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Down But Not Out: How School Districts May Utilize Race-Conscious Student Assignments in the Wake of *Parents Involved in Community Schools v. Seattle School District No. 1*

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On June 28, 2007, the Supreme Court, in a 5-4 decision, ruled that the race-based public school desegregation programs in Seattle and Jackson County, KY, which resemble hundreds of other such programs across the country,[1] are unconstitutional. The dually decided cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*[2] represent the first decisions by the Supreme Court concerning the "constitutionality of the voluntary use of race to remedy de facto segregation in public education."[3] Many view this decision as a clear sign that the Court is firmly controlled by an energized conservative majority[4] and, most importantly, the death knell of desegregation.[5]

While the *Parents Involved* decision firmly excludes any consideration of race to combat de facto segregation in public schools, Justice Kennedy's concurring opinion suggests the practical limitations of this decision and offers school districts guidance on how to enact constitutionally valid race-conscious

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1. Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y. TIMES, June 29, 2007, at A1, *available at* http://www.nytimes.com/2007/06/29/washington/29scotus.html.

2. 127 S. Ct. 2738 (2007).

3. Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding The (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 319 (2006).

4. *See, e.g.*, Greenhouse, *supra* note 1.

5. Nelson, *supra* note 3, at 295.

desegregation programs.[6] Justice Kennedy, the deciding vote for the majority, found that addressing de facto segregation in public schools was a compelling interest, but that the plans at issue were not narrowly tailored.[7] In so holding, Kennedy rejected the majority's "all-too-unyielding insistence that race cannot be a factor in instances when . . . it may be taken into account."[8]

Justice Kennedy's opinion is the key to understanding how school boards may be able to continue to battle racial segregation within their districts without having to abandon the consideration of race in doing so. This article will examine Justice Kennedy's particular critiques of the Seattle and Jackson County plans, which led him to conclude that they were not narrowly tailored. Based on the cited deficiencies, this article will suggest how the Seattle and Jackson County plans may have been constructed in a narrowly tailored manner. It is hoped that this analysis will mirror the efforts of school boards nationwide, who seek to remedy de facto racial segregation in the wake of the Supreme Court's decision in *Parents Involved*.

This article proceeds in five parts. Providing this article's public policy foundation, Part I characterizes the issue of de facto segregation and its effects on the education and well-being of minorities in America. Part II explains the development of the Supreme Court's strict scrutiny analysis in the context of race-based classifications and how this exacting standard is applied to race conscious education programs. Part III outlines the factual history of the plans at issue and details the procedural history of each plan prior to the Supreme Court's consideration of them. Part IV details the majority opinion, Justice Breyer's dissent, and Kennedy's concurring opinion in *Parents Involved*. In particular, this section addresses Justice Kennedy's critique of the plans, which led to his conclusion that they were not narrowly tailored. In conclusion, Part V applies Justice Kennedy's critique to the plans at issue in order to demonstrate how school boards may actually implement such plans in a constitutional fashion.

6. Greenhouse, *supra* note 1.

7. *Parents Involved*, 127 S. Ct. at 2788-97 (Kennedy, J., concurring); *see also* Greenhouse, *supra* note 1.

8. *Parents Involved*, 127 S. Ct. at 2791; *see also* Greenhouse, *supra* note 1.

I. De Facto Segregation's Effect on American Education and Society

The Supreme Court's statement, in *Brown v. Board of Education*,[9] that "education is perhaps the most important function of state and local governments"[10] is as true today as it was in 1954. Education develops cultural values, enables environmental adaptation, and prepares children for their professional lives.[11] Likewise, in a diverse society such as ours, it is important for children to develop the ability to successfully interact with individuals of disparate backgrounds in the educational context.[12]

Despite the inherent importance of diversity, public elementary and secondary schools are more segregated today than they were when the Supreme Court decided *Brown*.[13] For example, the average white student attends a school that is nearly eighty percent white and the average black student attends a school that is over half black, even though blacks comprise only one sixth of students nationwide.[14] The American population of whites is the most isolated racial or ethnic group.[15] In 2000, the typical neighborhood of a white metropolitan resident was eighty percent white.[16]

As a consequence, racial segregation in public schools generates long-term balkanizing effects on American society.[17] More immediately, racially segregated schools work to the disadvantage of minority children. Minority students in racially isolated schools have inferior learning opportunities and educa-

9. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

10. *Id.* at 493.

11. Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 819 (2006) (citing *Brown*, 347 U.S. at 493).

12. Siegel, *supra* note 11, at 828.

13. Nelson, *supra* note 3, at 296; *see also generally* Robert L. Carter, *Fifty Years of Reflection: Brown v. Board to Education and its Universal Implications: The Conception of Brown*, 32 FORDHAM URB. L.J. 93 (2004).

14. Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 277 (2007).

15. *Id.* at 285.

16. *Id. See also* ERICA FRANKENBERG ET. AL., CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 4 (2003), *available at* http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf.

17. Siegel, *supra* note 11, at 839-40.

tional outcomes.[18] In particular, black students in schools with predominant numbers of black students lag behind white students in terms of academic achievement.[19] Black students are more likely than white children to receive poor grades, require remedial education, and are less likely to graduate from high school.[20] These isolated black pupils are also less likely to attend college, and those who do matriculate at the university level have a lower chance of graduating.[21] As a direct result of these deficiencies, black children are more likely to be unemployed or employed in low-paying, unskilled jobs in their adulthood.[22]

This racial isolation and disparity in educational opportunities is a result of de facto segregation. De facto segregation is caused by "housing patterns or generalized societal discrimination."[23] The increasing rate of residential segregation in communities throughout the country, coupled with the fact that many school districts have adopted the neighborhood school theory to make student assignment decisions, has resulted in the current trend of racial segregation in public schools.[24]

Because of its disenfranchising effects, school districts seek to eliminate the trend of de facto segregation. Some argue that de facto segregated schools should be integrated even when the majority opposes integration because such segregation is "'unacceptable by democratic principles even if it is often supported

18. Liu, *supra* note 14, at 290.

19. Nelson, *supra* note 3, at 299; *see also* Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 8-9, 25-26 (2005).

20. Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2396-97 (2000); *see also* Nelson, *supra* note 3, at 303-04 ("Greater numbers of African-American students fail to complete high school as compared to white students. African-American students, many of whom attend racially imbalanced schools, routinely score lower than their white counterparts on standardized tests. Fewer African-American adults, as compared to white adults, obtain a college education. Such achievement gaps are due, in part, to disparities existing between the quality of the teachers at poor, minority-concentrated schools and their more affluent, white counterparts.").

21. Forde-Mazrui, *supra* note 20, at 2367.

22. *Id.* at 2396-97.

23. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2802 (2007) (Breyer, J., dissenting).

24. Nelson, *supra* note 3, at 306-07.

by democratic policies.'"[25] If, rather than affirmatively repel the effects of de facto segregation, school districts continue to yield to societal pressures that oppose diversification and base their student assignment policies upon racially segregated housing patterns, the goal of attaining educational equality for minority students will be unattainable.[26]

II. Strict Scrutiny's Effect on Race-Conscious Efforts in Education

In *Regents of the University of California v. Bakke*,[27] Justice Powell developed the idea that racial diversity in the context of education is a compelling interest to adopt race-based initiatives.[28] Justice Powell's vision of diversity encompasses a broad array of qualifications and characteristics, of which racial or ethnic origin is a single and important element.[29] While recognizing the need of schools to foster racial diversity, Justice Powell was wary of the use of racial classifications, concluding that racial or ethnic distinctions of any variety are inherently suspect and require the most exacting judicial scrutiny.[30] Applying strict scrutiny to the plan at issue in *Bakke*, Justice Powell concluded that the plan was unconstitutional because it was not narrowly tailored.[31] The *Bakke* plan reserved spots in each class for minority students, the "functional equivalent of a quota system," rather than considering all the factors of an applicant, including race, during admissions.[32]

It was not until 1989, in *City of Richmond v. J.A. Croson Co.*,[33] that the Supreme Court ruled that all state initiated racial classifications, including those with benign objectives like affirmative action, were presumptively invalid and subject to strict scrutiny.[34] The language of *Croson* suggested that affirm-

25. Siegel, *supra* note 11, at 824 (quoting AMY GUTMAN, DEMOCRATIC EDUCATION 162 (1987)).

26. Nelson, *supra* note 3, at 310.

27. 438 U.S. 265 (1978).

28. *Id.* at 311-15.

29. *Id.* at 315.

30. *Id.* at 291.

31. *Id.* at 320.

32. *Id.* at 318.

33. 488 U.S. 469 (1989).

34. *Id.* at 495.

ative action was now abolished because any such program was doomed to fail under a strict scrutiny analysis.[35] However, seven years later, in *Adarand Constructors, Inc. v. Pena*,[36] the Court stated that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[37] With this language, the Court left open the possibility that a government implemented program utilizing benign racial classifications may survive a strict scrutiny examination.

Such a result was realized in *Grutter v. Bollinger*,[38] where the Court upheld the use of race-based considerations in higher education.[39] In *Grutter*, Justice O'Connor, writing for the majority, reiterated that race-based classifications of all varieties are subject to strict scrutiny.[40] Justice O'Connor reached a conclusion similar to Justice Powell's in *Bakke*, finding that the University of Michigan School of Law's use of race as a consideration in admissions was supported by a compelling interest in attaining a diverse student body.[41] The Court also held that the *Grutter* plan was narrowly tailored, because it made individualized decisions that considered an applicant's race and did not make race a defining component of any student's application.[42]

Strict scrutiny would, however, prove fatal for the benign racial classification at issue in *Gratz v. Bollinger*.[43] In *Gratz*, the Court applied the *Grutter* standard in striking down the race conscious admission policy of the University of Michigan's undergraduate program, where a fixed number of points based on race were awarded to all minority applicants.[44] The Court found that this practice made race a defining feature of a student's application and, therefore, determined that the program was not narrowly tailored.[45]

35. Forde-Mazrui, *supra* note 20, at 2338.
36. 515 U.S. 200 (1995).
37. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 507 (1980).
38. 539 U.S. 306 (2003).
39. *Id.* at 326.
40. *Id.*
41. *Id.* at 328.
42. *Id.* at 334, 337-41.
43. 539 U.S. 244 (2003). This case was decided in conjunction with *Grutter*.
44. *Id.* at 270-71.
45. *Id.* at 271-72.

III. Factual and Procedural History of the Seattle and Jackson County Plans

A. *History of the Seattle Plan*

Racially segregated schools have never operated in Seattle and the city's districts have never been subjected to a court ordered desegregation mandate. There is, however, a racially notable residency pattern in Seattle, with most white students living in northern Seattle and the students of other races living in the southern part of the city.[46] The Seattle School District assignment plan sought to address the segregating effects of these racially isolated housing patterns on school enrollment.[47]

Seattle's plan arose after nearly fifty years of effort to combat racial segregation in Seattle. Following an increase in the black population in Seattle after World War II, the Seattle school system found itself highly segregated.[48] In response to this racial isolation, the National Association for the Advancement of Colored People ("NAACP") and other community organizations succeeded in pressuring the Seattle School Board to enact a race-based transfer policy.[49] Unsatisfied with the results of Seattle's efforts, the NAACP brought federal lawsuits against the Seattle School Board in 1969 and 1977, which resulted in a mandatory busing program designed to integrate Seattle schools.[50] As a consequence of the busing program, white families moved away from the Seattle city proper, and, over time, there was a marked decrease in overall student enrollment and an increase in the racial diversity of students in Seattle schools.[51] In the interest of attracting white students back to city schools and providing greater school choice for students, the Seattle School Board, in 1988, enacted a student assignment plan similar to the one struck down in *Parents Involved*.[52] The plan placed a heavy emphasis on race, using it as the sec-

46. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2747 (2007).

47. *Id.*

48. *Id.* at 2802-03 (Breyer, J., dissenting).

49. *Id.* at 2803.

50. *Id.* at 2803-05.

51. *Id.* at 2805.

52. *Id.*

ond factor in student assignments.[53] In seeking to deemphasize the use of race in student assignments, the Seattle School Board enacted the plan at issue in 1996, and it began operation in 1999.[54]

The Seattle School District's new assignment plan gave incoming ninth graders the option of ranking the high schools they wished to attend.[55] If too many students ranked a particular school as their first choice, three tiebreakers were employed to determine which students would enter that school.[56] The first tiebreaker considered whether a student had a sibling at the school, the second tiebreaker factored in the racial composition of the school and the race of the individual student, and the third tiebreaker took into account the student's geographic proximity to the school.[57]

The second tiebreaker was the aspect of the plan at issue in *Parents Involved*. Within Seattle's District No. 1 at the time of adjudication, forty-one percent of the students were classified as white, and the remaining fifty-nine percent of students, of varying racial composition, were classified as non-white.[58] In the event that a school was oversubscribed, and the first tiebreaker did not resolve the issue, the district would examine that school's racial demographics.[59] If the school's racial balance was not ten percentage points within the district's racial balance—forty-one percent white and fifty-nine percent non-white—the school would be labeled integration positive.[60] The district would then assign to that school those students whose race would harmonize that school's racial balance with that of the district.[61]

B. *History of the Jefferson County, Kentucky Plan*

The Jefferson County School District operates in downtown Louisville, Kentucky and, unlike the Seattle School District,

53. *Id*.
54. *Id.*
55. *Id*.
56. *Id*.
57. *Id*. at 2747 (majority opinion).
58. *Id.*
59. *Id*.
60. *Id*.
61. *Id.*

previously maintained a segregated school system.[62] This fact is important because the Supreme Court has previously recognized that remedying the past effects of intentional discrimination is a compelling interest that supports the use of racial classifications in education.[63] A federal court enacted a desegregation decree on Jefferson County in 1975, and the same court removed the decree in 2000 after holding that the district had eliminated segregation "[t]o the greatest extent practicable."[64]

In 2001, Jefferson County enacted the student assignment plan at issue in *Parents Involved*.[65] This plan required all nonmagnet schools to maintain a black enrollment of fifteen percent, at a minimum, or fifty percent, at a maximum.[66] At the time of adjudication, the district had 97,000 students, thirty-four percent of whom were black and sixty-six percent of whom were white.[67] At the kindergarten level, students were designated to what the district termed a "resides" school based on their residence.[68] These schools were organized in various groups in order to further racial integration.[69]

The district utilized two methods for assigning students to these schools.[70] Parents of kindergarteners, first graders, or new students to the district could submit an application selecting their first and second choices of schools in their respective cluster.[71] Children whose parents did not submit an application were assigned to a school in their respective cluster by the district.[72] The district based its assignments on available space and the district's racial guidelines of a fifteen percent minimum or fifty percent maximum enrollment of black children in a particular school.[73] If a certain school was close to being racially imbalanced per the guidelines, the district would not assign a

62. *Id*. at 2749
63. *Id.* at 2752
64. *Id.* at 2749 (quoting Hampton v. Jefferson County Bd. of Educ., 102 F. Supp.2d 358, 360 (W.D. Ky. 2000)).
65. *Id*.
66. *Id*.
67. *Id.*
68. *Id*.
69. *Id.*
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.

student to that school if the student's race would contribute to racial imbalance in that school.[74] Once assigned to a school, students of all grades could apply for transfer to another school for many reasons, but those transfers could be denied due to lack of available space or in consideration of the racial guidelines.[75]

C. *Procedural History of the Seattle Plan*

Parents Involved in Community Schools ("Parents Involved") is a non-profit corporation comprised of parents of children who have been or might have been denied acceptance to the high school of their choice in the Seattle District due to the racial tiebreaker.[76] Parents Involved brought suit against the Seattle School District in the Western District of Washington, alleging that the district's use of the racial tiebreaker violated the Equal Protection Clause of the Fourteenth Amendment, Title IV of the Civil Rights Act of 1964, and the Washington Civil Rights Act.[77] The district court granted summary judgment for the school district, holding that "state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest."[78]

The Ninth Circuit reversed the district court's ruling, based on its understanding of the Washington Civil Rights Act,[79] and enjoined the district's use of the racial tiebreaker.[80] However, the Ninth Circuit withdrew this decision, because the assignments for the upcoming school year would occur before the resolution of the case,[81] and certified the Washington Civil Rights Act question to the Washington Supreme Court.[82] The Wash-

74. *Id*. at 2749-50.
75. *Id.* at 2750.
76. *Id.* at 2748.
77. *Id.*
78. *Id.* (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001)).
79. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236, 1253 (9th Cir. 2002).
80. *Id.* at 1257.
81. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 294 F.3d 1085, 1086 (9th Cir. 2002).
82. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 294 F.3d 1084, 1085 (9th Cir. 2002).

ington Supreme Court upheld the district's racial tiebreaker holding, that the Washington State Civil Rights Act does not bar programs that are racially neutral, such as the district's racial tiebreaker.[83] The case then returned to the Ninth Circuit and the court reversed the district court's ruling on the federal constitutional question. The court determined that, although the school district's use of the racial tiebreaker was supported by compelling interests, its application was not narrowly tailored.[84] The Ninth Circuit reheard the case en banc and overruled the Ninth Circuit panel's decision, finding that the use of the racial tiebreaker was narrowly tailored to further its compelling interests.[85]

D. *Procedural History of the Jackson County, Kentucky Plan*

Crystal Meredith brought suit against the Jackson County School District in the Western District of Kentucky, alleging that the school district's plan violated the Equal Protection Clause of the Fourteenth Amendment.[86] Her suit came after the school district denied her request to have her son transferred to an elementary school closer to her residence because his attendance at that school would negatively affect that school's racial balance.[87]

The district court upheld the challenged assignment plan, finding "that Jefferson County had asserted a compelling interest in maintaining racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest."[88] On appeal, the Sixth Circuit affirmed the district court's ruling in a per curiam opinion. The Sixth Circuit relied on the district court's reasoning and did not

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

84. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 964, 980 (9th Cir. 2004).

85. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1192-93 (9th Cir. 2005) (en banc).

86. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2750 (2007).

87. *Id.*

88. *Id.* (citing McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004)).

issue a written opinion because doing so "would serve no useful purpose."[89]

IV. Supreme Court Opinions in *Parents Involved v. Seattle School District No. 1*

A. *The Majority Opinion*

The Supreme Court granted certiorari for both cases[90] and decided them concurrently because both concerned the same ultimate question, "whether a public school that had not operated legally segregated schools[91] or has been found to be unitary[92] may choose to classify students by race and rely upon that classification in making school assignments."[93] Chief Justice Roberts, writing for the majority,[94] began the review of the plans by noting that there are only two recognized interests that serve as compelling when reviewing the constitutionality of racial classifications in education: "remedying the effects of past intentional discrimination"[95] and "the interest in diversity in higher education upheld in *Grutter*."[96]

The majority found that neither plan was supported by either of these compelling interests.[97] Fundamentally, because the plans at issue were aimed at elementary and secondary education, as opposed to higher education, the *Grutter* interest could not apply.[98] In addition, both plans were not aimed at remedying past discrimination: Seattle schools were never seg-

89. *Id.* (citing McFarland v. Jefferson County Pub. Sch., 416 F.3d 513, 514 (6th Cir. 2005)).

90. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 547 U.S. 1177 (2006).

91. The majority's reference here is to the Seattle School District, which had never been legally deemed to operate intentionally segregated schools. *Id*. at 2747.

92. The majority's reference here is to the Jefferson County School District, which, in 1975, was found to have operated segregated schools. *Id*. at 2749. In 2000, it was determined that the school system had been effectively desegregated. *Id*. at 2749.

93. *Parents Involved*, 127 S. Ct. at 2746.

94. The majority consisted of Justices Alito, Roberts, Scalia, and Thomas. Justice Kennedy concurred with the majority opinion, disagreeing with the reasoning, but joining in result.

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

96. *Id.* at 2753.

97. *Id.* at 2752, 2754.

98. *Id.* at 2754.

regated by law or subjected to a desegregation order; and Jefferson County's desegregation decree had since been dissolved, and the district did "not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students."[99] The *Grutter* compelling interest, as interpreted by the majority, is designed "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."[100] The majority found that neither plan considered race as an element of a broader vision of diversity, but rather that they considered "race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County."[101]

In addition, neither plan met the majority's standard for being necessary and narrowly tailored "to the goal of achieving the educational and social benefits asserted to flow from racial diversity."[102] Each of the districts tailored their plans only to mirror "each district's specific racial demographics, rather than . . . any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[103] Also, no evidence was offered to indicate that the racial demographics of either district provided a measure of the diversity necessary to benefit students in secondary education.[104]

The majority viewed this demographically determined attempt at diversity as "working backward to achieve a particular type of racial balance."[105] The idea that racial balancing serves as an interest in and of itself, the majority reiterated, is "patently unconstitutional."[106] This reasoning could serve as the most important statement by the majority in the holding, because it attacks the idea of trying to eliminate the effects of de facto segregation. The Seattle School Board defended its plan "as necessary to address the consequences of racially identifi-

99. *Id.* at 2752.
100. *Id.* at 2753.
101. *Id.* at 2754.
102. *Id.* at 2755.
103. *Id.*
104. *Id*. at 2756.
105. *Id*. at 2757.
106. *Id*. (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

able housing patterns."[107] The majority rejected this argument, stating integration efforts do not require racial proportionality.[108] If allowed, racial balancing will have "no logical stopping point"[109] and "effectively assure that race will always be relevant in American life."[110]

The plans were also unnecessary in that they had little effect on student assignments in either district.[111] In the majority's view, "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."[112] Moreover, "[n]arrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,'" and, in the majority's view, the districts failed to show that they considered measures other than racial classifications to achieve classroom diversity.[113]

B. *Justice Breyer's Dissenting Opinion*

In his dissent, Justice Breyer advocated the application of a more contextual standard of analysis, as opposed to a fatal strict scrutiny review, for race-based classifications that seek to

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107. *Id*. at 2758.

108. *Id*. at 2759.

109. *Id*. at 2758 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).

110. *Id*. (quoting *Croson*, 488 U.S. at 495).

111. *Id*. at 2759-60. With regard to the Seattle plan, the Court stated:

> In over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no difference, and the district could identify only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.

Id. The Court made a similar finding concerning the effect of the Jefferson County plan:

> Elementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments.

Id. at 2760 (citation omitted).

112. *Id*. at 2760.

113. *Id*. (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

include, rather than exclude.[114] However, in light of the precedent established by *Grutter*,[115] *Bakke*,[116] and other cases, Justice Breyer subjected the two plans at issue to the traditional strict scrutiny test.[117] Under this exacting evaluation, Justice Breyer concluded that each plan was narrowly tailored to further compelling governmental interests and, therefore, was constitutional.[118]

In finding the plans constitutionally valid, Justice Breyer articulated three compelling interests furthered by the Seattle and Jefferson County plans.[119] First, the plans sought to "right the consequences of prior conditions of segregation,"[120] including effects on "housing patterns, employment practices, economic conditions, and social attitudes."[121] Second, there was "an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[122] Finally, the plans advanced "an interest in producing an

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114. *Id.* at 2816-20 (Breyer, J., dissenting). Justice Breyer, joined by Justices Ginsburg, Souter, and Stevens, articulated the contextual approach as:

> The view that a more lenient standard than 'strict scrutiny' should apply in the present context would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need. And the present context requires a court to examine carefully the race-conscious program at issue. In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that Justice Thomas and Justice Kennedy mention.
>
> But unlike the plurality, such a judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks they mention, for example, helping to end racial isolation or to achieve a diverse student body in public schools. Where that is so, the judge would carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.

Id. at 2819 (citations omitted).

115. 539 U.S. 306 (2003).

116. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

117. *Id.* Justice Breyer thus framed the issue as "whether the school boards in Seattle and Louisville adopted these plans to serve a 'compelling governmental interest' and, if so, whether the plans are 'narrowly tailored' to achieve that interest." *Id*.

118. *Id.* at 2820, 2824.

119. *Id*. at 2820.

120. *Id.*

121. *Id*.

122. *Id*.

educational environment that reflects the 'pluralistic society' in which our children will live."[123] Unlike the majority and Justice Kennedy, in his concurring opinion, Justice Breyer found the plans to be narrowly tailored in multiple respects.[124] Each plan applied a narrow use of race, utilized other non-race related criteria, had histories of development and modification, compared favorably to other desegregation plans across the country, and lacked any reasonable and non-race conscious alternatives.[125]

Justice Breyer took particular exception to the majority's distinction between de jure and de facto segregation.[126] Because many schools in the South that were allegedly segregated by law voluntarily desegregated their schools without a court order or submitted voluntary desegregation plans to be followed after a segregation decree was dissolved, "a court finding of de jure segregation cannot be a crucial variable."[127] In addition, the de jure and de facto distinction only concerns what desegregation measures school boards are constitutionally required to implement, rather than what desegregation plans they are allowed to undertake.[128] Justice Breyer could find no example of a prior Court decision that "relied upon the de jure/de facto distinction in order to limit what a school district is voluntarily allowed to do."[129] As de facto segregation becomes an increasing problem, Justice Breyer concluded that "such resegregation can create serious educational, social, and civic problems,"[130] and that the majority's holding deprives school districts of the abil-

123. *Id*. at 2821 (quoting Swann v. Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

124. *Id*. at 2824.

125. *Id*. at 2829-30.

126. *Id*. at 2803, 2810, 2823.

127. *Id*. at 2810.

128. *Id*. at 2823.

129. *Id*. (alteration in original).

130. *Id*. at 2833. Justice Breyer relies on a number of statistical sources to support the notion that de facto resegregation is increasing and is reflected in the racial proportionality of the nation's schools. *See* C. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 56 (2004); FRANKENBERG ET AL., *supra* note 16, at 30; G. ORFIELD & C. LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 18 (Jan. 2006), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

ity to combat de facto segregation with broad race-conscious assignment policies.[131]

C. *Justice Kennedy's Concurring Opinion*

In *Grutter*, Justice Kennedy offered a concurring opinion that was wary of the majority's decision to uphold the use of race-based admissions considerations. Justice Kennedy's disagreement with the majority did not concern the explicit use of race, but that it had been used too much. He understood Justice Powell, in *Bakke*, as permitting the use of "'race as one, non-predominant factor in a system designed to consider each applicant as an individual,' a use that was 'modest' and 'limited.'"[132] In what may likely prove to be the most useful opinion of *Parents Involved*,[133] Justice Kennedy again reiterated his opinion on this issue by concurring with the majority. Justice Kennedy found that although the plans were supported by compelling interests, they failed to satisfy the narrow tailoring aspect of the strict scrutiny test.[134]

Rejecting the majority's insistence that the Constitution mandates school districts to ignore the issue of de facto segregation in education,[135] Justice Kennedy found that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."[136] School boards may consider students' races, along with other, demographic factors, in pursuit of that interest.[137] Justice Kennedy's determination was in part based on a comparison with the rationale of *Grutter*.[138] Because the real world is not color blind, despite noble aspirations to make it so,[139] "it is permissible to consider the racial makeup of schools and to

131. *Id*.

132. Siegel, *supra* note 11, at 800.

133. *See* Leslie Yalof Garfield, *The Glass is Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AM. L. 385, 388, 416 (2008).

134. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

135. *Id.* at 2791.

136. *Id.* at 2797.

137. *Id*.

138. *Id.* at 2792.

139. *Id.* at 2791-92 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[140]

Although Justice Kennedy maintained that each plan was supported by a compelling interest, he found that both plans were not narrowly tailored. Governments that utilize racial classifications have the burden of demonstrating exactly how decisions based on a person's race are made in the challenged program.[141] Justice Kennedy found that Jefferson County failed to meet this burden, because it "explained how and when it employs [racial] classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny."[142] Specifically, Jefferson County failed to explain which personnel make the race-based decisions, who oversees the operation of the plan, the exact circumstances under which a race-based assignment may or may not be made, or how the district would decide which of two children with similar backgrounds would be subjected to a race-based determination.[143] Considering these ambiguities, Jefferson County did not clearly demonstrate that it relied on narrowly tailored racial classifications, as opposed to a broad and forbidden form of racial categorization.[144]

Justice Kennedy felt that the Seattle School District more clearly and specifically described the methods and criteria used to make race-based assignments in its plan.[145] However, he, like the majority, took issue with the manner in which Seattle categorized the race of students within its district.[146] The Seattle district "failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."[147] While Justice Kennedy agreed with Seattle in believing that the interests for the plan were compelling, the district failed to demonstrate to Justice Kennedy "how, in the context of its di-

140. *Id.* at 2792.
141. *Id.*
142. *Id.* at 2789-90.
143. *Id.* at 2790.
144. *Id.*
145. *Id.*
146. *Id.* at 2790-91.
147. *Id.*

verse student population, a blunt distinction between 'white' and 'non-white' furthers these goals."[148]

Additionally, Justice Kennedy stated that school boards may employ racial classifications in the interest of furthering racial diversity "only if they are a last resort."[149] Both school boards failed to demonstrate that their plans utilized race-based assignments because there was no other way to confront the issue of de facto racial isolation.[150] In addressing this shortfall, Justice Kennedy articulated some race neutral programs that school districts should implement before determining that plans utilizing racial classifications are necessary. Such programs include: strategic school site selection, organization of attendance zones in consideration of neighborhood demographics, reserving resources to establish special programs, recruiting students and faculty in a targeted manner, and tracking matriculation, academic achievement, and other statistics by race.[151]

After pursuing such alternatives, school boards could then, if necessary, implement "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[152] Such a program would be guided by the standards of *Grutter*, and the criteria would have to vary according to student age, parental needs, and the function of the schools.[153] However, in order to satisfy Justice Kennedy and thus, theoretically, be constitutional, a school board must draft any race conscious plan in a "general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[154]

V. Saving These Efforts: Reconciling Justice Kennedy's Critiques

Justice Kennedy hints that race-conscious assignment plans may pass constitutional muster only after various race-

148. *Id.* at 2791.
149. *Id*. at 2792.
150. *Id.*
151. *Id.*
152. *Id.* at 2793.
153. *Id.*
154. *Id*. at 2792.

neutral alternatives are exhausted. However, the programs Justice Kennedy describes, such as "allocating resources for special programs,"[155] have been administered and have failed to stop the current trend of de facto segregation. In support of the Seattle and Louisville plans, Justice Breyer stated that "[n]othing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals."[156] In particular, Justice Breyer associates Justice Kennedy's recommendation of "allocating resources for special programs" with "magnet schools."[157] Such resource-rich magnet schools provided Seattle and Louisville with only a "limited desegregation effect"[158] and thus it follows that "there is no evidence from the experience of these school districts that [such programs] will make any meaningful impact."[159] Through Justice Kennedy's own suggestion of race-neutral alternatives, which have been implemented with little effect, it is evident that race-conscious efforts are the only viable solution to the problem of racial isolation in public schools.

As Justice Breyer admits, "I have found no example or model that would permit this Court to say to Seattle and to Louisville: 'Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria that your plans.'"[160] If no existing plans are more narrowly tailored than those of Seattle and Jackson County, and if both those plans are unconstitutional, then how may a

155. *Id*.

156. *Id.* at 2828 (Breyer, J., dissenting). According to Justice Breyer, Justice Kennedy articulates the goals as "avoiding forced busing, countering white flight, [and] maintaining racial diversity." *Id*.

157. *Id*. Justice Breyer addresses each of Justice Kennedy's race-neutral alternatives. Concerning "strategic site selection" for new schools, Justice Breyer points out that "Seattle has built one new high school in the last 44 years." *Id*. The effort of "drawing" neighborhood "attendance zones" only worked in Louisville when it was combined with forced busing. *Id.* Each district has previously exercised the "recruiting faculty" option, "but only as one part of a broader program." *Id*. Justice Breyer dismisses the suggested effort of "tracking enrollments, performance, and other statistics by race" because "tracking reveals the problem; it does not cure it." *Id*.

158. *Id*.

159. *Id*.

160. *Id*. at 2827.

school board adopt a race-conscious student assignment plan without violating the Constitution?

The reasons Justice Kennedy articulates for striking down the Seattle and Jefferson County plans serve as a guide for school districts that will consider such race conscious desegregation efforts in the future. An application of Justice Kennedy's criticisms of each plan demonstrates how those particular school boards may have organized and articulated their programs in a fashion meeting Justice Kennedy's standard for narrow tailoring. This analysis offers an avenue for school districts to continue to utilize race-conscious efforts in the battle against de facto segregation in a constitutional fashion.[161]

As a threshold matter, school districts should avoid utilizing racial demographic statistics as the guidelines for their programs. Jefferson County relied on racial assignments when student-selected schools had student populations above or below a certain racial threshold. Each school in the district was allowed a fifteen percent minimum or fifty percent maximum black student enrollment. If a child's race would contribute negatively to a school's adherence to the racial demographic, the child would not be assigned to that school.[162] Seattle also relied on numerical demographics to dictate its race-conscious assignments. If the population of a school was not within ten percentage points of being forty-one percent white and fifty-nine percent non-white, the district would assign to that school those students whose race would contribute to a racial harmonizing of that school's population.[163]

As indicated by the *Parents Involved* decision, a plan to combat de facto segregation that utilizes race as an active consideration will almost certainly be found unconstitutional if its goal is based on a strict racial percentage. According to the Court in *Grutter*, a school's attempt to guarantee that a specific percentage of a racial or ethnic group will comprise a student

161. This theory is premised on the idea that, since Justice Kennedy already finds public school diversity to be a compelling interest, if Justice Kennedy were to find that a desegregation plan was narrowly tailored, he would join the instant case's dissenters as the majority in validating that plan. In such a case, Justices Alito, Roberts, Scalia, and Thomas would form the dissenting side, since they formed the solid majority here.

162. *Parents Involved*, 127 S. Ct. at 2749-50 (majority opinion).

163. *Id.* at 2747.

body is unconstitutional racial balancing.[164] Such balancing can be compared to a quota, where the individual is insulated from comparison with other students for the available positions in a particular school.[165] If, however, a school defines its program more abstractly and in reference to the educational benefits offered by diversity, then such a program may be constitutionally permissible.[166] Justice Kennedy endorsed such a position in *Parents Involved*, stating that "it is permissible [for school boards] to 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."[167] Thus, the Constitution allows school districts to consider race as a general or plus factor, while guaranteeing that each student competes with the other applicants.[168]

This suggestion offers little guidance as to how to actually proceed, but does delineate how not to fashion a program that utilizes racial classifications. The resulting programs may yield the same results or function in the same fashion as an unconstitutional plan, but they would be framed in a way that may survive strict scrutiny. For example, if both the Seattle and Jefferson County school districts had avoided the goal of matching the racial populations of their schools to the racial demographic of their communities, the plans may have been found more narrowly tailored to achieve the goal of diversity. School boards nationwide should take heed and avoid a desired percentage of a particular racial component in a student population.

How schools should characterize a desired level of diversity so as to comply with the constitution is an abstract question that is best left defined in an abstract fashion. As the University of Michigan School of Law demonstrated in *Grutter*, an integration goal need not be framed in terms of percentages. In conjunction with the interests of need, ability, geographic proximity, and interest of study, school districts can utilize a race factor so long as it is one element of overall consideration given

164. Nelson, *supra* note 3, at 322.
165. *Id.* at 323.
166. *Id.* at 322.
167. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).
168. Nelson, *supra* note 3, at 323.

to a particular student's assignment. Such a consideration would allow school districts to make their assignments and maintain a desired sense of scholastic diversity.

Concerning the plans at issue in *Parents Involved*, Justice Kennedy took issue with the manner in which Jefferson County exacted its race-based decisions. Specifically, the Jefferson County program was ambiguous in a variety of areas, such as what personnel made the race-based assignment decisions, who oversaw the plan's implementation, what exactly were the circumstances that dictated when a race-based assignment would be made, or how race would be applied in a situation between two children with similar backgrounds.[169] Seattle's plan failed to satisfy Justice Kennedy because it used the classifications "white" and "non-white" in a district whose population comprised a variety of different ethnic groups.[170]

These deficiencies mean that schools must be very specific as to how their respective plans are organized and administered. The Seattle district should have sought to ensure some vision of diversity within its various schools. This could have been achieved in a fashion similar to that found in *Grutter*. The school board could examine the populations of each high school during assignment time. In the event that too many students requested attendance at a certain school, the board could then consider the variety of factors such as address, presence of sibling, academic strengths and, lastly, race in deciding how to best assign those students to a school. Jackson County's plan may have been saved had its organization and procedures not been so ambiguous. The district should have assigned a particular administrator to be in charge of these sensitive assignment decisions. Oversight should have been provided by the school boards or some fixed group to ensure the race-based decisions were limited in scope. The district needed to more clearly articulate its procedures for making race-based decisions, specifically when such decisions would be resorted to as the final factor in assigning students to schools. Given the result of *Parents Involved*, race should have only been utilized as a factor in reference to a student's entire identity. In the face of competi-

169. *Parents Involved,* 127 S. Ct. at 2789-90 (Kennedy, J., concurring).
170. *Id.* at 2790-91.

tion amongst students for spots, the district should have fashioned a manner of individualized determinations to make its assignment decisions. Such a system would view the student's race as a single important aspect, rather than the deciding determination.

VI. Conclusion

Despite "[t]he enduring hope that race should not matter; the reality is that too often it does."[171] Presently, the United States is in the grip of a sweeping de facto segregation phenomenon. Justice Kennedy articulates that this is not a trend Americans must begrudgingly accept. "To the extent the plurality opinion suggests the Constitution mandates that state and local authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[172] In concluding his opinion, Justice Kennedy stated that "those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications."[173] One may interpret these words as a pronouncement effectively ending the use of racial classifications in secondary education. However, there is an alternative view to this statement. Justice Kennedy's reference to "widespread governmental allocation" means, when considered with the rest of his opinion, that it is only those broad and irresponsible uses of benign racial classifications that are forbidden.

Thus, Justice Kennedy's opinion in *Parents Involved* serves as a roadmap for school districts to battle de facto segregation with race-conscious means. By mandating that such race-conscious measures be as narrowly defined and applied as possible, Justice Kenney does not forbid their use. In the interest of fostering the notion of diversity in the most fertile of soils, secondary education, school districts must take heed and continue their noble efforts against de facto segregation, within the limits Justice Kennedy prescribes.

171. *Id.* at 2791.
172. *Id*.
173. *Id.* at 2797.