALITIES 1* (HarperCollins ed., Crown Publishers, Inc. 1992) (1991).

⁴ New York was not the first state to have such a statute passed. During the 1870s and 1880s, New Jersey, Pennsylvania, Ohio, and Illinois all had similar statutes. However, these statutes never ended the operation of segregated schools. *See generally* Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 *UCLA L. REV.* 677 (1991) (arguing that both *Brown* and the anti-segregation statutes are rendered ineffective by residential segregation).

⁵ 347 U.S. 483 (1954).

⁶ *Id.* at 494.

⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

student body consisting of 64.9% African-American students.⁸ That same student body had a White student population of only 2.2%.⁹ The discrepancy among the races was not limited to representation in the student body. That same year, 79.7% of White students were deemed proficient in English, while only 50.2% of the Black students were deemed so.¹⁰

In 2007, the Supreme Court decided *Parents Involved in Community Schools v. Seattle School District No. 1*.¹¹ The plurality opinion has been viewed by both the media and legal academia as either a return to separate but equal or a just and evenhanded application of accepted constitutional principles. Only through an analysis of Justice Kennedy's concurrence in *Parents Involved* can the true weight of this decision be ascertained. Justice Kennedy's opinion holds special significance, and lays the foundation upon which future desegregation programs can be based.

This article will be divided into four parts. Part One will discuss the legal history of segregation in the United States, and in doing so will provide the constitutional standards applied to race-based classifications in the area of education. Part Two will analyze *Parents Involved* and decipher its holding. This section will also address the debate that has been spurred by this decision. Part Three will attempt to predict the future of racial integration, or voluntary integration, policies in the United States. This comment, while discussing the broad principles that govern this area of constitutional law, will not ignore the very real and human stories that give rise to these cases. Part Four will conclude this article.

Part One: History of Segregation in the United States

Assume for the moment that the New York public school system contained a high school that was arguably racially segregated. Assume further that statewide Black and Latino students make up approximately 72% of students enrolled in the system, but this particular high school only enrolls less than 6% Black and Latino students.¹² This sounds like a school that was forced to desegregate shortly after *Brown*, a school that has roots, both deep and long, in

⁸State Education Data Center, *Far Rockaway High School*, <http://www.schooldatacenter.org/app/location/q/stid=33/lid=118/stlid=308/locid=1029191/stype=/catid=-1/secid=-1/compid=-1/site=pes> (last visited Oct. 14th, 2008).

⁹*Id.*

¹⁰State Education Data Center, *Far Rockaway High School*, <http://www.schooldatacenter.org/app/data/q/stid=33/lid=118/stlid=308/locid=1029191/catid=1013/secid=4538/compid=851/site=pes> (last visited Oct. 14, 2008).

¹¹ 127 S. Ct. 2738 (2007).

¹² State Data Education Center, *Stuyvesant High School*, <http://www.schooldatacenter.org/app/location/q/stid=33/lid=118/locid=1029545/stype=/catid=-1/secid=-1/compid=851/site=pes> (last visited Oct. 14, 2008).

the tradition of racial segregation. However, this school is not *circa*-1965. In fact, these statistics are those of Stuyvesant High School, one of the most prestigious public schools in the state, taken in 2006.¹³ Moreover, it would seem that Stuyvesant has lost a good measure of its diversity since *Brown*. According to author Johnathan Kozol, “black students [once] represented almost 13 percent of the student body . . . [T]oday they represent 2.7 percent.”¹⁴ This discrepancy could be due to numerous factors. However, in order to determine if Stuyvesant High School, or Far Rockaway High School, is segregated, it is necessary to determine what segregation means. Furthermore, after defining segregation, it must be determined what measures are constitutionally permissible methods to correct it.

A. *Plessy v. Ferguson*¹⁵ and ‘Separate but Equal’

Segregation is the separation or isolation of a race, class, or ethnic group by enforced or voluntary residence in a restricted area, by barriers to social intercourse, by separate educational facilities, or by other discriminatory means.¹⁶ Shortly after the Civil War, many states enacted Jim Crow laws.¹⁷ These laws mandated de jure segregation in all public facilities.¹⁸ These public facilities included restrooms, restaurants, schools, modes of transportation and countless other areas where interaction between the races was possible. While these laws attempted to hinder the newly freed slaves, several amendments to the Constitution were enacted in an effort to assist African-Americans. The Thirteenth Amendment states, in relevant part, “[n]either slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹⁹ The Fourteenth Amendment states, in relevant part, that “all

¹³ Jonathan Kozol, *Segregated Schools: Shame of the City*, GOTHAM GAZETTE, Jan 16, 2006, <http://www.gothamgazette.com/article/fea/20060116/202/1718>.

¹⁴ *Id.* While these numbers are startling, in the interest of fairness, for the year quoted, the percentage of Asian students at Stuyvesant High School was 58.5%. See State Education Data Center, *Stuyvesant High School*, <http://www.schooldatairect.org/app/location/q/stid=33/llid=118/stllid=308/locid=1029545/stype=/catid=-1/secid=-1/compid=-1/site=pes> (last visited Oct. 14, 2008).

¹⁵ *Plessy*, 163 U.S. 537.

¹⁶ Segregation is also defined as “the unconstitutional policy of separating people on the basis of color, nationality, religion, or the like.” BLACK’S LAW DICTIONARY 1388 (8th ed. 2004).

¹⁷ According to Ronald Davis, “[s]ome states also passed so-called miscegenation laws banning interracial marriages. These bans were, in the opinion of some historians, ‘the ultimate segregation laws.’” Ronald L. F. Davis, *From Terror to Triumph: Historical Overview*, <http://jimcrowhistory.org/history/overview.htm>.

¹⁸ These Jim Crow laws were “enacted or purposely interpreted to discriminate against blacks.” BLACK’S LAW DICTIONARY 853 (8th ed. 2004).

¹⁹ U.S. CONST. amend. XIII, § 1.

persons born or naturalized in the United States . . . are citizens of the United States . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . .”²⁰

In 1892, several years after the ratification of the Thirteenth and Fourteenth Amendments, Plessy purchased a first-class ticket on a coach traveling from New Orleans to Covington. Plessy decided to sit in a coach that was reserved for white passengers only. After being told to vacate the seat, Plessy refused and was subsequently arrested for violating a Louisiana statute that prohibited a “person or persons . . . [from] occupy[ing] seats in coaches, other than the ones assigned to them, on account of the race they belong to.”²¹

On appeal, Plessy attempted to argue that the Louisiana statute violated the Constitution. The Court addressed the applicability of each amendment separately. In relation to the Thirteenth Amendment, the Court reasoned that “refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant[.]”²² In relation to the Fourteenth Amendment, the Court reasoned that the true purpose of the amendment was to grant colored people “absolute equality . . . before the law” and not to “abolish distinctions based upon color.”²³ The Court held that separate but equal accommodations for the two races were constitutional.

However, Justice Harlan, in his dissent, spoke of things yet to come. While reading the two amendments separately, as the majority had done, may create the desired result, if taken together the amendments “will protect all the civil rights that pertain to freedom and citizenship.”²⁴ Despite addressing his own racial views,²⁵ Harlan stated, in his often recited quote, that the “[C]onstitution is color-blind and neither knows nor tolerates classes among citizens.”²⁶

For the next several decades, separate but equal facilities were used to hinder minorities. The majority in *Plessy* argued that the principle of separate but equal “implies merely a legal distinction between the white and colored races [and] has no tendency to destroy the legal equality of the two races or re-establish a state of involuntary servitude.”²⁷

B. Educational Segregation and Integration

²⁰ U.S. CONST. amend. XIV, § 1.

²¹ *Plessy*, 163 U.S. at 540.

²² *Id.* at 542 (citing the *Civil Rights Cases*, 109 U.S. 3(1883)).

²³ *Id.* at 544.

²⁴ *Id.* at 555 (Harlan, J., dissenting).

²⁵ Harlan stated “The white race deems itself to be the dominant race in this country. . . So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.” *Id.* at 559 (Harlan, J., dissenting).

²⁶ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

²⁷ *Id.* at 543.

A proper education is necessary for advancement in today's society. However, when *Plessy* was decided and even when the Thirteenth and Fourteenth Amendments were ratified, public education in America was lacking. During the late 1800s, "[e]ducation of white children was largely in the hands of private groups [and] [e]ducation of Negroes was almost nonexistent, and practically [the entire race] was illiterate."²⁸ Moreover, *Plessy* was concerned with transportation and not education arguably making it inapplicable to segregation cases involving public education. Any cases that did address separate but equal in relation to public education at that time never addressed the "validity of the doctrine itself."²⁹

Prior to *Brown v. Bd. of Ed.*, the public school system in the United States was segregated. Black students who attempted to gain admission into white public schools were turned away. In *Brown*, Black families attempted to have their children enrolled in public schools in Kansas, South Carolina, Virginia, and Delaware on a nonsegregated basis. The lower courts in each of those cases relied heavily on *Plessy* as precedent preserving the existence of a segregated school system.

Separate but equal doctrine only takes into account tangible things. An example would be the number of white seats as compared to the number of black seats on a coach. However, *Brown* challenged the Court to determine whether separate but equal extended to the intangible elements of public education.³⁰ While the actual physical facilities of the black and white schools may be the same, the effect that a segregated environment has on a developing mind is not. Separating children based solely on race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³¹ This intangible factor immediately makes the segregated public school system unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court also stated that American schools had to integrate "with all deliberate speed."³²

While *Brown* finally ended the era of segregation of public schools, it was not until years later that steps were made to truly integrate America's schools. *Brown*, as eloquently written as it was, failed to provide states with a system to implement compliance with its holding. In 1971, 17 years after *Brown*, the

²⁸ *Brown*, 347 U.S. at 490 (In actuality, there are two *Brown* decisions. *Brown I* decided in 1954, stands for the proposition that the doctrine of separate but equal has no place in education. *Brown II*, 349 U.S. 294 (1955), decided the following year, states that school authorities must make a good faith effort to desegregate and comply with the principles outlined in *Brown I*).

²⁹ *Brown*, 347 U.S. at 491 (citing *Cumming v. Bd. of Ed.*, 175 U.S. 528 (1899), and *Gong Lum v. Rice* 275 U.S. 78 (1927)).

³⁰ *Id.* at 493.

³¹ *Id.* at 494.

³² *Brown*, 349 U.S. at 301.

Supreme Court decided *Swann v. Charlotte-Mecklenburg Board of Education*.³³ The court in *Swann* was asked to define “in more precise terms . . . the scope of the duty of school authorities and district courts in implementing *Brown*.”³⁴ The Court made clear that *Brown* was concerned with state-enforced segregation, and its holding would not be extended to address the “myriad factors of human existence which can cause discrimination in a multitude of ways.”³⁵

In delineating its criteria for desegregation, the Court addressed several factors. First, the Court sought to determine the extent to which racial balance and racial quotas may be used to implement the remedial order. In regard to racial balance, the Court stated that it “has not ruled, and does not rule that ‘racial balance’ is required by the Constitution.”³⁶ The Court shied away from the use of quotas by stating “mathematical ratios [are] no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement.”³⁷ Also, the Court analyzed whether every all-black or all-white school had to be eliminated in order to achieve integration.³⁸ Second, the Court also stated that a “virtually one-race school[] within a district is not in and of itself the mark of a system that still practices segregation by law.”³⁹ However if that one-race school happens to reside in a district that has a history of racial segregation the school board must show that “their racial composition is not the result of present or past discriminatory action on their part.”⁴⁰ Third, the Court addressed whether school districts should be altered in order to facilitate integration. The Court recognized ‘broad remedial powers’ in the lower courts with regard to restructuring school districts.⁴¹ The Court stated that “[r]acially neutral’ assignment plans proposed by school authorities to district court[s] may be inadequate.”⁴² Therefore, “affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments.”⁴³ Finally, the Court determined that busing is permissible provided that “the time or distance of travel is [not] so

³³ 402 U.S. 1 (1971). When it comes to granting equal access to education, 17 years seems to be the definition of “all deliberate speed.”

³⁴ *Id.* at 6.

³⁵ *Id.* at 22.

³⁶ *Id.* at 25 n.9.

³⁷ *Swann*, 402 U.S. at 25.

³⁸ *Id.* at 22.

³⁹ *Id.* at 26.

⁴⁰ *Id.*

⁴¹ *Id.* at 27 (While the court has broad power to remedy present and past discrimination, that remedy must not exceed the effects of the constitutional violation). See *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that the remedy must be commensurate with the constitutional violation).

⁴² *Swann*, 402 U.S. at 28.

⁴³ *Id.*

great as to either risk the health of the children or significantly impinge on the educational process.”⁴⁴

Moreover, the *Swann* analysis aids in the creation of a constitutionally sensitive integration policy. The Court made clear its trepidation as to racial balancing and the use of quotas. Therefore, it would be beneficial for a school district to avoid the use of such devices when drafting a plan. It is also clear from *Swann* that the school districts have power to restructure entire school zones in order to better facilitate integration. While this power is broad, it is not without constitutional limitations.

C. The Constitutional Standard for Racial Classifications

In order to pass constitutional muster, race-based classifications must survive strict scrutiny. To survive strict scrutiny a race-based policy must “serve a compelling governmental interest, and must be narrowly tailored to further that interest.”⁴⁵ Strict scrutiny involves a two-tier analysis. First, a court must determine whether there is a compelling state interest. Second, the court must ascertain whether the policy is narrowly tailored and furthers that interest. In the area of education, both tiers pose special problems.

In 1977, a scant six years after *Swann*, the Court heard oral arguments in the case of *Regents of the University of California v. Bakke*.⁴⁶ Bakke, a white male, was denied admission to a state medical school. Bakke had a “strong benchmark score of 468 out of 500.”⁴⁷ Despite that fact Bakke was rejected, and “[t]here were four special admissions slots unfilled” at that time.⁴⁸ The Court stated that “applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke’s.”⁴⁹ Bakke argued that the special program “operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment[.]”⁵⁰

Special programs, such as the one at the center of *Bakke*, were designed to remedy the underrepresentation of minorities in the medical profession. In *Bakke*, the applications of certain disadvantaged groups, i.e. minorities, were given to a separate admissions committee. This committee screened “each application to see whether it reflected economic or educational deprivation [and these] special candidates did not have to meet the 2.5 grade point average cutoff applied to other

⁴⁴ *Id.* at 30-31.

⁴⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

⁴⁶ 438 U.S. 265 (1978)

⁴⁷ *Id.* at 276.

⁴⁸ *Id.*

⁴⁹ *Id.* at 277.

⁵⁰ *Id.* at 277-78.

applicants.”⁵¹ A certain percentage of seats in any given class were set aside for these students.⁵² The Supreme Court of California declared this special program to be unlawful.⁵³

However, Justice Powell, in his opinion reasoned that race could be used as a factor in admissions. The test that Powell employed was less than strict scrutiny however.⁵⁴ According to Justice Powell “a State must show that its purpose [for using the suspect classification] or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary [for accomplishing that goal].”⁵⁵ Powell rejected the idea that the student body needed a “specified percentage of a particular group[.]”⁵⁶ Such a quota is “facially invalid.”⁵⁷ Despite this statement, Justice Powell did recognize the substantial interest of the state to “eliminate[e] . . . the disabling effect[] of identified discrimination.”⁵⁸ This language does not give the state the authority to address societal discrimination. Societal discrimination, according to Powell, is an “amorphous concept” which lacks the clarity of “specific instances of racial discrimination.”⁵⁹ Powell did observe, however, that ethnic diversity is a substantial state interest. Powell’s acceptance of diversity as an acceptable interest relied on the fact that institutions of higher education have academic freedom. This freedom allows “universit[ies] to determine for [themselves] on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁶⁰ By giving institutions of higher education the freedom to determine who may be admitted to study, Powell concluded that pursuing diversity is an acceptable exercise of that power. The pursuit of diversity cannot result in allowing an applicant to avoid “comparison with all other candidates.”⁶¹

⁵¹ *Bakke*, 438 U.S. at 275.

⁵² “While the overall class size was 50, the prescribed number [of special candidates] was 8; in 1973 and 1974, when the class size was doubled to 100, the prescribed number of special admissions was doubled[.]” *Id.* at 275.

⁵³ *Id.* at 270.

⁵⁴ The *Bakke* case resulted in a decision that lacked a clear majority. However, Justice Powell’s concurrence in *Bakke* has been seen as “the touchstone for [the] constitutional analysis of race-conscious admissions policies.” *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003). Moreover, the Supreme Court in *Grutter* expressly adopted Powell’s concurrence as the position of the court. *See Grutter* at 325.

⁵⁵ *Bakke*, 438 U.S. at 305 (internal quotations and citations omitted).

⁵⁶ *Id.* at 307.

⁵⁷ *Id.* (By holding that quotas are facially invalid, the Court has stopped shying away from quotas and has outright made them unconstitutional. While this may seem simple, the use of quotas has continued to be a part of several integration programs).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Bakke*, 438 U.S. at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

⁶¹ *Id.* at 317.

By allowing the applicants to avoid such comparison the program failed to achieve its goal of diversity in a constitutional manner.

In *Grutter v. Bollinger*,⁶² the Supreme Court addressed the admissions practices of the University of Michigan Law School. Grutter, a white applicant, alleged that the law school used race as a predominant factor in its admissions procedure.⁶³ The lower court found the program to be unlawful on two points. First, the district court held that, under *Bakke*, “the attainment of a racially diverse class” was not a compelling state interest.⁶⁴ Second, the court claimed that even if the diversity interest was compelling, the admissions policy was not narrowly tailored. However, both the Court of Appeals and the Supreme Court disagreed.

The policy in *Grutter* survived strict scrutiny. Under *Bakke*, according to the *Grutter* Court, racial classifications may be used to either remedy past discrimination or to create a diverse student population. Both of these are compelling state interests. The Court reasoned that the law school’s interest in diversity is closely related to its exercise of academic freedom.⁶⁵ This freedom is the freedom to seek “those students who will contribute the most to the robust exchange of ideas [and this] goal is of paramount importance in the fulfillment of [the university’s] mission.”⁶⁶ Given this broad academic freedom, the interest in diversity becomes a compelling one. While the policy may have a compelling interest, the means must fit the interest “so closely that there is little or no possibility that the motive for classification was illegitimate racial prejudice or stereotype.”⁶⁷ The Supreme Court determined that the law school’s admission policy bore “the hallmarks of a narrowly tailored plan.”⁶⁸ The admissions policy, at the heart of the *Grutter* case, was consistent with the constitutional requirements in this area. The law school took great care to avoid using racial quotas by refusing to “admit a particular percentage or number of minority students.”⁶⁹ The program also did not foreclose comparison between the minority applicant and other applicants, as required under *Bakke*.⁷⁰ Also, the plan did not

⁶² 539 U.S. 306 (2003).

⁶³ *Id.* at 317.

⁶⁴ *Id.* at 321.

⁶⁵ *Id.* at 325.

⁶⁶ *Id.* at 325. The court in *Bakke* goes on to state that because of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” *Grutter*, 539 U.S. at 329. Furthermore, a university is free “to make its own judgments as to education [and this] includes the selection of the student body.” *Id.*

⁶⁷ *Id.* at 334. (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 318.

⁷⁰ *Bakke*, 438 U.S. at 315.

allow race to act as the decisive factor between acceptance and rejection. It merely acted as a plus factor.

In *Gratz v. Bollinger* the Court was asked to determine the constitutional validity of an admissions program utilized by an undergraduate institution. The University, beginning in 1998, used a point system for admissions. Under this system, minority applicants received an automatic twenty points toward their total score.⁷¹ Moreover, the University also had “protected seats” in each entering class which were reserved for “protected categories.”⁷² *Gratz*, like *Bakke*, argued that this system violated her Fourteenth Amendment Equal Protection rights.

The Court applied strict scrutiny. As in *Grutter*, the Court stated that diversity is a compelling interest.⁷³ While the university’s admission system served a compelling interest, one based on academic freedom, it failed to achieve that interest through narrowly tailored means. The Court recognized that Powell’s opinion in *Bakke* hinged on the fact that the use of race in admissions was only allowed if such a use did not foreclose individualized consideration of applicants. The automatic addition of the twenty points resulted in “making [race] decisive for virtually every minimally qualified . . . applicant.”⁷⁴ Therefore, the automatic distribution of the additional points had two unconstitutional effects. First, the points resulted in a complete lack of individual consideration. Second, the granting of the points foreclosed any comparison of the minority student with other non-minority students. The university’s plan was deemed unconstitutional. It was not narrowly tailored and, therefore, it failed strict scrutiny.

In the area of education, *Brown* stands for the proposition that racially segregated schools inherently are not equal. The psychological effect of segregation alone made the treatment of Black students different from the treatment of White students. As soon as this was determined, the Court considered the contours and limitations of desegregation policies. These policies must survive strict scrutiny. Given the holdings in *Bakke*, *Grutter*, and *Gratz* both remedying past discrimination and diversity interests have been deemed compelling for strict scrutiny purposes. That diversity interest, however, is tied to academic freedom, a freedom that is given to institutions of higher learning.

Part Two: *Parents Involved v. Seattle Schools*⁷⁵

Assume that Stuyvesant High School wished to diversify its student body. Admission to Stuyvesant is highly competitive, and a standardized test is part of that process. To achieve diversity, Stuyvesant would do well to mirror the plan in

⁷¹ *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

⁷² *Id.* at 256.

⁷³ *Id.* at 270.

⁷⁴ *Id.* at 272.

⁷⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

Grutter. The applicants could be given a plus factor for minority status, but that plus factor should not act as the deciding item in an admissions decision. The process should also make sure that minority applicants are compared to non-minority applicants. This program would presumably hinge on the argument that diversity is a compelling interest.⁷⁶ This is problematic. The diversity interest, as expressed in *Gratz* and *Grutter*, is closely tied to academic freedom. The issue is whether a school, an institution below the higher education level, can permissibly advance diversity as its compelling state interest.

A very similar issue was addressed in *Parents Involved*. *Parents Involved* involved two different school districts. In Seattle School District No. 1 (hereinafter referred to as “Seattle”) the public schools were never operated on a segregated basis.⁷⁷ However, Seattle decided to engage in a voluntary integration program in order to remedy the effects of housing patterns on school assignments. Under the Seattle program, if too many students enrolled in one school a tiebreaker would be used to determine which students would remain there. One such tiebreaker was based on the racial composition of the schools, and the particular race of the child.⁷⁸ This was designed to bring “the school into [racial] balance.”⁷⁹ In Jefferson County (“Jefferson”) a federal court, in 1973, found that the county maintained a segregated school system.⁸⁰ Jefferson was ordered to integrate by 2000. Once the court order was lifted Jefferson continued a voluntary student assignment plan. This plan required all “nonmagnet schools to maintain a minimum black enrollment of 15 percent and a maximum black enrollment of 50 percent.”⁸¹

A. Plurality Opinion: Chief Justice Roberts

Parents Involved is a plurality opinion. Chief Justice Roberts utilized strict scrutiny, and while his holding is that of the Court, his reasoning was not adopted by a majority. Ultimately, the voluntary integration plans in both Seattle and Jefferson were held to be unconstitutional. The true problem is ascertaining which opinion provides the guidance necessary to create a constitutional voluntary integration program. Strict scrutiny is a constitutional standard which demands that a race-based policy must “serve a compelling governmental interest, and must

⁷⁶ It must be noted that arguing past discrimination would likely fail. As stated in the Introduction, Roosevelt outlawed segregation in NY schools in 1900. Therefore, there has been no state-sanctioned, i.e. de jure, segregation practiced since in the realm of education. Diversity would be the best argument.

⁷⁷ *Parents Involved*, 127 S. Ct. at 2747.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2749.

⁸¹ *Id.*

be narrowly tailored to further that interest.”⁸² Roberts reasoned that both Seattle and Jefferson could not argue that remedying past discrimination was their compelling state interest. In Seattle, the fact the schools were never “segregated by law”⁸³ meant that the school district had no past discrimination to remedy. While Jefferson did have a history of segregation, it was deemed integrated in 2000. Therefore, Jefferson had “remedied the constitutional wrong that allowed race-based assignments.”⁸⁴ By remedying the past discrimination, Jefferson lost the ability to argue that there was still discrimination to remedy.

However, both Seattle and Jefferson argued that *Grutter* was applicable. If *Grutter* had been applicable, then diversity would be a compelling state interest upon which a constitutionally valid policy could be based. However, the diversity interest is only deemed compelling “in the context of higher education.”⁸⁵ This academic freedom is “unique to institutions of higher education . . . [due to] ‘the expansive freedoms of speech and thought associated with the university environment[.]’”⁸⁶ Moreover, that diversity interest was aided by the fact that the *Grutter* admissions policy “was not focused on race alone but encompassed all factors that may be attributed to student body diversity.”⁸⁷ By restricting the diversity interest to institutions of higher education, Seattle and Jefferson were effectively left with no goal to justify their voluntary integration programs. Furthermore, Roberts articulated that “the plans here employ only a limited notion of diversity [by] viewing race exclusively in white/nonwhite terms.”⁸⁸ Roberts also stated that racial balance may not be used as a compelling state interest. Allowing balance to be a compelling interest would “support [the] indefinite use of racial classifications.”⁸⁹

With regard to the second aspect of strict scrutiny - the achievement of the compelling interest through narrowly tailored means - Roberts rejected the contention that the plans were narrowly tailored. The narrowly tailored prong requires, in education cases, that the school board attempt to find other race-

⁸² *Adarand*, 515 U.S. at 202.

⁸³ *Parents Involved*, 127 S. Ct. at 2752.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2753.

⁸⁶ *Id.* at 2754.

⁸⁷ *Id.*

⁸⁸ *Parents Involved*, 127 S. Ct. at 2754. Viewing America in strictly Black and White terms is far too simplistic. A student body would require rich, poor, homosexual, heterosexual, and countless other types of students in order to be deemed truly diverse. However, race based affirmative action programs are subject to strict scrutiny. Affirmative action for other historically discriminated groups is subject to lower forms of constitutional scrutiny. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding that gender classifications need only serve an important governmental objective and must be substantially related to the achievement of that goal).

⁸⁹ *Parents Involved*, 127 S. Ct. at 2758.

neutral alternatives prior to implementing a race-based plan.⁹⁰ Roberts argued that the automatic nature of the tiebreaker was a “binary conception of race [which was] an extreme approach . . . and requires more than such an amorphous end to justify it.”⁹¹ Therefore, Roberts held that the plans of both Seattle and Jefferson counties were unconstitutional. Both plans lacked a constitutionally permissible compelling interest, and both failed to serve an interest through narrowly tailored means.

B. Plurality Opinion: Justice Clarence Thomas

Justice Clarence Thomas has long been opposed to affirmative action programs. Justice Thomas has always believed that “African-Americans are better served by colorblind programs than affirmative action.”⁹² It should not be surprising that Thomas agreed with Roberts on the unconstitutionality of the Seattle and Jefferson integration policies. However, his reasoning was slightly different and, therefore, deserves separate attention.

Whether students benefit from an integrated learning environment has been an area of debate since *Brown*. Thomas points to the existence of Seattle’s “African-American Academy” as an example of the benefits of segregation on the scholastic achievement of black students. The Academy has a “‘nonwhite’ enrollment of 99%.”⁹³ Black children educated in this school “have shown gains when placed in a ‘highly segregated’ environment.”⁹⁴ Thomas pointed out that the existence of the Academy shows that Seattle is not truly dedicated to a diversity interest, due to the fact that “operating a school with such a high ‘non-white’ enrollment would be a shocking dereliction of its duty to educate”⁹⁵

Furthermore, Thomas feels that affirmative action makes Blacks “‘beggars or objects of charity.’”⁹⁶ He also has stated that “[w]e don’t get smarter just because we sit next to white people in class, and we don’t progress just because society is ready with handouts.”⁹⁷ Prior to *Brown*, minorities were forced to educate themselves without the assistance of the public school system. Dunbar

⁹⁰ *Id.* at 2761.

⁹¹ *Id.* at 2743.

⁹² Associated Press, *Thomas says that Constitution forbids racial preference*, Sep. 9, 2008, http://www.breitbart.com/article.php?id=D933CKDG1&show_article=1 (last visited Sept. 22, 2008).

⁹³ *Parents Involved*, 127 S. Ct. at 2777.

⁹⁴ *Id.* at 2778.

⁹⁵ *Id.*

⁹⁶ Neil A. Lewis, *Justice Secures His Place as Critic of Integration*, N.Y. Times, July 9, 2007, at A15, available at <http://nytimes.com/27/0/09/washgton/09thoma.tml?ex=1341633600&en=21ff939f73f8e68c&ei+5090&partner=rsuerland&em=ss> (last visited Sept. 22, 2008).

⁹⁷ *Id.*

High School, one of many all-black high schools, had graduates that “earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan.”⁹⁸ Thomas seems to suggest that the potential educational benefit of an integrated classroom experience is not a compelling interest to support integration.⁹⁹

However, Thomas’ concurrence neglects to point out the problems that face children in segregated schools. In 1987, a public school in the Bronx had a student population of “90 percent black and Hispanic.”¹⁰⁰ In this one school “[t]wo first grade classrooms share a single room without a window, divided only by a blackboard.”¹⁰¹ There is very little likelihood that students taught in such a manner will be prepared for high school, college, and beyond. It can be argued that for every Dunbar High School there exists an inner-city school that is both segregated and ill-equipped. By arguing that segregation may aid Black students, Thomas is unwittingly casting inner-city minority youths to the side.

C. Plurality Opinion: Justice Kennedy

While Kennedy agreed that the Seattle and Jefferson County plans were unconstitutional, he did not take the restrictive view that Roberts took. Moreover, he did not take the favorable view of segregation that Thomas embraced. Kennedy’s opinion takes into account all of the cases discussed in this article, and arrived at a conclusion that does not foreclose the use of race in elementary schools.

First and foremost, Kennedy recognized diversity as “a compelling educational goal a school district may pursue.”¹⁰² Moreover, there are compelling interests in “avoiding racial isolation [and] achiev[ing] a diverse student population.”¹⁰³ However, Kennedy argued that upholding these programs would result in ignoring the subtle distinction between *de jure* and *de facto* segregation.

De jure segregation, the type of segregation at the very heart of *Plessy*, *Brown*, and *Swann*, is segregation carried out by law. Racial classifications, such as desegregation programs, “may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause.”¹⁰⁴ School districts have an “affirmative duty” to “desegregate” if that

⁹⁸ *Parents Involved*, 127 S. Ct. at 2777.

⁹⁹ “Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.” *Id.* at 2778.

¹⁰⁰ JONATHAN KOZOL, *SAVAGE INEQUALITIES* 87 (HarperCollins ed., Crown Publishers, Inc. 1992) (1991).

¹⁰¹ *Id.*

¹⁰² *Parents Involved*, 127 S. Ct. at 2789.

¹⁰³ *Id.* at 2797.

¹⁰⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989).

school district “had been enforcing de jure segregation at the time of *Brown*.”¹⁰⁵ De facto segregation, or societal segregation, is not sufficient to justify racial classification.¹⁰⁶ In the case of de jure segregation, there is a “cognizable legal wrong, and the courts . . . have broad power to remedy it.”¹⁰⁷ However, when dealing with “de facto discrimination . . . our tradition has been that the remedial rules are different.”¹⁰⁸ Furthermore, America has an obligation to create “an integrated society that ensures equal opportunity for all of its children.”¹⁰⁹ Kennedy reasoned that

Race may be one component of that diversity, but other demographic factors, plus special talents and needs should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.¹¹⁰

Kennedy was aware of the fact that school districts have an interest in remedying de facto segregation. However, attempting to remedy that particular form of segregation takes more thought than the automatic school assignment procedures that both Seattle and Jefferson County employed. Kennedy articulated a set of permissible means of achieving diversity. Kennedy’s suggestions closely mirror the criteria set forth in *Swann*. According to Kennedy a school board, in its pursuit of diversity, may make “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of the neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion[.]”¹¹¹ Moreover, Kennedy stated that “[t]hese mechanisms are race conscious, but do not lead to different treatment based on a classification . . . so it is unlikely any of them would demand strict scrutiny to be found permissible.”¹¹²

¹⁰⁵ *Freeman v. Pitts*, 503 U.S. 467, 501 (1992) (citing *Green v. Sch. Bd. of New Kent City*, 391 U.S. 430, 437-38 (1968)).

¹⁰⁶ *Parents Involved*, 127 S. Ct. at 2795.

¹⁰⁷ *Id.* at 2796.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2797.

¹¹⁰ *Id.*

¹¹¹ *Parents Involved*, 127 S. Ct. at 2792.

¹¹² *Id.* at 2792.

Parents Involved has been the focus of media coverage since it was decided. Most of the attention has been given to Kennedy's concurrence.¹¹³ It has been argued that *Parents Involved* has overruled *Brown*, and that *Brown* "is now out of step with American political and social realities."¹¹⁴ By finding the programs in both Seattle and Jefferson County unconstitutional, the court had "come full circle" and "a conservative majority conclude[d] that any policy based on race – no matter how well intentioned – is a violation of every child's 14th amendment right"¹¹⁵ It has also been argued that Kennedy's concurrence, the deciding vote in this case, would "place [*Parents Involved*] squarely [with] the 1978 *Bakke* decision and the 2003 [*Gratz*] decision."¹¹⁶ It is impossible for both positions to be accurate. Either *Parents Involved* overruled *Brown* or it is the next logical step in progression from *Swann*, which defined the limits of an integration policy, to *Grutter*, which allowed race to act as one factor in an admissions decision.

Kennedy's concurrence brings two components of this debate to light. The conservative majority of the Court did, in fact, determine that the voluntary integration programs were unconstitutional. Moreover, four of those five judges even went as far as to argue that grade schools cannot argue that diversity is a compelling state interest because they lack academic freedom. This would lend weight to the position that the days of *Brown* are officially over. *Brown* was fought, arguably, for the integration of grade schools, and *Parents Involved* restricted the use of affirmative action policy to the remedy of past de jure segregation. However, Kennedy's concurrence does not ignore the applicability of *Bakke* to the current situation. Kennedy enthusiastically defends the idea that diversity is a worthy interest to pursue.¹¹⁷

Part Three: State Reaction to *Parents Involved*

Gratz, *Grutter*, and *Parents Involved* are all cases that attack the constitutionality of integration programs. Since the days of *Swann* and *Brown*, integration and affirmative action programs have been under constant scrutiny

¹¹³ It would seem that Justice Kennedy is usually the pivotal vote on controversial issues before the court. Shortly after writing an amicus brief in *Parents Involved*, Chermersky jokingly stated that "[m]y brief was a shameless attempt to pander to Justice Kennedy. If I could have put [his] picture on the front of my brief, I would have done so." Erwin Chemerinsky, *An Overview of the October 2006 Supreme Court Term*, 23 TOURO L. REV. 731, 734 (2008).

¹¹⁴ Juan Williams, *Don't Mourn Brown v. Board of Education*, Jun. 29, 2007 http://www.nytimes.com/2007/06/29/opinion/29williams.html?_r=1&oref=slogin. (last accessed Jan. 13, 2009).

¹¹⁵ *Id.*

¹¹⁶ Denver Post Editorial Board, *Race one factor in admissions*, Jun 29, 2007 http://www.denverpost.com/editorials/ci_6263553 (last accessed Jan. 13, 2009).

¹¹⁷ "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." *Parents Involved*, 127 S. Ct. at 2789.

from the public. In *Bd. of Educ. Of Oklahoma v. Dowell*,¹¹⁸ the court held that judicial supervision of a school district was never intended to “operate in perpetuity.”¹¹⁹ The remedies discussed in *Swann* were never meant to “extend beyond the time required to remedy the effects of past intentional discrimination.”¹²⁰ Therefore, the perfect storm created by *Parents Involved* has forced several states to worry about the future of their own affirmative action policies. The issue is whether *Parents Involved* marks the inevitable end of affirmative action programs. To analyze this issue, it is necessary to look at how states like Connecticut, Wisconsin, and New York have viewed the impact *Parents Involved* has had on their own integration programs.

Similarly, to fully understand the peril that affirmative action is in, it is necessary to discuss a recent trend in this area. Ward Connerly, the head of the American Civil Rights Coalition, has fought to place a very controversial initiative on the ballot of five states.¹²¹ The initiative, which may appear on the November 2008 ballots in several states, proposes that “[t]he state shall not discriminate against or grant preferential treatment to any individual or group on the basis race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”¹²² Similar propositions

¹¹⁸ 498 U.S. 237 (1991).

¹¹⁹ *Id.* at 248.

¹²⁰ *Hart v. Cmty. Sch. Bd. of Brooklyn*, 536 F. Supp. 2d 274, 280 (E.D.N.Y. 2008) (citing *Dowell*, 498 U.S. at 247-248).

¹²¹ Ward Connerly is no stranger to controversy. Born in Leesville, Louisiana on June 15, 1939, Connerly has become a prominent Republican and wealthy businessman. Connerly has grown to believe that affirmative action programs “hamper the motivation to succeed and are thus more of a detriment than a boon to those it intends to assist.” Ward Connerly, <http://browser.grik.net/www.africanamericans.com/WardConnerly.htm> (last visited Oct. 27, 2008). This argument is not new. According to Professor Davison M. Douglas, “[m]any African Americans accepted and even preferred segregation....” Davison M. Douglas, *Accomplishing Racial Change: School Desegregation in the Brown North*, 44 UCLA L. REV. 677, 697 (1991). The issue becomes which state of being causes the most mental anguish to the developing minority child. In other words, was segregation less harmful than affirmative action or vice versa. Do affirmative action programs make black children beggars as Justice Thomas believes or does Affirmative Action right the wrongs created by slavery, Jim Crow Laws, and discriminatory practices? There is no easy answer. However, cases such as *Brown*, *Gratz*, and *Grutter* suggest that the Affirmative Action is deemed the lesser problem of the two.

¹²² Lindy Royce, *Affirmative Action ban heads for ballot in five states*, Mar. 7, 2008, <http://www.cnn.com/2008/POLITICS/03/07/affirmative.action/>. (last visited Jan. 13, 2009). Nebraska passed a similar ban on affirmative action on November 4, 2008. Brittany Anas, *Affirmative Action Ban Too Close Too Call*, Daily Camera, Nov. 4, 2008, available at <http://www.dailycamera.com/news/2008/nov/04/affirmative-action-ban-too-close-call-colorado/>. (last visited Jan. 13, 2009). However, Colorado rejected the measure after a close vote. Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, Nov. 7, 2008, <http://kathmanduk2.wordpress.com/2008/11/25/colorado-voters-reject-affirmative-action-ban/> (last visited Jan. 13, 2009).

were already passed in California and Washington. These initiatives are proposed amendments to state constitutions which will effectively end affirmative action. To determine how these initiatives effect affirmative action, it is proper to look at Michigan's reaction to the proposed initiative.

A. Connecticut

Connecticut, much like Jefferson County, has a history of racial segregation. Unlike Jefferson County the order to desegregate Connecticut schools was not entered in the 1970s. In fact, the state of Connecticut was found to still operate a segregated public education system in 1996.¹²³ The state supreme court, in *Sheff v. O'Neill*, stated that "the existence of extreme racial and ethnic isolation in the public school system deprives school children of a substantially equal educational opportunity and requires the state to take further remedial measures."¹²⁴

In 2003, the plaintiffs in *Sheff v. O'Neill* reached a settlement. As part of that settlement agreement an integration plan was developed. The Hartford school district was directed to open two magnet schools with a capacity of 600 students each. Furthermore, an "open choice" policy would be implemented to allow parents to bus their children to a desirable public school.¹²⁵ The ultimate goal of the plan, was to have 30% of Hartford school children in an integrated classroom within 4 years.¹²⁶ However, much like *Brown*, the promise of integration was slow in coming.

On February 21, 2007, Richard Blumenthal, Attorney General of Connecticut, was asked "whether the State Board of Education should continue to enforce . . . intra-district racial imbalance statutes . . . in light of the [*Parents Involved* decision]."¹²⁷ Blumenthal stated that, while it is difficult to determine if Kennedy's concurrence will be controlling precedent, "[f]or now and the indefinite future, his concurring opinion assumed paramount importance for guidance as to the state of the law."¹²⁸ Therefore, Blumenthal analyzed Connecticut's statutory scheme through the lens of Kennedy's concurrence.

Connecticut was in an interesting position. At the time of this Attorney General opinion, Connecticut did not have any policies in operation. Even though the O'Neill settlement was available, very little to no action was taken to implement its plan. Blumenthal recognized that a decision on the constitutionality of an integration plan can only be made "when a district actually files its plan

¹²³ *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

¹²⁴ *Id.* at 1281.

¹²⁵ Sheff Movement, *A Decade and Then Some: The First Ten Years of Sheff v. O'Neil Implementation*, http://www.sheffmovement.org/pdf/ACLU_powerpoint_-_first_ten_years.pdf (last visited Jan. 13, 2009).

¹²⁶ *Id.*

¹²⁷ Allan Taylor, 2007 WL 4965555 (Conn. A.G.).

¹²⁸ *Id.*

with the State Board of Education.”¹²⁹ However, Blumenthal pointed out that Conn. Gen. Stat. § 10-226e¹³⁰ lacks the “automatic imposition of a formulaic ‘racial tiebreaker’”¹³¹ This tiebreaker would make the plan unconstitutional under *Gratz*, *Grutter*, and *Parents Involved*. According to Blumenthal, *Parents Involved* allowed “race [to act] as a component of diversity, and [the] use of race conscious measures to achieve such diversity, so long as they use other demographic factors and avoiding treating individual students differently based solely on systematic racial classifications.”¹³² Therefore, any desegregation plan that was created pursuant to this statute would be deemed constitutional if all of Kennedy’s suggestions are implemented.

In 2008, the plaintiffs in *O’Neill* tried to settle, once again, with Connecticut. The new plan “require[d] that the state plan more effectively . . . [and] make it easier for families to participate in [magnet schools] . . . [also] schools can be a maximum of 75% minority.”¹³³ This plan seems to be race conscious and does not rely on an automatic tiebreaker for student assignments. In fact, a major component of this plan is to educate parents on the existence of the magnet schools and the voluntary busing program.¹³⁴ While the *O’Neill* settlement is still very new, given the way that it has been drafted it appears that the plan would meet the criteria set forth in *Parents Involved*. However, the requirement that the schools be less than 75% minority may viewed by a court as being a quota.

A. Wisconsin

The State of Wisconsin has always been front and center in the debate over civil rights. Ezekiel Gillespie, an African-American, successfully sued for the

¹²⁹ *Id.*

¹³⁰ “The State Board of Education shall have the authority to establish regulations for the operation of sections 10-226a to 10-226e, inclusive, including times and procedures for reports to said board, and the criteria for approval of plans to correct racial imbalance and fix standards for determination as to racial imbalance. Such regulations shall include voluntary enrollment plans approved by the State Board of Education as an alternative to mandatory pupil reassignment, allowance for diverse schools existing in school districts with minority enrollments of fifty per cent or more and require equitable allocation of resources within any cited school districts.” CONN. GEN. STAT. § 10-226e (2001).

¹³¹ Allan Taylor, 2007 WL 4965555 (Conn. A.G.).

¹³² *Id.*

¹³³ Sheff Movement, *A Decade and Then Some: The First Ten Years of Sheff v. O’Neil Implementation*, http://www.sheffmovement.org/pdf/ACLU_powerpoint_-_first_ten_years.pdf (last visited Jan. 13, 2009).

¹³⁴ *Id.*

right to vote in 1866.¹³⁵ However, after the Black population boomed in the years after World War II segregation began to be felt in “housing, employment, and education.”¹³⁶ During the 1960s, Milwaukee was “one of the most segregated cities in the nation.”¹³⁷ In 1979, the school board agreed to implement a five-year desegregation plan to address segregation in public schools. While a lawsuit may have brought about the agreement, it was not court ordered. Much like Connecticut, this first plan was created as part of a settlement. This settlement agreement expired in 1995, but the “suburban schools agreed to make a good faith effort to fill a certain number or percentage of their seats or enrollments with . . . minority students.”¹³⁸

On December 20, 2007, J.B. Van Hollen, Attorney General for the state of Wisconsin, was asked to give his opinion on how *Parents Involved* affected the constitutionality of a Wisconsin integration statute. According to Evers, the effect of this statute was that “a student’s race becomes a mandatory, threshold requirement when determining [a child’s placement in school]”.¹³⁹ In applying *Parents Involved*, Evers concluded that the statute could not be enforced as written. According to Evers, “the binary racial classifications system . . . [is] not narrowly tailored to achieve a compelling government interest.”¹⁴⁰

B. New York

Despite the advances made by Theodore Roosevelt, New York was also forced to integrate in 1975. In *Hart v. Community School Board of Brooklyn*,¹⁴¹ the court held that the school board was “liable for conducting a segregated school in violation of the Constitution.”¹⁴² Under the resulting court order the school board was required to, among other things, maintain “approximately 70% Caucasian and 30% minority.”¹⁴³ This order has “remained in effect, and has continued to be implemented in good faith.”¹⁴⁴

However, in the wake of *Parents Involved* the continued existence of the integration order was in question. The school board used the holding in *Parents*

¹³⁵ Wisconsin Historical Society, *Desegregation and Civil Rights*, http://www.wisconsinhistory.org/turningpoints/tp-049/?action=more_essay (last visited Jan. 13, 2009).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ J.B. Van Hollen, 2007 WL 4928489 (Wis. A.G.).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 536 F. Supp. 2d 274.

¹⁴² *Id.* at 277.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 279.

Involved to argue that Mark Twain, the school at the center of the controversy, was “effectively desegregated and that ‘all vestiges’ of any past de jure or de facto segregation have been eliminated.”¹⁴⁵ Furthermore, the school board argued that the 1974 order was not in line with the reasoning advanced in *Parents Involved*. However, the court stated that the board’s reliance on *Parents Involved* is ill-advised.¹⁴⁶ The court relied heavily on Kennedy’s concurrence in *Parents Involved*, and concluded that the integration order was not a violation of that holding. The court even went as far as to state that “[i]f the facts were the same today as they were in 1974 the same decree would issue because the plaintiffs proved both de facto and de jure segregation.”¹⁴⁷

By looking at the reactions of Connecticut, Wisconsin, and New York, it can be argued that *Parents Involved* has not ended the era of *Brown*. Given the manner in which this case has been construed, and the reliance that courts have placed on Kennedy’s concurrence, affirmative action plans are still viable. Universities and colleges are allowed to use diversity as a compelling interest upon which to base their programs, and the plans will be deemed narrowly tailored as long as the use of race is not the deciding factor in a placement or admissions decision. Furthermore, given the holding in *Hart*, the integration decrees of the 1970s would still be enforceable if handed down today. This, according to the court in *Hart*, is true even after *Parents Involved*.

C. Michigan Civil Rights Initiative

While, Connecticut, Wisconsin, and New York have ascertained methods by which to preserve diversity, other states have not been as fortunate. Justice Thomas is not alone in his sentiments about affirmative action programs. Ward Connerly and Barbara Grutter, the plaintiff in *Grutter v. Bollinger*, fought to have an initiative placed on the 2006 statewide ballot in Michigan that would “bar programs for state school admission, public employment, and public contracting that grant preferential treatment on the basis of race or gender.”¹⁴⁸ Grutter created the MCRI, also known as the Michigan Civil Rights Initiative. According to MCRI, the goal of the Michigan Initiative is to “make it unlawful for public employers, public contractors, and public education to discriminate or grant

¹⁴⁵ *Id* at 280.

¹⁴⁶ The court plainly stated that “the proposition that the 1974 decree does not now accord with the law is not well-founded in the face of the plurality *Seattle* decision.” *Hart*, 536 F. Supp. 2d at 281.

¹⁴⁷ *Id.* at 284.

¹⁴⁸ *Coalition to Defend Affirmative Action v. Cox*, 539 F. Supp. 2d 924, 931 (2008). While it may be surprising to see Grutter involved in this action, it is also interesting to note the Jennifer Gratz was also a party to this litigation.

preferential treatment on the basis of race, ethnicity, skin color, sex, or national origin.”¹⁴⁹

This proposal was approved by Michigan voters with “approximately 57.9% of the voters in favor and 43.1% disapproving.”¹⁵⁰ However, several members of the community, including students and prospective students of Michigan’s public university system, filed a lawsuit. In *Coalition to Defend Affirmative Action v. Cox*, the plaintiffs claimed, among other things, that the proposal “was unconstitutional as it applied to public colleges and universities.”¹⁵¹ The plaintiffs further argued that “Proposal 2 has as its primary aim reducing the admission of [minority] students into some programs . . . by eliminating the ‘desegregation plans that have resulted in the admission of significant numbers’ of such students.”¹⁵²

Moreover, the plaintiffs skillfully used both the holding in *Gratz* and *Grutter* to bolster their argument that the initiative is unconstitutional. Both *Gratz* and *Grutter* used academic freedom as a cornerstone for the position that diversity is a compelling interest. By stripping away the university’s right to seek such diversity, the initiative is infringing on the “First Amendment right [of the University] to consider race and gender in the selection of faculty and students in order to promote diversity and fruitful education.”¹⁵³ As well stated as this argument is, it was ultimately rejected by the court. According to the court, the student plaintiffs lacked the standing necessary to bring such a claim. The court held that the students did not have third party standing, and were therefore barred from bringing claims on behalf of the universities. *Coalition* was ultimately dismissed with prejudice, and universities in Michigan were required to change their admissions policies to ones that would not use race as a factor.

It can be argued that the initiative would strip the universities of what little protection that Kennedy’s opinion has provided. By allowing a statute to strip away, not only the free exercise of academic freedom, but the freedom to pursue diversity as a compelling interest, the initiative has rendered *Gratz*, *Grutter*, and *Parents Involved* nullities. The Court, in ruling that the students did not have standing to make this argument, did not preclude the university from using it. If the proper plaintiff, i.e. university officials, articulated this position - that the initiative effectively has stripped away academic freedom - the result very well may have been different.

¹⁴⁹The Michigan Civil Rights Initiative, *Jennifer Gratz – Executive Director*, <http://www.michigancivilrights.org/jengratzbio.html> (last visited Jan. 13, 2009).

¹⁵⁰*Coalition*, 539 F. Supp. 2d at 931.

¹⁵¹*Id.* at 932.

¹⁵²*Id.* at 934.

¹⁵³*Id.* at 935.

Part Four: Conclusion

On November 4, 2008, the United States elected its first black President, Barack Hussein Obama. His candidacy alone served as a rallying cry for the end of affirmative action programs. It was argued during the campaign that “[i]f Americans make a black person . . . president . . . how can racial prejudice be so prevalent and potent that it justifies special efforts to place minorities in coveted jobs and schools?”¹⁵⁴ This question fails to take into account the goal of affirmative action. Affirmative action programs were not created to get a minority into the White House. These programs were created, in part, to remedy past intentional discrimination. Allowing the success of Barack Obama to end a program that benefits millions of minority children is incorrect. His historic candidacy should not be seen as a sign that affirmative action has run its course. Rather it should be seen as a sign that equal access to education is necessary to achieve success in America.

Parents Involved, much like the election of Barack Obama, has been misconstrued. While it is true that *Parents Involved* indicates that the increasingly conservative Court is hostile toward affirmative action, Justice Kennedy’s opinion provides methods to preserve those programs. Justice Kennedy recognized that diversity is a compelling state interest and that a program must be narrowly tailored to serve that interest. His concurrence also allows grade schools to pursue diversity, and that alone makes Kennedy’s concurrence a logical companion to *Brown*. Despite the treatment of *Parents Involved* in the press, the key to the decision rests with Kennedy’s concurrence. Connecticut and New York relied on Kennedy’s opinion to determine whether a current or proposed desegregation plan was constitutional.

America has made great progress toward becoming truly diverse. There is still much work to be done, and affirmative action programs play an important role. Schools in the United States were directed to integrate in 1955. Year after year, individuals have attacked the *Brown* decision. It is impossible to believe that a system of racism and the rampant marginalization of minorities can be completely overcome in nearly 60 years. Kennedy’s concurrence in *Parents Involved*, and the subsequent adoption of that opinion by lower courts and state officials, has provided affirmative action with a momentary safe harbor. The increasing hostility toward affirmative action, as exemplified by the MCRI movement, has reached a feverish pitch after the historic candidacy and election of Obama. However, given the existence of Kennedy’s opinion in *Parents Involved*, affirmative action programs are protected for the time being.

¹⁵⁴ Associated Press, *Does Obama Threaten Affirmative Action?*, MSNBC, Jun. 30, 2008, <http://www.msnbc.msn.com/id/25458941/> (last visited Jan. 13, 2009).