Brooklyn Law Review

Volume 76 | Issue 2 Article 3

2010

Parents Involved, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules

Preston C. Green III

Julie F. Mead

Joseph O. Oluwole

Parents Involved, School Assignment Plans, and the Equal Protection Clause

THE CASE FOR SPECIAL CONSTITUTIONAL RULES

Preston C. Green, III, Julie F. Mead, and Joseph O. Oluwole[†]

INTRODUCTION

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[1] the Supreme Court examined whether two race-conscious student assignment plans violated the Equal Protection Clause.[2] In each plan, race was a significant factor in determining whether children were eligible to attend oversubscribed schools.[3] In dissent, Justice Stephen Breyer argued that a permissive standard of strict scrutiny was applicable because legal precedent permitted school districts to use race-conscious approaches.[4] Five Justices rejected Justice Breyer's argument and held that traditional strict scrutiny was applicable, in large part because they believed that the Equal Protection Clause precluded the application of less demanding strict scrutiny to racial classifications.[5] Justice Clarence Thomas went so far as to say that the Constitution was "color-blind."[6] Likewise, the Justices argued that the racial classifications could promote feelings of racial inferiority and increase racial hostility.[7] Justice Anthony Kennedy was concerned that the dissent's version of strict scrutiny could expand the acceptance of racial classifications far beyond the

---

[†] Preston C. Green, III, Professor of Education and Law, The Pennsylvania State University. Julie F. Mead, Professor of Education, University of Wisconsin-Madison. Joseph O. Oluwole, Assistant Professor of Education, Montclair State University.

[1] 551 U.S. 701 (2007) [hereinafter *Parents Involved*].

[2] *Id.* at 709-10.

[3] *Id.*

[4] *Id.* at 832 (Breyer, J., dissenting).

[5] *Id.* at 746 (plurality opinion); *id*. at 792-93 (Kennedy, J., concurring).

[6] *Id.* at 772 (Thomas, J., concurring).

[7] *Id.* at 746 (plurality opinion); *id*. at 773 (Thomas, J., concurring); *id*. at 795 (Kennedy, J., concurring).

educational context and lead to a nationwide implementation of race-based governmental measures.[8]

The majority's refusal to apply a contextualized standard of strict scrutiny in *Parents Involved* needs to be examined. Notwithstanding the Court's famous declaration in *Tinker v. Des Moines Independent Community School District*[9] that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[10] the Court has lowered the constitutional standard for public schools in matters involving free speech,[11] search and seizure,[12] and due process.[13] In these contexts, the Court altered the applicable constitutional rules because it recognized that school districts' fundamental need to operate a safe and orderly learning environment outweighed its otherwise dogmatic adherence to strict scrutiny principles. Conversely, the Court has rejected arguments to adopt special constitutional rules in the educational context for cases in which school districts' curriculums threatened to violate the Establishment Clause.[14] Ultimately, the Court determined that the text of the Constitution[15] and the Founding Fathers' specific intent to protect citizens' freedom of conscience from the potentially coercive pressures of governmental religious establishment mandated a broad application of the Establishment Clause, particularly in school settings, where students were inherently susceptible to coercion.[16]

In this article, we argue that the Court's collective jurisprudential analyses of students' constitutional challenges to public school actions justify a more nuanced application of strict scrutiny—an application that accounts for the special context of public school education when applied to the race-

---

[8] *Id.* at 791 (Kennedy, J., concurring).

[9] 393 U.S. 503 (1969).

[10] *Id.* at 506.

[11] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 408-10 (2007); Hazelwood v. Kuhlmeier, 484 U.S. 260, 271-72 (1988); *Tinker*, 393 U.S. at 513.

[12] *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 836-37 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995); New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985).

[13] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 680-82 (1977); Goss v. Lopez, 419 U.S. 565, 581-83 (1975).

[14] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307-09 (2000); Lee v. Weisman, 505 U.S. 577, 590-92 (1992); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225-26 (1963).

[15] *Lee*, 505 U.S. at 591.

[16] *Id.* at 591-92.

conscious student assignment plans at issue in *Parents Involved*. Part I of this article provides an overview of the Supreme Court's decision in *Parents Involved*. It closely examines the debate between Justice Breyer and the Justices constituting the majority over whether a less stringent standard of strict scrutiny should have been applied to race-conscious school assignment plans. Specifically, we discuss Justice Breyer's argument that a nonfatal version of strict scrutiny should apply because the policy was designed to bring the races together rather than to keep them apart.[17] We also examine the majority's counterargument that the Equal Protection Clause is color-blind, and that race-conscious student assignment plans promote notions of racial inferiority and increase racial conflict.[18]

In Part II, this article examines several cases in which the Court has consistently held that the constitutional rights of students pursuant to the First, Fourth, and Fourteenth Amendments are not necessarily coextensive with the rights of the general public. Moreover, the Court has consistently engaged in a balancing test between students' constitutional rights and public schools' ability to function safely, effectively, and autonomously. In contrast, we find that, in Establishment Clause cases, the Court has refused to apply a balancing test based on the language of the Constitution and the statements of the Founding Fathers. We demonstrate, however, that the Court still considers the public school context in determining whether state officials have violated the Establishment Clause.

Part III concludes that the Court's free speech, search and seizure, and due process decisions collectively illustrate a nuanced version of constitutional scrutiny that can be applied to the race-conscious student assignment plans challenged in *Parents Involved*. We show that the Equal Protection Clause is not like the Establishment Clause because there is no constitutional basis for concluding that the Equal Protection Clause is color-blind. We also demonstrate that concerns about racial hostility do not serve as a legitimate basis for the Court's refusal to apply a more nuanced version of strict scrutiny to race-conscious school assignment plans. Further, we argue that if the Court had applied the principles gleaned from its free speech, search and seizure, and due process cases, it would

---

[17] *See infra* Part I.C.2.

[18] *See infra* Part I.C.3.

have concluded that a contextualized version of strict scrutiny was applicable in the *Parents Involved* case and that the programs under examination were narrowly tailored to the compelling governmental interest of facilitating self-selected public school diversity.

I. THE *PARENTS INVOLVED* DECISION

In the *Parents Involved* decision, the Supreme Court examined the constitutionality of two school districts' voluntary student assignment plans, which used race as one of the factors in making enrollment decisions.[19] This section provides an overview of the assignment plans and a discussion of the various opinions in the case, paying particular attention to the Justices' debate over whether special constitutional rules should apply to race-based voluntary desegregation plans.

A. The Facts of Parents Involved

Parents Involved was a consolidation of two cases involving race-based student assignment policies in Seattle, Washington, and Jefferson County, Kentucky.[20] In the Seattle case, the school district employed a series of tiebreakers to determine student assignments to oversubscribed high schools.[21] Under the pertinent tiebreaker, the district sought to ensure that the schools were within 10% of the district's white/nonwhite composition, which was 41% white and 59% nonwhite.[22] The district used this tiebreaker to approve transfer requests from students whose race would serve to integrate the student body rather than exacerbate any identified racial imbalance.[23]

A nonprofit corporation of parents and students who had been denied their school preference asserted that the racial tiebreaker violated the Equal Protection Clause.[24] A federal district court held that the use of the tiebreaker was constitutional (*Parents Involved I*).[25] Subsequent to a number of

---

[19] *Parents Involved*, 551 U.S. 701, 710 (2007).

[20] *Id.*

[21] *Id.* at 711-12.

[22] *Id.* at 712.

[23] *Id.*

[24] *Id.* at 713-14.

[25] *Id.* at 714; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved I*), 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001) (subsequent history omitted).

withdrawals, rehearings, and reversals, and a certified question, a Ninth Circuit panel reversed the lower court ruling, finding that the tiebreaker was not narrowly tailored (*Parents Involved VI*).[26] After an en banc hearing, the Ninth Circuit reversed the panel on the ground that the tiebreaker served a compelling interest and was narrowly tailored (*Parents Involved VII*).[27] Specifically, *Parents Involved VII* concluded that Seattle's plan served the compelling state interest of "obtaining the educational and social benefits of racial diversity in secondary education," and "avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern."[28] Likewise, the majority of the Ninth Circuit en banc panel held that the plan was narrowly tailored to that interest because the school district considered and rejected race-neutral means, and it only used race as a tiebreaker in limited circumstances. Moreover, the school district reviewed the plan periodically to determine whether the racial classification was a continued necessity.[29]

Similarly, the Kentucky school district's assignment plan was designed to make certain that each non-magnet school had between 15% and 50% black enrollment.[30] The district's racial composition was approximately 34% black and 66% white.[31] Under the plan, students' requests for school preference were approved on the basis of availability and the racial integration guidelines.[32] Students were denied their enrollment choice if it would place the school out of compliance with the district's racial balancing guidelines.[33] After students had been assigned to schools, they could apply to transfer between non-magnet schools in the district.[34] The district could deny a transfer request based on the racial guidelines.[35] The district had been under a desegregation decree from 1975 to 2000, and a similar plan had been instrumental in helping the

---

[26] *Parents Involved*, 551 U.S. at 715; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved VI*), 377 F.3d 949 (9th Cir. 2004) (subsequent history omitted).

[27] *Parents Involved*, 551 U.S. at 715. The Ninth Circuit reheard the case in *Parents Involved VII*, 426 F.3d 1162 (9th Cir. 2005) (en banc) (subsequent history omitted).

[28] *Parents Involved VII*, 426 F.3d at 1179.

[29] *Id.* at 1179-92.

[30] *Parents Involved*, 551 U.S. at 716.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 716-17.

[35] *Id.* at 717.

district dismantle the previously segregated system.[36] The district modified the voluntary assignment plan one year after the district court declared the district unitary and dissolved the consent decree.[37]

A parent whose son was denied transfer to a school close to his house on the basis of the district's integration guidelines challenged the student assignment plan on Equal Protection Clause grounds.[38] The district court held that the plan passed constitutional muster under an application of strict scrutiny.[39] The court held that the plan furthered the compelling state interest of maintaining the integration gained through desegregation and that the use of race was narrowly tailored to that end.[40] In a per curiam opinion, the Sixth Circuit affirmed the lower court's decision and adopted its analysis.[41]

B. Opinions of the Justices Declaring the Student Assignment Plans Unconstitutional

On appeal, the Supreme Court addressed the issue of whether Seattle's and Louisville's voluntary assignment plans violated the Equal Protection Clause.[42] Chief Justice John Roberts wrote the Court's opinion, joined by Justices Clarence Thomas, Antonin Scalia, Samuel Alito, and Anthony Kennedy,[43] that declared the two assignment plans unconstitutional.[44] Justice Thomas wrote a concurring opinion.[45] Justice Kennedy wrote an opinion concurring in the judgment but relying on analysis separate from the plurality of Roberts, Scalia, Alito, and Thomas.[46] This subsection provides a summary of the opinions that invalidated the student assignment plans in the *Parents Involved* case.

---

[36] *See id.* at 715-16.

[37] *See id.* at 716.

[38] *Id.* at 717.

[39] McFarland v. Jefferson Cnty. Pub. Schs., 330 F. Supp. 2d 834, 849 (W.D. Ky. 2004).

[40] *Id.* at 855.

[41] McFarland v. Jefferson Cnty. Pub. Schs., 416 F.3d 513, 514 (6th Cir. 2005) (per curiam).

[42] *See Parents Involved*, 551 U.S. at 710-11.

[43] *Id.* at 707.

[44] *See id.*

[45] *Id.* at 748 (Thomas, J., concurring).

[46] *Id.* at 782-83 (Kennedy, J., concurring).

1. Chief Justice Roberts's Opinion: The Court's Majority Opinion

In the Court's majority opinion,[47] Chief Justice Roberts declared that all racial classifications are subject to strict scrutiny pursuant to the Equal Protection Clause.[48] He observed that the Court had identified two compelling interests: (1) to remedy the vestiges of intentional discrimination;[49] and (2) to attain the beneficial, educational effects of diversity at the university level.[50] Because the Seattle school district had never been subject to a court-ordered desegregation decree and had not segregated its schools by law,[51] the school district did not have a compelling interest to remedy the present effect of past discrimination.[52] Likewise, although Louisville had been subject to a desegregation decree,[53] the dissolution of the decree precluded the district from claiming a compelling interest in eliminating the vestiges of past discrimination.[54]

The Court's opinion also examined whether the two school districts could claim that they were acting to achieve the compelling interest of student body diversity.[55] In *Grutter v. Bollinger*, the Court held that diversity was a compelling interest in the context of higher education.[56] In *Grutter*, the Court deferred to the law school's judgment that diversity was vital to its educational mission. The *Parents Involved* Court held that the school districts' enrollment plans were out of compliance with *Grutter*.[57] While the racial classification sustained in *Grutter* was part of a "highly individualized, holistic review" of applicants,[58] race was the determinative factor in both school assignment plans.[59] Additionally, the plans

---

[47] Hereafter, we use the term "Court's opinion" or "majority opinion" to refer to those portions of Roberts's opinion joined by the Court's majority which included Chief Justice Roberts, and Justices Kennedy, Scalia, Thomas, and Alito. Those sections are: Parts I, II, III-A (*id.* at 711-25), and III-C (*id*. at 733-35).

[48] *See id.* at 720.

[49] *Id.*

[50] *Id.* at 722.

[51] *See id.* at 720.

[52] *See id.*

[53] *Id.*

[54] *See id.* at 720-21.

[55] *See id.* at 723.

[56] *Id.* at 722 (citing Grutter v. Bollinger, 539 U.S. 306, 328 (2003)).

[57] *Id.* at 723.

[58] *Id.* (quoting *Grutter*, 539 U.S. at 337).

[59] *Id.* at 723.

were too limited because they viewed race solely "in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County."[60]

Further, the Court held that *Grutter* did not govern the two assignment plans because that decision was based on considerations that were applicable only to colleges and universities.[61] As the Court explained, "in light of 'the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'"[62] Moreover, the Court concluded that the classifications were not narrowly tailored to meet the school districts' diversification objectives.[63] Significantly, the Court found that the plans had a minimal impact on the racial composition of schools' student population[64] and therefore "cast doubt" on the necessity and effectiveness of the plans' racial classifications.[65] Correspondingly, the Court concluded that the districts failed to give bona fide consideration to "workable race-neutral alternatives."[66]

2. Chief Justice Roberts's Opinion: The Plurality Opinion

The plurality opinion[67] concluded that the school districts' additional reasons for employing the race-based enrollment plans also violated the Equal Protection Clause. The school districts asserted two additional compelling interests: (1) to reduce racial concentration in their schools and (2) to make sure that racially concentrated school patterns did not prevent nonwhite students from having access to the best schools.[68] The plurality found that it did not need to resolve the dispute "whether diversity in schools in fact has a marked impact on test scores and other intangible . . . socialization benefits" because the two plans were not narrowly tailored to achieve the educational and social benefits that would result

---

[60] *Id.*

[61] *Id.* at 724-25.

[62] *Id.* at 724 (quoting *Grutter*, 539 U.S. at 329).

[63] *Id.* at 733-36 (majority opinion).

[64] *See id.* at 734.

[65] *Id.*

[66] *Id.* at 735 (majority opinion) (quoting *Grutter*, 539 U.S. at 339) (internal quotation marks omitted).

[67] Hereafter, we refer to those portions of Roberts's opinion joined only by Justices Scalia, Thomas, and Alito as the "plurality opinion." Those sections are Part III-B *(id*. at 725-33) and Part IV (*id*. at 735-48).

[68] *Parents Involved*, 551 U.S. at 725 (plurality opinion).

from such diversity.[69] The policies were not tied to any pedagogic concept that might determine the level of diversity needed to attain the asserted educational benefits of diversity; rather, the plans were directly linked to the racial demographics of each school district.[70] Neither district provided evidence to explain why the level of racial diversity needed to attain the benefits of diversity coincided with the racial composition of the school districts.[71]

The plurality also found that the assignment plans were not narrowly tailored because they had "no logical stopping point."[72] As the demographics of the districts would shift, so would the racial guidelines of the plans.[73] Furthermore, the Seattle plan was not narrowly tailored because it was designed to address the consequences of racial housing patterns.[74] This broad goal violated the Court's holding in *Wygant v. Jackson Board of Education*, which prohibited the use of racial classifications to remedy general societal discrimination.[75]

3. Justice Thomas's Concurrence

Justice Thomas's concurrence rejected Justice Breyer's claim, in dissent, that the school districts had two compelling interests: (1) to prevent resegregation and (2) to eliminate earlier school segregation.[76] Thomas drew a sharp distinction between segregation and racial imbalance.[77] He characterized segregation in the public school context as "the deliberate operation of a school system to carry out a government policy to separate pupils in schools solely on the basis of race."[78] By contrast, Thomas defined racial imbalance as "the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large."[79] Although racial imbalance might be

---

[69] *Id.* at 726.

[70] *Id.*

[71] *Id.* at 726-27.

[72] *Id.* at 731 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) (plurality opinion))) (internal quotation marks omitted).

[73] *See id.*

[74] *Id.*

[75] *Id.* at 731-32.

[76] *Id.* at 748 (Thomas, J., concurring).

[77] *Id.* at 749.

[78] *Id.* (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971)) (internal quotation marks omitted).

[79] *Id.*

the result of de jure segregation, it might also be caused by private decision-making.[80] "Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself."[81] Using this logic, Thomas concluded that although both Seattle and Louisville might be in danger of becoming racially imbalanced, neither school district was in danger of resegregation.[82]

Thomas also found that the two school districts did not have a compelling interest in eliminating earlier school segregation.[83] According to Thomas, the Court had authorized "race-based measures for remedial purposes in two narrowly defined circumstances": (1) where a school that had been segregated by law seeks to remedy its past segregation and (2) where a governmental agency seeks to remedy past discrimination that it had caused.[84] Thomas concluded that the two school districts' plans were not justified under the first instance.[85] Seattle had no prior history of racial segregation.[86] Although Louisville had operated a de jure segregated school system, it was no longer under a desegregation decree;[87] therefore, it also had no justification under the second category.[88] Seattle's justifications were "forward looking—as opposed to remedial."[89] Counsel for Louisville explicitly declared that their plan was not devised to eliminate the school district's past discrimination.[90]

Justice Thomas made it clear in his concurrence that it would be extremely difficult for school districts to establish a compelling government interest for racial classifications.[91] For instance, Justice Thomas stated that a governmental entity must establish "a strong basis in evidence for its conclusion that remedial action was necessary."[92] To establish this "strong basis," the entity must provide the following findings: (1) the

---

[80] *Id.* at 750.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 751.
[84] *Id.*
[85] *See id.* at 753-54.
[86] *Id.* at 753.
[87] *Id.* at 753-54.
[88] *Id.* at 754.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 756; *see also id.* at 754-72.
[92] *Id.* at 754.

extent of its past discrimination, (2) "the scope of any injury and the necessary remedy," and (3) that the remedy is targeted at "more than inherently unmeasurable claims of past wrongs."[93] Thomas concluded that neither district provided sufficient evidence to satisfy that standard.[94]

4. Justice Kennedy's Concurrence

Justice Kennedy disagreed with the plurality in that he believed that both Seattle and Louisville had compelling interests for using race-based student assignment policies.[95] He rejected the plurality's suggestion that "the Constitution requires school districts to ignore the problem of de facto resegregation in public schooling."[96] Justice Kennedy also declared that "diversity, depending on its meaning and definition, is a compelling educational goal [that] a school district may pursue."[97] He described diversity in the kindergarten through twelfth grade context as an interest in "a diverse student body, one aspect of which is its racial composition."[98]

However, despite Justice Kennedy's belief that a compelling interest was at stake, he found that neither school district's student assignment policy was narrowly tailored.[99] He concluded that Louisville's school officials did not have a "thorough understanding of how [its] plan work[ed]"[100] because they described it in "broad and imprecise" terms.[101] Justice Kennedy also agreed with the Court's opinion that the plans were not narrowly tailored because they had minimal impact on the number of student assignments that would be affected by the policy.[102] Consequently, the fact that racial tiebreakers were employed only infrequently highlighted the likelihood that the school districts could have achieved their goals through race-neutral policies.[103]

---

[93] *Id.* at 755.

[94] *Id.*

[95] *See id.* at 783 (Kennedy, J., concurring).

[96] *Id.* at 788.

[97] *Id.* at 783.

[98] *Id.* at 788.

[99] *Id.* at 786.

[100] *Id.* at 784.

[101] *Id.* at 784-85.

[102] *See id.* at 790.

[103] *Id.* Justice Kennedy provided guidance for school districts seeking to use race-conscious measures to provide equal educational opportunities. He declared:

C. The Dissent Versus the Majority: Should Student Assignment Plans Be Subject to Special Constitutional Rules Under Equal Protection?

The *Parents Involved* decision is fascinating because of the Justices' discussion concerning whether student assignment plans should be subject to special constitutional deference pursuant to strict scrutiny or should be subject to a less exacting level of scrutiny.[104] Two dissents were written in conjunction with the case. Justice John Paul Stevens penned a short dissent highlighting what he perceived to be inconsistencies between the Court's opinion and landmark precedent set in *Brown v. Board of Education*.[105] Justice Stephen Breyer, in a dissent joined by Justices Stevens, Ruth Bader Ginsburg, and David Souter, laid out several arguments for why traditional strict scrutiny should not have been applied to the student assignment plans.[106] The Court's opinion and the concurrences by Justices Thomas and Kennedy responded to these challenges.[107] This section analyzes the debate. First, we examine the arguments advanced by the Justices in dissent that traditional strict scrutiny should not apply to Louisville's and Seattle's race-based school assignment plans. Next, we analyze the responses that the three authoring Justices who constituted the majority made to Justice Breyer's contentions.

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

Id. at 788-89.

Justice Kennedy went on to provide examples of general, race-conscious approaches to achieve racial diversity that would not be subject to strict scrutiny. These possibilities included "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* at 789. By contrast, Justice Kennedy found that individualized classifications would be subject to strict scrutiny. *Id.* at 789-90. Although he found that these two plans did not satisfy the rigors of strict scrutiny, he did hold out the possibility that a program serving a prospective compelling goal could, at least in theory, survive judicial analysis. *Id.*

[104] *See id.* at 744 (plurality opinion); *id.* at 778-79 (Thomas, J., concurring); *id.* at 791 (Kennedy, J., concurring).

[105] *See id.* at 798-803 (Stevens, J., dissenting).

[106] *See id.* at 823-37 (Breyer, J., dissenting).

[107] *See id.* at 735-48 (plurality opinion); *id.* at 757-82 (Thomas, J., concurring); *id.* at 790-97 (Kennedy, J., concurring).

1. Justice Stevens's Dissent

Justice Stevens's short dissent decried the Court's opinion as disrespectful of precedent[108] and the Chief Justice's invocation of *Brown* in support of that conclusion as a "cruel irony."[109] He argued that a "rigid adherence to tiers of scrutiny obscures *Brown*'s clear message"[110] and "that a decision to exclude a member of a minority race is fundamentally different from a decision to include a member of the minority."[111] He reasoned that student assignment systems such as the ones at work in Seattle and Louisville did not "stigmatize or exclude" and therefore should have been examined differently than the segregation policies at issue in *Brown*.[112] In particular, he pointed to the Court's per curiam decision in *School Committee of Boston v. Board of Education*[113] that upheld a Massachusetts court's opinion that race-conscious efforts adopted by schools in order to achieve equal educational opportunities did not violate the Equal Protection Clause.[114] Stevens closed with a pointed condemnation of the Court's holding:

> The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.[115]

2. Justice Breyer's Dissent

On behalf of the dissenting Justices,[116] Justice Breyer penned a lengthy and detailed dissent. He argued that "[a]

---

[108] *Id.* at 803 (Stevens, J., dissenting).

[109] *Id.* at 798-99.

[110] *Id.* at 800-01.

[111] *Id.* at 799 n.3.

[112] *Id.* at 799-800.

[113] 389 U.S. 572 (1968) (per curiam).

[114] *Parents Involved*, 551 U.S. at 801-02, 801 n.5 (Stevens, J., dissenting).

[115] *Id.* at 803. The import of Justice Stevens's final statement is that it expresses his belief that the Rehnquist Court would have reached the opposite conclusion in *Parents Involved*. Chief Justice Rehnquist was an Associate Justice on the Court when Stevens joined it in 1975. *See Members of the Supreme Court of the United States*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/members.aspx (last visited Nov. 20, 2010). If Stevens's assertion is correct, at least five members of the Rehnquist Court would have found the plans constitutional (Chief Justice Rehnquist, and Justices Stevens, Souter, Ginsburg, and Breyer).

[116] Justices Stevens, Souter, and Ginsburg joined Breyer's dissenting opinion. *See Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting).

longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[117] In support of this assertion, he cited the Court's statement in *Swann v. Charlotte-Mecklenburg Board of Education*,[118] which suggested that school officials were empowered with broad authority to mandate that schools' student bodies proportionately reflect the racial composition of their districts "in order to prepare students to live in a pluralistic society."[119] While Justice Breyer acknowledged that this statement was "not a technical holding" in *Swann*, he asserted that the Court established a "basic principle of constitutional law . . . that has found wide acceptance in the legal culture."[120]

Justice Breyer found further support for this assertion in *North Carolina Board of Education v. Swann*.[121] In that case, the Court claimed that "school authorities have a wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."[122] Moreover, in *Bustop, Inc. v. Los Angeles Board of Education*,[123] Chief Justice Rehnquist stated, "While I have the gravest doubts that [a state supreme court] was *required* by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action."[124]

Breyer maintained that these various statements were not limited to situations in which districts were under a court-

---

[117] *Id.* at 823.

[118] 402 U.S. 1 (1971).

[119] *Parents Involved*, 551 U.S. at 823 (Breyer, J., dissenting) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)) (internal quotation marks omitted).

[120] *Id.* (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)) (internal quotation marks omitted).

[121] 402 U.S. 43 (1971).

[122] *Parents Involved*, 551 U.S. at 824 (Breyer, J., dissenting) (quoting North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)) (internal quotation marks omitted).

[123] 439 U.S. 1380 (1978).

[124] *Parents Involved*, 551 U.S. at 824 (Breyer, J., dissenting) (quoting Bustop, Inc. v. Los Angeles Bd. of Educ., 439 U.S. 1380, 1383 (1978) (opinion in chambers)) (internal quotation marks omitted).

ordered desegregation decree.[125] In *McDaniel v. Barresi*,[126] he noted, the Court upheld a voluntarily adopted student assignment plan that had no court order.[127] Also, in several cases, the Court ruled that school districts may have to take race-conscious action even when there was no evidence of de jure segregation.[128] Moreover, lower federal and state courts prior to *Swann* had held that school districts were not prohibited by the Constitution from reducing de facto segregation and racial imbalance in public schools.[129] Thus, it followed that "*Swann* was not a sharp or unexpected departure from prior rulings; it reflected a consensus that had already emerged among state and lower federal courts."[130] Indeed, Breyer continued, "If there were doubts before *Swann* was decided, they did not survive this Court's decision. Numerous state and federal courts explicitly relied on *Swann*'s guidance for decades to follow."[131] Further, Breyer counted fifty-one federal statutes, one hundred state statutes, and a number of presidential executive orders that employed race-conscious measures.[132] Moreover, "hundreds of local school districts have adopted student assignment plans that use race-conscious criteria."[133]

Additionally, Breyer argued that *Swann*'s statement regarding voluntary desegregation policies was not surprising, given that it was supported by the well-established purpose underlying the Fourteenth Amendment.[134] Breyer opined that the Fourteenth Amendment was drafted to eliminate systematic racial exclusion and to integrate former slaves into American society.[135] Accordingly, the drafters of the Fourteenth Amendment understood the fundamental and practical difference between race-conscious classifications intended to "keep the races apart" and those intended "to bring the races together."[136] Breyer also rejected the assertion that recent

---

[125] *Id.* at 824.

[126] 402 U.S. 39 (1971).

[127] *Parents Involved*, 551 U.S. at 824 (Breyer, J., dissenting) (citing McDaniel v. Barresi, 402 U.S. 39, 41 (1971)).

[128] *Id.* at 825. *See, e.g.*, Bd. of Educ. v. Harris, 444 U.S. 130, 148-49 (1979).

[129] *Parents Involved*, 551 U.S. at 825-26 (Breyer, J., dissenting). *See, e.g.*, Tometz v. Bd. of Educ., 237 N.E.2d 498, 501 (Ill. 1968).

[130] *Parents Involved*, 551 U.S. at 827 (Breyer, J., dissenting).

[131] *Id.*

[132] *Id.* at 828.

[133] *Id.* at 829.

[134] *Id.*

[135] *Id.*

[136] *Id.*

Supreme Court cases—such as *Grutter v. Bollinger*,[137] *Johnson v. California*,[138] and *Adarand Constructors v. Pena*[139]—superseded *Swann*.[140] While Breyer allowed that "[s]everal of these cases were significantly more restrictive than *Swann* in respect to the degree of leniency the Fourteenth Amendment grants to programs designed to *include* people of all races,"[141] he identified two reasons for finding that these cases did not mark a critical change in Equal Protection Clause jurisprudence.[142] First, in more recent decisions, the Court had made clear that not all uses of race-conscious criteria must automatically be treated the same under strict scrutiny analysis.[143] Rather, the Court struck down racial classifications that harmfully excluded members of other races, but it applied a nonfatal version of strict scrutiny to racial classifications that sought to include underrepresented groups.[144] Breyer further opined that the *Grutter* case, which upheld a law school's use of a race-conscious admissions program, provided a clear example of the inclusion/exclusion principle.[145]

Second, Breyer reasoned that the *Grutter* case demonstrated that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[146] Because contexts vary significantly from each other, the same "fatal in fact" level of strict scrutiny should not be applied automatically.[147] Breyer argued that the more flexible level of strict scrutiny should be applied to the school districts'

---

[137] 539 U.S. 306 (2003).

[138] 543 U.S. 499 (2005).

[139] 515 U.S. 200 (1995).

[140] *Parents Involved*, 551 U.S. at 831-32 (Breyer, J., dissenting).

[141] *Id.* at 832.

[142] *Id.*

[143] *Id.*

[144] *See id.* at 832-33.

[145] *See id.* at 833.

[146] *Id.* at 834 (quoting Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003)) (internal quotation marks omitted).

[147] *Id.* at 833. Breyer went on to note that:

> Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases [and] assignments of police officers patrolling predominantly minority-race neighborhoods . . . . Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

Id. at 834.

policies because they were designed to bring the races together rather than to keep them apart.[148]

Applying this more flexible standard, Breyer concluded that the school districts had a compelling interest in attaining racial integration.[149] This interest contained three elements: (1) historical and remedial, (2) educational, and (3) democratic.[150] The historical and remedial element represented the school districts' interests in rectifying the lingering effects of segregation caused by school policies.[151] This remedial element was rooted in the concern that the American public school system, in the absence of corrective measures, might undergo de facto resegregation.[152] Likewise, the educational element represented school districts' "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[153] Finally, the democratic element represented school districts' "interest in producing an educational element that reflects the pluralistic society in which our children will live."[154]

The dissenting Justices also concluded that the race-based assignment plans were narrowly tailored.[155] One factor leading to this conclusion was that the race-conscious criteria merely "set the outer bounds of broad ranges."[156] In other words, consideration of an applicant's race was only one minor factor in the determination of that student's placement.[157] The primary factor in the assignment plans was student choice, not race.[158]

The second factor was that the broad-range limitations were not very burdensome.[159] The Justices found that the broad-range limits in the race-based assignment plans ensured that race only factored into admissions in a fraction of non-merit based assignments as opposed to large numbers of merit-based

---

[148] *Id.* at 835. Indeed, Breyer noted that a more lenient application of strict scrutiny in this case would not imply the abandonment of traditional strict scrutiny. *Id.* at 836.

[149] *See id.* at 837.

[150] *Id.* at 838-40.

[151] *Id.* at 838.

[152] *Id.*

[153] *Id.* at 839.

[154] *Id.* at 840 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

[155] *Id.* at 846.

[156] *Id.* (emphasis omitted).

[157] *Id.*

[158] *Id.*

[159] *Id.* at 847.

assignments as had been the case in *Grutter*.[160] The fact that rejected students still had opportunities to attend "substantially equal" schools further substantiated the dissent's finding of lessened burden.[161]

The third factor was that the assignment plans relied less on race than prior integration plans in the community, such as mandatory busing.[162] Since the race-based assignment plans were relatively less centered on race than mandatory busing and other prior integration plans in the school district, the Justices found the plans constituted a relatively progressive de-emphasis on race.[163] Coextensive with the third factor was the Justices' view that local school districts have great expertise in matters affecting education and should have latitude to experiment for educational excellence, therefore entitling them to judicial deference.[164] The fourth factor concerned lack of reasonable alternatives.[165] The dissenting Justices claimed that narrow tailoring does not require "proof that there is no hypothetical other plan that could work as well."[166]

3. Responses of Justices Making Up the Majority

a. Court Opinion

The Justices constituting the majority rejected the dissent's arguments for applying a less stringent standard of strict scrutiny to the race-based assignment plans.[167] The majority opinion dismissed as "dicta" *Swann*'s statement that school districts could voluntarily use race.[168] Furthermore, *Swann* was unavailing because the Court in that opinion did not address whether a district could voluntarily adopt a race-based assignment plan without a prior finding of de jure segregation.[169] The *Bustop* case was inapposite because it

---

[160] *Id.*
[161] *Id.* at 847-48.
[162] *See id.*
[163] *See id.* at 807.
[164] *Id.* at 848-49.
[165] *Id.* at 850.
[166] *Id.* (emphasis omitted).
[167] *Id.* at 721 n.10 (majority opinion).
[168] *Id.* at 721.
[169] *See id.*

concerned an emergency injunction,[170] which Chief Justice Roberts characterized as a clear distinction.[171]

b. Plurality Opinion

The plurality opinion rejected the dissent's arguments for applying a less stringent standard of strict scrutiny to the race-based assignment plans.[172] The plurality rejected Breyer's interpretation of *McDaniel*, claiming that *McDaniel* concerned a school district with past de jure segregation.[173] Because neither Seattle nor Louisville operated—or were acting pursuant to—a court order to remedy de jure segregation, *McDaniel* was inapplicable.[174] The plurality also disagreed with the dissent's reliance on *Swann*, labeling the discussion about school districts' voluntary use of race to achieve a culturally diverse student body as "pure dicta."[175] The Chief Justice also faulted Justice Breyer's assertion about *Swann*'s dicta because it merely advanced racial balancing as a hypothetical government objective without analyzing whether race-based classifications would be a constitutionally permissible means for achieving that objective.[176] The plurality claimed the omission was obvious: *Swann* "did not involve any voluntary means adopted by a school district."[177] Thus, even taking *Swann* at its full precedential value would not change the plurality's holding because the racial classifications proposed in Louisville's and Seattle's school assignment plans were still subject to constitutional scrutiny. Furthermore, most of the lower court cases cited by the dissent as proof of *Swann*'s applicability were not pertinent[178] because they were all decided before the Court had definitely determined that all race classifications should be subject to strict scrutiny.[179]

The plurality opinion also rejected the dissent's assertion that *Grutter* was controlling and that the "compelling nature of these interests in the context of primary and

---

[170] *Id.*
[171] *Id.*
[172] *Id.* at 735-36 (plurality opinion).
[173] *Id.* at 736-37.
[174] *Id.* at 737.
[175] *Id.*
[176] *Id.* at 738.
[177] *Id.*
[178] *Id.* (citation omitted).
[179] *Id.* at 739 n.16.

secondary education follow[ed] here *a fortiori*."[180] The plurality emphasized that *Grutter* focused on the importance of conducting an individualized, holistic review instead of using race as a primary factor in determining enrollment decisions.[181] Additionally, the dissent's characterization of the plans as narrowly tailored was faulty because it failed to consider how the plans functioned, the students they affected, or the school "districts' failure to consider race-neutral alternatives."[182] The plurality also rejected Justice Breyer's claim that the Court should defer to the decisions of local school boards.[183] Roberts countered that such deference "is fundamentally at odds with our equal protection jurisprudence"[184] and that Court precedent put a significant burden on governmental entities to justify any use of racial classifications.[185] The plurality additionally rejected the use of racial classifications because such classifications "promote notions of racial inferiority and lead to a politics of racial hostility."[186] In pertinent part, the plurality stated that racial classifications "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[187] Furthermore, racial classifications "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[188]

Finally, the plurality asserted that the use of race-based classifications went against the heritage of *Brown v. Board of Education*[189] and the Fourteenth Amendment.[190] Citing the

---

[180] *Id.* at 842 (Breyer, J., dissenting) (internal quotation marks omitted).

[181] *Id.* at 740-41 (plurality opinion).

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 746 (internal quotation marks omitted).

[187] *Id.* (internal quotation marks omitted).

[188] *Id.* (internal quotation marks omitted).

[189] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

[190] *Parents Involved*, 551 U.S. at 746-47 (plurality opinion). Justice Roberts made this clear when he asserted:

> In *Brown v. Board of Education* . . . we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because governmental classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954 . . . . The next Term, we accordingly stated [in *Brown II*] that "full compliance" with *Brown I* required school districts to

plaintiffs' brief in *Brown*, the plurality observed that their position could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of . . . race."[191] The plurality also pointed out that plaintiffs' counsel in *Brown* consistently argued that admission into public schools was required to be conducted "*on a nondiscriminatory basis*."[192] Therefore, the racial classifications challenged in the case in chief went against the spirit of *Brown* and the Fourteenth Amendment by determining admission on a racial basis.[193]

c. Justice Thomas's Concurrence

Justice Thomas rejected the dissent's "attempt[] to marginalize the notion of a color-blind Constitution."[194] He intoned, "I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: 'Our constitution is color-blind, and neither knows nor tolerates classes among citizens.'"[195] Justice Thomas also noted that the plaintiffs' attorneys in *Brown* supported this position.[196]

Justice Thomas further argued that the dissent's attempt to "pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts"[197] was dangerous because the Court acted analogously in *Plessy* to justify discriminatory practices.[198] Further, the segregationists

---

> achieve a system of determining admission to the public schools *on a nonracial basis*.

Id. (quoting Brown v. Bd. of Educ. *(Brown II)*, 349 U.S. 294, 300-01 (1955)).

[191] *Id.* at 747.

[192] *Id.*

[193] *Id.*

[194] *Id.* at 772 & n.19 (Thomas, J., concurring).

[195] *Id.* (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[196] *Id.*

[197] *Id.* at 773.

[198] Justice Thomas likewise dismissed any reliance on social science research in support of the plans. He explained:

> In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the

in *Brown* supported the reliance on current practices and deference to local officials to justify public school segregation.[199] Against this historical backdrop, Justice Thomas was unwilling to defer to the decision making of school officials.[200]

d. Justice Kennedy's Concurrence

Justice Kennedy also objected to the dissent's call for a contextualized application of strict scrutiny. He asserted that the general conclusions relied upon by the dissent "have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling," likening the dissent's application of strict scrutiny to "rational-basis review."[201] Justice Kennedy worried that Congress could require the adoption of the Louisville or Seattle plans nationwide pursuant to the Commerce or Spending Clauses.[202]

Justice Kennedy also rejected the dissent's reliance on the Supreme Court's higher education cases to justify the racial classifications employed by Seattle and Louisville. The districts could not rely on *Gratz v. Bollinger*[203] because the admissions procedures used in that case relied even less on race than the plans presented to the Court in *Parents Involved*.[204] *Gratz* was also distinguished because it arose "in the context of college admissions where students had other choices and precedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity."[205] "Even so," Justice Kennedy pointed out, "the race factor [in *Gratz*] was found to be invalid."[206] Therefore, it followed that if *Gratz* were the appropriate measure, then the Seattle and Louisville plans would be "*a fortiori* invalid."[207] *Grutter* did not control, he argued,

---

problems at hand," the Constitution enshrines principles independent of social theories.

Id. at 780 (internal citations and footnotes omitted).

[199] *Id.* at 773.

[200] As Justice Thomas asked: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow." *Id.* at 781-82.

[201] *Id.* at 791 (Kennedy, J., concurring).

[202] *Id.*

[203] 539 U.S. 244 (2003).

[204] *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring).

[205] *Id.*

[206] *Id.*

[207] *Id.*

because the plan approved in that case "was flexible enough to take into account 'all pertinent elements of diversity,'[208] and considered race as only one factor among many."[209]

Further, Justice Kennedy found that applying permissive strict scrutiny would require the Court to set aside two concepts designed to lessen the injury and negative consequences arising from racial discrimination: (1) "the difference between de jure and de facto segregation" and (2) "the presumptive invalidity of a state's use of racial classifications to differentiate its treatment of individuals."[210] In the school desegregation cases, Justice Kennedy noted that school districts that practiced de jure segregation had an affirmative duty to eliminate segregation, while districts affected by de facto segregation had no such duty.[211] Further, "[t]he distinction between de jure and de facto segregation extended to remedies available to governmental units in addition to the courts."[212] Justice Kennedy argued that this distinction served the important role of limiting the harm that could be caused by racial classifications. Moreover, Justice Kennedy rejected the argument that school authorities should be able to resolve the problems caused by de facto segregation through direct, race-based assignments instead of the general policies, such as the ones that he proposed; and he explicitly reiterated his worries about the dangers of racial classification.[213]

II. THE SUPREME COURT, PUBLIC SCHOOLS, AND THE CONSTITUTION

The previous section provided an overview of the *Parents Involved* decision. In dissent, Justice Breyer argued that a more nuanced version of strict scrutiny should have been

---

[208] *Id.* at 793 (citing Grutter v. Bollinger, 539 U.S. 306, 341 (2003)).

[209] *Id.* at 792 (citing *Grutter*, 539 U.S. at 340).

[210] *Id.*

[211] *Id.* at 794.

[212] *Id.*

[213] *Id.* at 796-97. Specifically, Justice Kennedy stated:

> Governmental classifications that command people to march in different directions based on racial typologies can cause new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse political heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.

Id. at 797.

applicable. The Justices in the majority rejected this contention. However, one major omission in the debate over the appropriateness of special constitutional rules for race-based assignment plans deserves attention. None of the opinions—not even Justice Breyer's dissent—addressed the fact that the Court, on several occasions, created special rules for other constitutional challenges to public schools' actions. In disputes pitting students' constitutional concerns against school districts' concerns, the Supreme Court has adjusted the constitutional requirements on matters involving free speech, search and seizure, and due process.[214] On the other hand, the Court has rejected arguments to adopt special rules favoring the school district in questions that raise Establishment Clause concerns.[215] Nonetheless, the Court still takes into account the context of public schooling in deciding whether the government's actions violated the Establishment Clause.[216] Our analysis in this section supports the conclusion that the Court should apply special constitutional rules to loosen its strict scrutiny analysis with respect to race-conscious school assignment plans. Furthermore, we will show that this proposed precedential shift would be consistent with the Court's previous application of adjusted standards for analyzing students' constitutional rights under the First, Fourth, and Fourteenth Amendments.

A. Instances in Which the Court Has Created Special Constitutional Rules for Public Schools

1. First Amendment (Free Speech Clause)

In *Tinker v. Des Moines School District*, the Supreme Court addressed for the first time the rights of students in the classroom pursuant to the First Amendment's Free Speech Clause.[217] In that case, a school district suspended students who wore black armbands in protest against the Vietnam War.[218] The Court held that the suspensions violated the Free Speech Clause,[219] finding that schools were public places and that

---

[214] *See infra* Part II.A.
[215] *See infra* Part II.B.
[216] *See infra* Part II.B.
[217] 393 U.S. 503 (1969).
[218] *See id.* at 504.
[219] *Id.* at 514.

students had the right to express their opinions within the confines of those institutions.[220] The Court famously declared, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[221] Still, the Court cautioned, this right must be balanced against the legitimate interests of school officials in the safe and orderly operation of schools.[222] With respect to the armband protest, the Court observed that there was no evidence of "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone."[223] The Court held that this conduct was protected by the Free Speech Clause and distinguished it from student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[224]

Since the landmark *Tinker* decision, the Supreme Court on three occasions has found that the First Amendment rights of students pursuant to the Free Speech Clause are limited by their school districts' legitimate interests in operating safe and orderly schools. In *Bethel School District No. 403 v. Fraser*, the Court held that school districts could discipline students for lewd and indecent speech.[225] The Court acknowledged that although "[t]he First Amendment guarantees wide freedom in matters of adult public discourse,"[226] it did not follow that "the same latitude must be permitted to children in a public school."[227] The Court based the authority of school districts to prohibit vulgar speech on their *in loco parentis* power[228] to "inculcate the habits and manners of civility."[229] The Court reasoned it was necessary for schools to teach these values

---

[220] *See id.* at 506.

[221] *Id.*

[222] Justice Fortas, the opinion's author, explained: "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507.

[223] *Id.* at 508.

[224] *Id.* at 513. This essentially expresses the *Tinker* substantial disruption test which authorizes schools to regulate student speech that would substantially and materially disrupt the school or the rights of other students.

[225] 478 U.S. 675, 685 (1986).

[226] *Id.* at 682.

[227] *Id.*

[228] *Id.* at 684. *In loco parentis* is a Latin phrase meaning "in the place of a parent" or "instead of a parent." BLACK'S LAW DICTIONARY 858 (9th ed. 2009).

[229] *Bethel Sch. Dist.*, 478 U.S. at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

because they were "necessary to the maintenance of a democratic political system."[230] It was legitimate for schools to decide that "the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."[231]

In *Hazelwood v. Kuhlmeier*,[232] the Court further described the limitations of student expression. The Court ruled that a high school principal could remove an article from the school's newspaper that discussed student experiences with pregnancy[233] and another article that discussed students' experiences with divorce.[234] While recognizing *Tinker*'s admonition that public school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[235] the Court pointed out that students' First Amendment rights were not "automatically coextensive with the rights of adults in other settings"[236] and "must be applied in light of the special characteristics of the school environment."[237] The Justices distinguished the instant case from *Tinker*.[238] While *Tinker* dealt with "educators' ability to silence a student's personal expression that happens to occur on the school premises," *Hazelwood* "concern[ed] educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[239] The Court characterized the latter set of activities "as part of the school curriculum . . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[240]

> Educators are entitled to exercise greater control over [curricular-related] expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of

---

[230] *Id.* (quoting Ambach v. Norwick, 441 U.S. 67, 76-77 (1979)) (internal quotation marks omitted).

[231] *Id.* at 683.

[232] 484 U.S. 260 (1988).

[233] *Id.* at 274, 276.

[234] *Id.*

[235] *Id.* at 280 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)) (internal quotation marks omitted).

[236] *Id.* at 266 (quoting *Bethel*, 478 U.S. at 682) (internal quotation marks omitted).

[237] *Id.* (quoting *Tinker*, 393 U.S. at 506) (internal quotation marks omitted).

[238] *Id.* at 270.

[239] *Id.* at 271.

[240] *Id.*

> maturity, and that the views of the individual speaker are not erroneously attributed to the school.[241]

This authority enabled a school to "'disassociate itself' . . . from speech that is ungrammatical, poorly written, inadequately researched, biased, or prejudiced, vulgar or profane, or unsuitable for immature audiences."[242] Additionally, a school could consider the emotional maturity of the intended audience before disseminating student speech on potentially controversial subjects.[243] Schools further retained the authority to refuse sponsoring speech that was inconsistent with the "shared values of a civilized order."[244] Otherwise, citing *Brown*, the Court observed, "the schools would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.'"[245]

Consequently, the Court concluded that the standard established in *Tinker* for punishing student expression did not apply for determining when a school may disseminate student expression.[246] Instead, the Court ruled that schools did not violate the First Amendment in exercising their control over the content of student expression in school-sponsored activities "so long as their actions [we]re reasonably related to legitimate pedagogical concerns."[247] This standard was in keeping with the Court's frequently expressed belief that education was "primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."[248]

Most recently, the Court's ruling in *Morse v. Frederick*[249] further emphasized school officials' legitimate authority over student speech when that speech appeared to promote drug use. The Court found that the "special characteristics of the school setting" enabled a school district to suspend a student who hoisted a banner supporting drug use at an off-campus,

---

[241] *Id.*

[242] *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

[243] *Id.* at 272.

[244] *Id.* (quoting *Bethel Sch. Dist.*, 478 U.S. at 683) (internal quotation marks omitted).

[245] *Id.* (quoting *Brown I*, 347 U.S. 483, 493 (1954)).

[246] *Id.* at 272-73.

[247] *Id.* at 273.

[248] *Id.*

[249] 551 U.S. 393 (2007).

school-sponsored event.[250] At this event, this student—along with several others—unfurled a banner that read "BONG HiTS 4 JESUS," which the principal believed promoted drug use.[251] After the student refused to take down the banner, the principal confiscated it and later suspended the student.[252]

The student sued, claiming that the suspension violated his First Amendment rights.[253] The Court disagreed, holding that school districts could restrict student speech at school events "when that speech is reasonably viewed as promoting illegal drug use."[254] In reaching this conclusion, the Court took special note of two basic principles taken from the *Fraser* case.[255] The first point was that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[256] While Morse's speech, like Fraser's, would have been protected if it had occurred outside of the school setting, this speech could be limited "in light of the special characteristics of the school environment."[257] The second principle was that *Tinker*'s substantial disruption test was not absolute.[258]

Further, the Court observed that it had recognized in the Fourth Amendment context that deterring student drug use "is an important—indeed, perhaps compelling interest."[259] The Court found further support for the importance of educating students about the dangers of drug use because Congress had provided billions of dollars to support drug prevention programs at the state and local level.[260] Congress had also required schools receiving federal funding under the Safe and Drug-Free Schools Community Act of 1994 to confirm that their drug prevention programs "convey[ed] a clear and consistent message that . . . the illegal use of drugs is wrong

---

[250] *Id.* at 393, 408 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[251] *Id.* at 397-98.

[252] *Id.* at 398.

[253] *Id.* at 399.

[254] *Id.* at 403.

[255] *Id.* at 404-05.

[256] *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

[257] *Id.* at 405 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[258] *Id.*

[259] *Id.* at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)) (internal quotation marks omitted).

[260] *Id.* at 408.

and harmful."[261] Moreover, the Court noted that "[t]housands of school boards throughout the country . . . have adopted policies aimed at effectuating this message."[262]

The Court concluded that the "special characteristics of the school environment . . . and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[263] The Court distinguished the relaxed standard in *Morse* from *Tinker*'s material disruption standard because it found that a school district's interest in combating student drug use was a more compelling interest than a school district's "abstract desire to avoid controversy."[264]

2. Fourth Amendment

Another constitutional provision that has raised conflict between school districts and students is the Fourth Amendment, which prohibits unreasonable search and seizure by government agents.[265] Generally, police must have probable cause and a warrant before conducting a search.[266] Before the Supreme Court resolved the issue, there had been a debate among the courts as to whether the Fourth Amendment applied to searches conducted by public school officials,[267] and, if so, the appropriate constitutional standard for conducting a search.[268]

In *New Jersey v. T.L.O.*, the Supreme Court concluded that, while the Fourth Amendment applied to searches conducted by public school officials, a special standard was necessary to recognize the particular interests of the school environment. In determining the level of protection that should be accorded to searches conducted by public school officials, the Court struck a balance between the student and school

---

[261] *Id.* (quoting 20 U.S.C. § 7114(d)(6) (2000 ed., Supp. IV)) (internal quotation marks omitted).

[262] *Id.*

[263] *Id.*

[264] *Id.* at 408-09.

[265] *See generally* U.S. CONST. amend. IV.

[266] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[267] The Court resolved this debate in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). It reasoned that the Fourteenth Amendment makes the Fourth Amendment applicable to the states, and, therefore, unreasonable searches and seizures by state officers are prohibited. *Id.* at 334. The Board of Education is a part of the State, and as such is bound by the Fourth Amendment prohibiting unreasonable searches and seizures. *Id.* at 334 & n.4.

[268] This issue was also resolved in *New Jersey v. T.L.O. See id.* at 338-43.

concerns.[269] Students had a legitimate expectation of privacy, which included the right to "carry with them a variety of legitimate, non-contraband items, and there was no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."[270] Comparatively, public schools had a substantial interest in maintaining order and a proper educational environment.[271] The Court observed that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."[272] Ultimately, the Court concluded that the warrant requirement was particularly unsuited to the school environment because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[273] The Court also found that the "accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools [did] not require strict adherence to the requirement that searches be based on probable cause."[274]

The Court held that reasonableness was the correct standard for determining the constitutionality of a search of a student in the public school setting.[275] Determining reasonableness required a two-step inquiry.[276] The first question asks whether the search "was justified at its inception."[277] The second question considers whether the search, as conducted, "was reasonably related in scope to the circumstances which justified the interference in the first place."[278] The Court asserted that the reasonableness standard would sufficiently balance the concerns of students and school authorities. Teachers and administrators would be spared "the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[279] The reasonableness standard

---

[269] *See id.* at 337.
[270] *Id.* at 339.
[271] *Id.*
[272] *Id.* at 340.
[273] *Id.*
[274] *Id.* at 341.
[275] *Id.*
[276] *Id.*
[277] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
[278] *Id.*
[279] *Id.* at 343.

also protected students by ensuring that their interests would be invaded only to the extent necessary to effectuate "the legitimate end of preserving order in the schools."[280]

In *Vernonia School District 47J v. Acton*,[281] the Court expanded school officials' authority with respect to student searches. The Court held that the Fourth Amendment permitted random urinalysis as a requirement for all students who wished to participate in interscholastic athletics.[282] In *Vernonia*, the school district implemented a random urinalysis requirement for participation in sports because evidence showed that athletes were the leaders of a student drug culture in the district, and school officials were worried that drug use increased the risk of sports-related injury.[283]

The Court held that, while the district's drug testing policy constituted a search under the Fourth Amendment, the district was not required to obtain a warrant or establish probable cause, as was the case in searches by law enforcement officials.[284] Government officials could conduct a search unsupported by probable cause and without a warrant "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[285] The Court then noted that it had recognized the existence of special needs in the public school context that did not require school officials to obtain a warrant or establish probable cause.[286] Quoting *T.L.O.*, the Court observed that "the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'"[287] While *T.L.O.* was distinguishable because the search approved in that case "*was* based on individualized *suspicion* of wrongdoing," the Court found that individualized suspicion was not required because

---

[280] *Id.*

[281] 515 U.S. 646 (1995).

[282] *Id.* at 650, 665.

[283] *Id.* at 649.

[284] *Id.* at 653, 665.

[285] *Id.* at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[286] *Id.*

[287] *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985)).

"the Fourth Amendment imposes no irreducible requirement of such suspicion."[288]

In addition to the Court's anti-drug finding, one of the factors it considered was the nature of the students' privacy interests.[289] With respect to students' privacy interests, the Court explained that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere: the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[290] Public schools required students to undergo a variety of physical examinations and vaccinations "[f]or their own good and that of their classmates."[291] Therefore, with regard to medical examinations and procedures, students in the public school environment had a lesser privacy expectation than the general public.[292]

Student athletes had an even lesser expectation of privacy because they "voluntarily subject[ed] themselves to a degree of regulation even higher than that imposed on students generally."[293] These regulations required student athletes to undergo a preseason physical exam, provide a urine sample, acquire adequate insurance coverage, and maintain a minimum grade point average.[294]

In *Board of Education of Independent School District No. 92 v. Earls*,[295] the Court once more upheld an expansion of school authority. The *Earls* Court held that a school district could require students who participate in competitive extracurricular activities other than sports to submit to random urinalysis.[296] In *Earls*, the Court rejected the assertion that evidence of pervasive drug use was necessary before the district could implement a suspicionless drug testing policy.[297] "Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug

---

[288] *Id.*
[289] *Id.* at 654.
[290] *Id.* at 656.
[291] *Id.*
[292] *Id.* at 656-57.
[293] *Id.*
[294] *Id.* These were the Vernonia School District athletic regulations. *Id.*
[295] 536 U.S. 822 (2002).
[296] *Id.* at 828, 830.
[297] *Id.* at 836.

testing policy."[298] In reaching this conclusion, the Court repeatedly emphasized that the "only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities."[299]

The Court's most recent pronouncement in the area of students' Fourth Amendment rights resolved a disputed strip search of a thirteen-year-old girl by public school officials in *Safford Unified School District v. Redding*.[300] In its analysis, the Court reaffirmed the need to balance a student's rights with a school district's need to maintain order and ensure the safety of the entire student body.[301] The Court then applied the *T.L.O.* test and held that, while school authorities had reasonable suspicion that the pupil had contraband—prescription strength ibuprofen and over-the-counter naproxem[302]—the ensuing search was not reasonable in scope and therefore violated her rights.[303] Justice Souter directly addressed the limitation to deference to school decision-making when intrusive student searches are at issue:

> In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students . . . [T]he Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.
>
> We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.[304]

Thus, the Court made clear that, although the ruling preserved the special *T.L.O.* test, the deference afforded school

---

[298] *Id.*
[299] *Id.* at 833.
[300] 129 S. Ct. 2633 (2009).
[301] *Id.* at 2639.
[302] *Id.* at 2642.
[303] *Id.* at 2642-43.
[304] *Id.* at 2643.

officials through its application and, given the special concerns of public schools, was not unfettered or without limitation.[305]

3. Fourteenth Amendment (Due Process Clause)

The third area in which the Court has applied special rules for kindergarten through twelfth grade settings is with respect to the Due Process Clause of the Fourteenth Amendment. In *Goss v. Lopez*,[306] the Court determined the procedural due process rights of persons suspended for ten days or fewer.[307] The Court found that students who were suspended for up to ten days were entitled to due process because they had a legitimate property interest in a public education based on state law.[308] In determining the level of due process to be accorded to these students, the Court observed that, "[a]t a very minimum . . . , students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."[309] The Court noted, however, that the student's right to explain his version of the events was to be balanced against the school district's need to maintain order and discipline.[310]

The Court also noted that "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."[311] The student was concerned about "avoid[ing] unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences."[312] Schools, on the other hand, needed to maintain "[s]ome modicum of discipline and order . . . if the educational function is to be performed" and relied on suspensions as a teaching tool.[313]

Balancing the concerns of students and the school, the Court rejected the notion "that school authorities must be totally free from notice and hearing requirements if their

---

[305] The Court also determined that since the limitation on strip searches was not clearly established at the time Ms. Redding came under suspicion, the principal was entitled to qualified immunity for his actions. *Id.* at 2644.

[306] 419 U.S. 565 (1975).

[307] *Id.* at 567.

[308] *Id.* at 576.

[309] *Id.* at 579.

[310] *Id.* at 580.

[311] *Id.* at 579.

[312] *Id.*

[313] *Id.* at 580.

schools are to operate with acceptable efficiency."[314] A student facing suspension of ten days or fewer had a right to "be given oral and written notice of the charges against him and, if he denie[d] them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[315] The Due Process Clause "requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."[316] Still, the Court refused to require that hearings connected with short suspensions provide students with the opportunity to obtain counsel, to cross-examine witnesses, or to call supporting witnesses because of the special nature of the educational enterprise.[317]

Two years later, in *Ingraham v. Wright*, the Court considered the application of the Fourteenth Amendment's Due Process Clause to the imposition of corporal punishment in schools.[318] The Court held "that corporal punishment in public schools implicates a constitutionally protected liberty interest, but . . . that the traditional common-law remedies are fully adequate to afford due process."[319] Once again, the special nature of schools weighed heavily in the Court's analysis. First, Justice Powell, writing for the majority, explained that, because liberty interests had always encompassed "freedom from bodily restraint and punishment," the state was required to comply with due process.[320] Accordingly, the case turned on "what process is due."[321] To resolve this question, the Court noted that the traditional role of corporal punishment in school contexts "is to correct a child's behavior without interrupting

---

[314] *Id.* at 581.

[315] *Id.*

[316] *Id.*

[317] *Id.* at 583. Specifically, the Court explained:

> To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

Id.

[318] 430 U.S. 651 (1977). *Ingraham v. Wright* also investigated whether corporal punishment implicated the Eighth Amendment's ban against cruel and unusual punishment. In a 5-4 opinion, the Court concluded that the Eighth Amendment did not apply to corporal punishment in schools. *Id.* at 671.

[319] *Id.* at 672.

[320] *Id.* at 673-74 (footnote and internal citation omitted).

[321] *Id.* at 674.

his education."[322] As with First and Fourth Amendment rights, the Court examined the competing interests at stake and recognized that children faced some risk when disciplinarians resorted to corporal punishment.[323] Even so, the Court was unwilling to impose notice and hearing requirements in advance of any corporal punishment, reasoning that any procedures that would protect students against wrongful punishment would not outweigh the "costs" they would impose on the orderly operation of schools.[324] For instance, teachers may decide to resort to less effective disciplinary strategies instead of corporal punishment because of "the possible disruption that prior notice and a hearing may entail."[325] Ultimately, the Court held that the Due Process Clause does not require public schools to provide notice and a hearing before imposing corporal punishment. This holding demonstrated the Court's belief that the school district's interest in maintaining effective and flexible disciplinary control over its students outweighed the need to strictly enforce students' due process rights.[326]

B. Denial of Special Constitutional Tests: The Establishment Clause

As noted above, the Supreme Court has created special constitutional rules recognizing that students' rights are not "coextensive with the rights of adults in other settings."[327] By contrast, the Court has consistently refused to develop special constitutional rules in Establishment Clause challenges where students are compelled or coerced to adopt a particular religious viewpoint. In each of these cases, the Court noted that the Founding Fathers were especially concerned that state-sponsored religious exercises posed a serious danger to freedom of conscience.[328] Therefore, the Court was unwilling to accept

---

[322] *Id.* at 674 n.43.

[323] *Id.* at 676.

[324] *Id.* at 680.

[325] *Id.* at 680-81.

[326] *Id.* at 682.

[327] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). *See generally supra* Part II.A.

[328] The Court has heard numerous cases on the Establishment Clause in relation to public elementary and secondary education. Those cases fall roughly into three categories: (1) cases involving public funding relating to religion (*see, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding the constitutionality of publicly funded voucher program including sectarian schools); Comm. for Pub. Educ. &

the arguments raised by the public schools that would have permitted the religious activity if the facts led to the conclusion that state action "established" religion.

In *School District of Abington Township, Pennsylvania v. Schempp*,[329] the Court held that the state practice of requiring schools to begin each day with a Bible reading violated the Establishment Clause. In reaching this decision, the Court discussed the relationship between the Establishment Clause and the Free Exercise Clause. The Establishment Clause prohibits "a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."[330] The Court explained that to withstand an Establishment Clause challenge, legislation must have a secular purpose and must neither advance nor inhibit religion.[331]

Comparatively, the Free Exercise Clause "recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state."[332] The purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."[333] To establish a violation of the Free Exercise Clause, the plaintiff must demonstrate that the enactment has a coercive effect on his ability to practice his religion.[334] Thus, the Court concluded that the difference between the two clauses is that the Free Exercise Clause

---

Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating direct funding to private religious schools)); (2) cases which deal with prayer (*see, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (allowing a student-led religious group at a public high school); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (invalidating the practice of daily prayers over the school's intercom)); and (3) cases which deal with religion in the curriculum (*see, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating a state statute requiring the teaching of Creationism whenever evolution was taught); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (invalidating religious instruction delivered on public school grounds)). The universe of cases is too numerous to include a summary of each here. Rather, we focus on the prayer cases and have selected those cases that discuss the tension between the Establishment Clause and other First Amendment rights, whether speech or exercise of religion. We also focus on those cases most recently decided by the Court.

[329] 374 U.S. 203 (1963).

[330] *Id.* at 222.

[331] *Id.*

[332] *Id.*

[333] *Id.* at 223.

[334] *Id.*

requires a showing of coercion, while the Establishment Clause does not.[335]

Applying these principles, the Court found that the practice of Bible reading violated the Establishment Clause.[336] The fact that students could absent themselves upon parental request was no defense to the finding of unconstitutionality. Further, the Court held that it was no defense that the religious practices were "minor encroachments on the First Amendment."[337] In reaching this decision, the Court cited *Memorial & Remonstrance Against Religious Assessments*,[338] written by James Madison, the principal architect of the Bill of Rights.[339] Writing for the Court, Justice Clark warned that "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"[340] In addition, the Court rejected the argument that the refusal to permit Bible reading in the public schools violated the free exercise rights of the majority. "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone," the Court explained, "it has never meant that a majority could use the machinery of the State to practice its beliefs."[341]

The Supreme Court provided further instruction on the relationship between the Religion Clauses in *Board of Education of the Westside Community Schools v. Mergens*.[342] *Mergens* involved a high school student who wished to create a student-led religious group. School officials denied the request on the rationale that to do otherwise would create a symbolic link between the school and religion in violation of the Establishment Clause.[343] To consider this contention, the Court

---

[335] *Id.*

[336] *Id.*

[337] *Id.* at 225.

[338] *Id.* at 213.

[339] *See* JAMES MADISON: WRITINGS 1772-1836 (Jack N. Rakove ed., Library of America 1999).

[340] *Schempp*, 374 U.S. at 225 (quoting MADISON, *supra* note 339).

[341] *Id.* at 226 (emphasis omitted).

[342] 496 U.S. 226 (1990).

[343] *Id.* at 231. The plaintiffs alleged that school officials must allow formation of their group in order to comply with the federal Equal Access Act, 20 U.S.C. §§ 4071-4074 (2006). The Equal Access Act prohibits public secondary schools that have created "a limited open forum" to limit student groups "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." *Id.* § 4071(a). The school claimed that it only allowed clubs related to the curriculum and, therefore, had

applied an endorsement analysis, which requires examination of whether a reasonable observer would perceive a governmental endorsement of religion.[344] If so, then the activity is impermissible under the Establishment Clause, even if it results in curtailment of students' right to exercise religion or express themselves from a religious viewpoint.[345] Given the broad array of student clubs available at the high school in question, the Court concluded that a reasonable observer would comprehend that school officials were merely accommodating the myriad interests of its students, not endorsing the activity in question.[346] What is telling about this analysis is the Court's tacit acceptance of the absolute prohibition formed by the Establishment Clause. Had the endorsement test confirmed school officials' concerns about a violation, the denial of the students' request would have been proper.[347]

The Court next addressed the obligation of public schools to adhere to the Establishment Clause in *Lee v. Weisman*,[348] where the majority ruled that the practice of including nonsectarian prayer in public school graduations violated the Establishment Clause because it coerced those in attendance to act in a religious manner.[349] In *Lee* and in keeping with tradition for that school, the principal decided to include an invocation and a benediction in the ceremony. The principal chose the religious participant—a rabbi—and also provided the rabbi a pamphlet with guidelines as to how to conduct a nonsectarian prayer.[350] The school argued that the justification for the nonsectarian prayer was to advance tolerance and help students learn to live a pluralistic society.[351]

In reaching the conclusion that the practice violated the First Amendment, the Court made a subtle shift from *Schempp* in discussing the relationship between the Free Exercise and Establishment Clauses. Writing for the Court, Justice Kennedy

---

not created the requisite "limited open forum." The Court rejected this contention, pointing to the scuba club and chess club as examples of non-curriculum-related clubs. *Mergens*, 496 U.S. at 244-46. As such, the Court held that the Equal Access Act applied and then turned to examine whether the Establishment Clause nonetheless required a denial of the request to form the club. *Id.* at 247.

[344] *Mergens*, 496 U.S. at 248-50.

[345] *Id.* at 250.

[346] *Id.*

[347] *See id.*

[348] 505 U.S. 577 (1992).

[349] *Id.* at 599.

[350] *Id.* at 581.

[351] *Id.* at 590.

explained, "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[352] Thus, the Court recognized that the government could violate the Establishment Clause by coercing citizens to act in a religious manner.

The Court found that the school's involvement in the development of the school prayers violated this principle. The school's extensive involvement in the selection of the rabbi could create divisiveness because "subtle coercive pressures exist . . . where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[353] The school countered that its directions for the content of the prayers were "a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony."[354] While the school's concern was understandable, Justice Kennedy observed that its good faith was not the issue. Instead, the pertinent question was whether the school could legitimately invite someone to produce a prayer for a formal religious exercise, which all students would be required to attend.[355]

The Court found that the school's actions were indeed illegitimate. Justice Kennedy explained that the Religion Clauses were not merely designed to protect the rights of minorities; they also existed "to protect religion from government interference."[356] These concerns led Justice Kennedy to conclude that the school officials' creation of a nonsectarian prayer violated the Establishment Clause because the involvement of school officials "will be perceived by the students as inducing a participation they might otherwise reject."[357]

Justice Kennedy also rejected the school's claim that the practice of nonsectarian prayer during graduation was justifiable as a bulwark against intolerance because it overlooked a fundamental difference between freedom of

---

[352] *Id.* at 587.
[353] *Id.* at 588.
[354] *Id.*
[355] *Id.* at 589.
[356] *Id.*
[357] *Id.* at 590.

worship and freedom of speech.[358] While "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment," Justice Kennedy explained, "the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions."[359] The reason for this difference rested in the fear of the Founding Fathers that "what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."[360]

The Court's decision in *Santa Fe Independent School District v. Doe*[361] solidified the precedent established in *Lee*. *Santa Fe* once again involved religious expression, though this time led by students prior to high school football games.[362] The school district had a long history of sponsoring prayers before sporting events, which even included an elected student "chaplain" to deliver the prayers.[363] Although that policy had been replaced, the prayers before football games continued.[364] The district argued that they had created a "limited open forum" for the purpose of student expression before each game.[365] Therefore, officials claimed the speech was "private" and not governmental speech, placing it outside the ambit of the Establishment Clause.[366] The Court rejected this thinking. That the prayers were student-led was insufficient to transform the practice from governmental speech into private speech.[367] Justice Stevens, writing for a six-Justice majority,[368] again employed an endorsement analysis, concluding that the

---

[358] *Id.* at 591.

[359] *Id.*

[360] *Id.* at 592. Justice Kennedy concluded with the reminder that

> The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.

Id.

[361] 530 U.S. 290 (2000).

[362] *Id.* at 294.

[363] *Id.*

[364] *Id.* at 297-98.

[365] *Id.* at 301.

[366] *Id.* at 302.

[367] *See id.* at 302-05.

[368] *Id.* at 292. Justice Stevens was joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. *Id.*

public would "perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[369] Moreover, the Court noted that any analysis of endorsement must take into consideration the history and context of the policy and practice under scrutiny.[370] In this instance, the Court concluded that the revised policy was written in order "to preserve the practice of prayer before football games."[371] While the Court's ruling did not prohibit private religious activity, it cautioned that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."[372]

This balance between private voluntary prayer and state-orchestrated prayer was again at issue in *Good News Club v. Milford Central School*.[373] This case challenged a school district's denial of a request to use school facilities immediately after school by a Christian club designed for elementary school children.[374] The club claimed the free speech right to meet since the school district allowed other non-school groups to meet during the same time frame.[375] The school district maintained that allowing the religious club to meet would violate the Establishment Clause, noting that elementary-aged children would not be able to discern the difference between endorsing the activity and merely accommodating it.[376] The Court,

---

[369] *Id.* at 307-08. Justice Stevens listed a number of contextual factors supporting the conclusion of endorsement:

> The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags.

Id.

[370] *Id.* at 308 (citing Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (invalidating a moment of silence statute because of an expressed preference for prayer)).

[371] *Id.* at 309.

[372] *Id.* at 313.

[373] 533 U.S. 98 (2001).

[374] *Id.* at 103.

[375] *Id.* at 102, 104.

[376] *Id.* at 112-13.

however, disagreed that the perceptions of the young children attending the school determined the constitutionality of the issue.[377] Rather, since no student could attend a club meeting without parental permission, the Court reasoned that whether the religious club would be viewed as an endorsement of religion needed to be considered from the parents' perspective.[378] In other words, whether such a club violated the Establishment Clause turned on whether a reasonable parent familiar with all the circumstances of after-school clubs at the school would perceive an endorsement of religion or feel coerced by the state to allow their child to attend.[379] Applying this test, the Court concluded that the Constitution posed no barrier to allowing the club to meet.[380]

Interestingly, just as the Court has cited the unique relationship between schools and children to declare special rules with regard to students' rights to freedom of expression, freedom from unreasonable searches and seizures, and due process, the Court has referenced the same context to exercise caution when interpreting the Establishment Clause. As the court noted in *Edwards v. Aguillard*:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.[381]

Thus, even with respect to the more restrictive Establishment Clause, the Court has taken into account the context of schools in determining whether the school has violated the rights of children.

III. APPLICATION OF GENERAL SCHOOL LAW PRINCIPLES TO RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS

In the previous section, we examined various constitutional challenges mounted by students against schools to

---

[377] *Id.* at 115-16.
[378] *Id.* at 115.
[379] *Id.*
[380] *Id.*
[381] Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

determine when the Supreme Court has developed special rules for the public school context. We found that in the context of free speech, search and seizure, and due process, the Court has held that public school students do not possess the same level of rights as the general public.[382] In each of these cases, the Court reached this conclusion by balancing school district and student concerns.[383] The only exception we have found to this general rule is the Establishment Clause cases. The Court has refused to engage in a school-specific test because of the special language of the Religion Clauses and the declarations of the Founding Fathers.[384] However, the Court has referenced schools' unique context when analyzing the Establishment Clause.[385]

In this section, we explain that the *Parents Involved* decision should be analyzed in the same fashion as the majority of student rights' cases in which the Court has developed special constitutional rules for the public school setting, and that the Equal Protection Clause is different from the Establishment Clause.

A. Is the Equal Protection Clause Like the Establishment Clause?

When examined against the backdrop of other school law cases, it becomes clear that the Justices making up the plurality in the *Parents Involved* case believe that Equal Protection cases should be treated in the same manner as the Establishment Clause cases. In other words, they reject the application of a balancing test because the Equal Protection Clause requires all racial classifications to be examined in the same manner. For example, recall that Chief Justice Roberts stated that the Constitution "prevents states from according differential treatment to American children on the basis of their color or race."[386] Also recall Justice Thomas's assertion that the Constitution is "color-blind."[387]

However, an examination of the language of, and the history behind, the Equal Protection Clause reveals that this

---

[382] *See supra* Part II.

[383] *See generally supra* Part II.A.

[384] *See supra* Part II.B.

[385] *See supra* Part II.B.

[386] *Parents Involved*, 551 U.S. 701, 747 (2007) (plurality opinion) (internal quotation marks omitted).

[387] *Id.* at 772 (Thomas, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

constitutional provision contains no such prohibition. Andrew Kull, in his volume, *The Color-Blind Constitution*, observes, "The interesting fact that the Congress in 1866 considered and rejected a series of proposals that would have made the Constitution explicitly color-blind has been, in consequence, largely forgotten."[388] Indeed, educational historian James Anderson notes that the Republicans introduced seven versions of the Fourteenth Amendment that contained a provision prohibiting discrimination on the basis of race or color—all were rejected.[389] After all these proposals had been defeated, Congress then accepted a version of the Equal Protection Clause that replaced the color-blind provisions with an "equal protection" provision "that protected undefined rights against state infringement but avoided any principle that would forbid discrimination on account of race or color."[390]

According to James Anderson, "The change that was made allowed states to discriminate by race as deemed appropriate, especially in the arena of 'social rights' that included education."[391] Furthermore, the framers of the Fourteenth Amendment believed that "provisions forbidding distinctions of race and color had to be dropped in order to gain enough support for the passage and eventual ratification by the states."[392] "In other words," Anderson explained, "they left the constitutional question of racial classifications by government unresolved."[393] Accordingly, the Supreme Court should not pretend that they are limited by a color-blind Equal Protection Clause.[394]

Even Justice Harlan's invocation of the term "color-blind" in his famous dissent to *Plessy* does not provide justification for reading the Constitution to prohibit all racial classifications. Rather, his use of the term relates to the use of "color" as a means to establish a ruling class who then enacts laws "cunningly devised to defeat legitimate results of the [Civil] [W]ar."[395] Nothing in Justice Harlan's opinion examines race-conscious actions taken to further the intent of the Fourteenth Amendment, that is, to provide people of color with

---

[388] ANDREW KULL, THE COLOR-BLIND CONSTITUTION 69 (1992).

[389] James D. Anderson, *Race-Conscious Educational Policies Versus a Color-Blind Constitution: A Historical Perspective*, 36 EDUC. RESEARCHER 249, 254 (2007).

[390] *Id.* at 254.

[391] *Id.* at 255.

[392] *Id.*

[393] *Id.* at 256.

[394] *Id.*

[395] Plessy v. Ferguson, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting).

equal opportunities enjoyed by white citizens. Justice Stevens made the same point when chiding the majority opinion for neglecting this seminal distinction and the fact that the policies at issue in *Brown* only negatively affected one race.[396]

Further support for the proposition that Harlan's use of the term "color-blind" was not intended to eliminate all racial classifications is found in another of Harlan's opinions. Only three years after *Plessy*, Harlan wrote the Court's opinion in a segregated school case, *Cumming v. Richmond County Board of Education*.[397] *Cumming* involved a challenge to a Georgia school district's decision to close the high school that served the district's African American children while maintaining the school that served white children.[398] In a unanimous opinion, the Court upheld the board's decision. Justice Harlan wrote:

> The state court did not deem the action of the board of education in suspending temporarily and for economic reasons the high school for colored children a sufficient reason why the defendant should be restrained by injunction from maintaining an existing high school for white children. It rejected the suggestion that the board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race. Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[399]

Had Harlan's use of the term "color-blind" Constitution had the meaning ascribed to him by Justice Thomas, he would have likewise dissented from the *Cumming* decision. To the contrary,

---

[396] *Parents Involved*, 551 U.S. 701, 799 (2007) (Stevens, J., dissenting). Justice Stevens noted that Chief Justice Roberts's attempts to revise history caused him to recall "Anatole France's observation: '[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.'" *Id*. (alteration in original) (quoting LE LYS ROUGE (THE RED LILY) 95 (W. Stephens trans., 6th ed. 1922)).

[397] 175 U.S. 528, 528 (1899). Interestingly, neither Justice Thomas nor any of the other opinion authors in *Parents Involved* reference or discuss *Cumming*.

[398] *Id.* at 530.

[399] *Id.* at 545.

he concluded that a school district could offer no high school education to a group of children solely based on the color of their skin and do so without violating the Fourteenth Amendment.[400]

Moreover, even if one concludes as did the plurality in *Parents Involved* that a "color-blind" interpretation of the Equal Protection Clause has evolved over time, and even if one concludes that this view of the Fourteenth Amendment parallels the Establishment Clause as a strict prohibition against state action, it does not follow that every use of race to serve nonremedial ends is per se unconstitutional. As our review of cases involving school-sponsored religion demonstrates, the Court still engages in a careful examination of context in order to determine whether state officials have violated or run the risk of contravening the Establishment Clause. The fact that religion arises in the public school context is not sufficient to dictate the outcome. Dispositive contextual factors include whether the officials' purpose was legitimate and secular;[401] whether the activity was compulsory or voluntary;[402] whether it occurred during instructional or non-instructional time;[403] whether state officials led the exercise or used the "machinery of the state" to encourage or discourage

---

[400] In the same case, Harlan also wrote:

> The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant board to cease giving support to a high school for white children. The board had before it the question whether it should maintain, under its control, a high school for about 60 colored children or withhold the benefits of education in primary schools from 300 children of the same race. It was impossible, the board believed, to give educational facilities to the 300 colored children who were unprovided for, if it maintained a separate school for the 60 children who wished to have a high-school education. Its decision was in the interest of the greater number of colored children, leaving the smaller number to obtain a high-school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the board.

Id. at 544.

[401] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[402] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000); Lee v. Weisman, 505 U.S. 577, 594-95 (1992); Bd. of Educ. v. Mergens, 496 U.S. 226, 252 (1990); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963).

[403] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2000); *Mergens*, 496 U.S. at 251.

religion;[404] whether individuals are treated similarly regardless of religious beliefs;[405] and whether a reasonable observer knowledgeable about the history and context would perceive a state endorsement of religion.[406] Accordingly, even the extra "vigilance" afforded the application of the Establishment Clause in public school settings does not result in an analysis that is "strict in theory, but fatal in fact."[407] Just as nothing in the Establishment Clause precludes a contextual interpretation of the amendment, nothing in the text or history of the Equal Protection Clause provides the foundation for a rigid interpretation of the provision excluding the observation that "[c]ontext matters."[408]

B. Are Race-Conscious Policies Inherently Improper Because They Imply "Racial Inferiority" and Create "Racial Hostility"?

Another justification for the Court's unyielding application of strict scrutiny to race-conscious policies regardless of context is the alleged propensity for such policies to spawn notions of "racial inferiority" and consequent "racial hostility." Recall that Chief Justice Roberts expressed concern that such propensity[409] could "reinforce the belief . . . that individuals should be judged by the color of their skin,"[410] which then could lead to "a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[411] Consequently, Roberts concluded, any use of race in the absence of a judicial remedial order threatened racial harmony. The pathway to equal protection was clear to the Chief Justice, who declared simply, "The way to stop discrimination on the

---

[404] *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312; *Lee*, 505 U.S. at 592-93; *Schempp*, 374 U.S. at 226.

[405] *See, e.g.*, *Good News*, 533 U.S. at 114; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); *Mergens*, 496 U.S. at 252.

[406] *See, e.g.*, *Good News*, 533 U.S. at 119; *Mergens*, 496 U.S. at 252. For non-school cases discussing this analysis, see, for example, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 862 (2005); Van Orden v. Perry, 545 U.S. 677, 682-83 (2005).

[407] Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (describing the problems associated with a rigid application of strict scrutiny in Equal Protection Clause matters).

[408] Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003).

[409] *Parents Involved*, 551 U.S. 701, 746 (2007) (plurality opinion) (internal quotation marks omitted).

[410] *Id.* (internal quotation marks omitted).

[411] *Id.* (internal quotation marks omitted).

basis of race is to stop discriminating on the basis of race."[412] Also, Justice Kennedy in his concurrence warned that "classifications . . . based on racial typologies can cause a new divisiveness" and "lead to corrosive discourse" where race serves "as a bargaining chip in the political process."[413]

Unfortunately, this apprehension neglects two critical aspects of the school programs under scrutiny. First, both programs at issue were forms of school choice.[414] The traditional method of student assignment in the United States has long linked the school a child attends to the location of the family residence.[415] The earliest school choice programs, so-called magnet schools,[416] evolved in direct relationship to the country's desegregation efforts.[417] Districts, weary of forced busing programs, adopted systems designed to induce parents to enroll their children in schools they otherwise would be unlikely or reluctant to attend, thereby achieving integration voluntarily.[418] Accordingly, these early school choice programs were designed to quell, not inflame, racial animosity. Moreover, to attract parents who were neutral or opposed to integration, these

---

[412] *Id.* at 748.

[413] *Id.* at 797 (Kennedy, J., concurring). While Justice Thomas did not discuss racial inferiority or hostility per se, he did include a lengthy discussion of the history of racism in the United States. He concluded that discussion with the following: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow." *Id.* at 781-82 (Thomas, J., concurring). However, Thomas's discussion neglects the simple fact that the victims of the policies in both *Dred Scott* and *Plessy* were disenfranchised and therefore had no means to affect the political process by which the policies were made. In the first instance, the disenfranchisement was accomplished by the Constitution itself and the second by Jim Crow laws designed to systematically suppress the participation of African Americans in the democratic process. Thus, Thomas's "gamble" is unlikely to arise, and, even if it did, those affected could vote to challenge the policies legislatively. Thomas's view that judicial reasoning would limit litigation as a corrective tool does not affect this conclusion.

[414] *Id.* at 711, 716 (majority opinion).

[415] *See generally* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983); DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION (1974).

[416] "[T]he term 'magnet school' means a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7231a (2006); *see also* Magnet School Assistance Act, *id.* § 7231.

[417] JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 107 (1994). *See generally* MARY HAYWOOD METZ, DIFFERENT BY DESIGN: THE CONTEXT AND CHARACTER OF THREE MAGNET SCHOOLS (1986).

[418] HENIG, *supra* note 417, at 156; *see also* 20 U.S.C. § 7231(a)(1)-(2); *Who We Are*, MAGNET SCH. AM., http://www.magnet.edu/modules/content/index.php?id=1 (last visited Nov. 21, 2010).

magnet schools developed unique curricular offerings as a "carrot" to encourage parents and students to select those schools.[419] Parents could enroll their children in these choice schools only by choosing to integrate. Enrollment patterns were carefully monitored and only choices that furthered the integrative intent of the program were permitted.[420]

Interestingly, the issue of magnet schools came up early in oral arguments regarding the Seattle program. Notice Justice Scalia's recognition of the voluntariness associated with magnet schools in his conversation with attorney Harry J.F. Korrell, who represented the plaintiffs challenging the program:

> JUSTICE SCALIA: You would object, then, to magnet schools? You would object to any system that is designed to try to cause people voluntarily to go into a system that is more racially mixed?
>
> MR. KORRELL: Justice Scalia, our objection to the Seattle program is that it is not a race neutral means.
>
> JUSTICE SCALIA: No, I understand. But I'm trying to find what, you know, the outer limits of your contentions are. It doesn't seem to me that your briefs indicated that you would object to something like magnet schools. The—even if one of the purposes of those schools is to try to cause more white students to go to schools that are predominantly non-white. It's just voluntary, I mean, but the object is to achieve a greater racial mix.[421]

Unfortunately, neither school district attorney articulated that both the Seattle and Louisville programs shared with magnet schools both the purpose and effect of voluntarily integration.[422] Indeed, both intradistrict and interdistrict open enrollment programs evolved over time as companion tools to magnet schools in districts' integration arsenals.[423]

The program operated in Louisville perhaps best illustrates this evolution. The school board created a program that allowed parents to list enrollment preferences for each child.[424] However, rather than eliminate neighborhood assignment in its entirety, each child was assigned a "resides

---

[419] HENIG, *supra* note 417, at 107-09.

[420] *Id.*

[421] Transcript of Oral Argument 6-7, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (Dec. 4, 2006) (No. 05-908), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-908.pdf.

[422] *Parents Involved*, 551 U.S. at 820 (Breyer, J., dissenting).

[423] Julie F. Mead, *Including Students with Disabilities in Parental Choice Programs: The Challenge of Meaningful Choice*, 100 WEST'S EDUC. L. REP. 463, 463-64 (1995).

[424] For the Seattle Program, see *Parents Involved*, 551 U.S. at 711. For the Jefferson County Program, see *id.* at 715-16.

school" based on where the child lived.[425] Accordingly, the "resides" or residential assignment school became a sort of default enrollment for each child and, indeed, more than half of all students attended their "resides school."[426] Assignments to other schools occurred only if the parent requested a transfer.[427] Therefore, participation in Louisville's transfer program, just like participation in magnet programs, was voluntary on the part of parents.

More importantly, both the Seattle and Louisville programs existed specifically and explicitly to produce integrated schools without forcing children to be bused to schools outside their neighborhoods without parental approval.[428] And since urban neighborhoods, even in modern times, tend to be racially identifiable,[429] establishing a system that induces parents to select schools for reasons other than proximity to residence is inextricably intertwined with de facto segregation in housing. Rather than attempting to alter these residential patterns—a goal clearly outside the purview of school policy-making authority—open enrollment programs provide an incentive to parents to reach beyond their neighborhoods for educational opportunities. Properly understood then, it is clear such programs "seek to open minds about and to offset the effects of those [housing] patterns—to challenge and to be certain that those patterns are not determinative of [educational] opportunity."[430]

Second, the only way the majority's conclusion about racial hostility makes sense is if one accepts the proposition that neither the City of Seattle nor the City of Louisville experiences any racial hostility in the absence of the school assignment policies, or if there is actual evidence that use of the plan has enflamed existing hostility. Both propositions lack any foundation. Allowing schools to become racially identifiable would be more likely to engender racial hostility than a program expressly designed to bring races together in

---

[425] McFarland v. Jefferson Cnty. Pub. Schs., 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004).

[426] *Id.*

[427] *Parents Involved* 551 U.S. at 844 (Breyer, J., dissenting).

[428] *Id.* at 820.

[429] Population Studies Center, *Racial Residential Segregation Measurement Project*, UNIV. OF MICH., http://enceladus.isr.umich.edu/race/seg.html (last visited Dec. 19, 2010).

[430] Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 98 (2002).

preparation to live and work in a pluralistic society. Research has consistently shown that intergroup conflict and stereotypic thinking decreases when children are educated in integrated settings.[431] Furthermore, no evidence exists that the Seattle or Louisville plans had any causal relationship to racial tensions in either city.

And yet the Chief Justice's discussion of racial hostility completely ignored both the fact that racial animosity has never been eradicated from our society and that educational programs have played a central role in addressing that racial enmity, both historically and contemporarily. Nor did his discussion of the potential for racial hostility consider the very real possibility that allowing parents unfettered choices will likely exacerbate racial isolation.[432] The *Brown* Court reviewed and accepted evidence that the dual program struck down by its decision caused children to infer that they lacked ability simply because their skin was black.[433] As Chief Justice Warren explained,

> To separate them from others of similar age and qualifications solely because of their 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. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case . . . [and] is amply supported by modern authority.[434]

---

[431] For a review of that research, see Brief of American Educational Research Association as Amicus Curiae in Support of Respondents at 6-9, *Parents Involved*, 551 U.S. 701 (Oct. 10, 2006) (Nos. 05-908, 05-915).

[432] Policy Brief, Roslyn Arlin Mickelson et al., School Choice and Segregation by Race, Class, and Achievement (Mar. 2008), *available at* http://epsl.asu.edu/epru/documents/EPSL-0803-260-EPRU.pdf.

[433] *Brown I*, 347 U.S. 483, 494-95 (1954).

[434] *Id.* In a footnote to this passage, the Court cited extensive social science research concluding that segregation led children to impute feelings of inferiority:

> K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

Id. at 494 n.11.

Unlike the segregation programs at issue in *Brown*, the policies in Seattle and Louisville fell on students of all races.[435] Moreover, Chief Justice Roberts cited neither evidence nor any research similar to that accepted by the *Brown* Court to show that any students were caused to feel inferior because of the programs at issue.[436]

Judicial consideration of "hostility" in relation to bringing diverse groups of students together is not limited to Equal Protection jurisprudence. Perhaps not surprisingly, the other context in which the Court has addressed this concern is in relation to religious divisions. For example, the dissenting Justices in *Zelman v. Simmons-Harris*—which established the constitutionality of publicly funded school voucher programs that permitted religious school participation—raised concerns that the political struggles to preserve or expand voucher programs could engender political divisions along religious lines.[437] Chief Justice Rehnquist's dismissive response to these concerns in relation to constitutional analysis is quite telling.

> Justice Breyer would raise the invisible specters of "divisiveness" and "religious strife" to find the program unconstitutional. It is unclear exactly what sort of principle Justice Breyer has in mind, considering that the program has ignited no "divisiveness" or "strife" other than this litigation. Nor is it clear where Justice Breyer would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find "divisive." We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs.[438]

---

[435] For the Seattle Program, see *Parents Involved*, 551 U.S. 701, 711-12 (2007). For the Jefferson County Program, see *id.* at 715-17.

[436] *See generally id.* at 701-48 (partially majority and partially plurality opinion).

[437] Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting). As Justice Breyer explained:

> School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Id. at 723-24.

[438] *Id.* at 662 n.7.

Yet neither Roberts nor Kennedy adhered to the Court's previous wholesale rejection of speculative divisiveness when they analyzed the constitutionality of Louisville's and Seattle's race-conscious school assignment plan in *Parents Involved*.

In deciding another case, Chief Justice Rehnquist also addressed the relationship between individual choices and perceptions of state hostility. *Locke v. Davey* examined limitations on a publicly funded scholarship program in the higher education context.[439] The state of Washington had created the program with one limitation—that funds could not be used for the study of theology for the purpose of entering the ministry.[440] Individuals pursuing other vocations could use scholarship funds to support enrollment in various religious classes. In reaching the conclusion that the limitation did not offend the First Amendment, Chief Justice Rehnquist, writing for the majority, examined whether the state denial of the individual's choice evinced hostility toward religion.[441] He concluded that it did not.[442] As he explained:

> [W]e find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect. Without a presumption of unconstitutionality, Davey's claim must fail. The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars.[443]

Likewise, concerns about racial hostility stemming from school districts' use of race-conscious approaches lack merit when the "historic and substantial state interest at issue" is juxtaposed against the "relatively minor burden" of some students being denied their first choice of school assignment.[444] Arguably, Davey's burden was even greater than that of the petitioner in *Parents Involved*. Davey had to forgo public funding if he wished to follow his chosen vocation[445]—and yet his "burden" is

---

[439] 540 U.S. 712 (2004).
[440] *Id.* at 715.
[441] *Id.* at 721.
[442] *Id.*
[443] *Id.* at 725.
[444] *Id.*
[445] *Id.* at 717.

characterized as a "minor" encroachment on his rights.[446] The burden borne by the plaintiffs in *Parents Involved* only implicated a child's first choice of school, not all public education. Even then, any denial often lasted for only one school year.[447]

Therefore, concerns for "racial inferiority" and "racial hostility," while legitimately a consideration in Equal Protection jurisprudence, should be recognized as only one of myriad matters of fact to be analyzed in context after a full examination of all evidence. Chief Justice Roberts's unfounded speculative concerns regarding racial hostility foreclosed the possibility of using a balanced approach to examine the school districts' race-conscious school assignment plans in *Parents Involved*.

C. The Balancing Test Applied to Race-Conscious Student Assignment Plans: Is There a Justification for a Special Application of Strict Scrutiny?

We have explained above that the Equal Protection Clause is different from the Establishment Clause in that its text and history does not prohibit the Court from adopting a balancing test that weighs the important functions and unique concerns of school districts' against its students' constitutional rights. Likewise, potential hostility engendered by the limited use of racial classifications provides no justification for the Court's fatal application of strict scrutiny. In contrast, the Court's school law jurisprudence provides ample foundation for the adoption of a version of strict scrutiny for Equal Protection Clause that is fully cognizant of the special role public schools play in our democratic republic. In other constitutional contexts, the Court has balanced the concerns of school districts against the concerns of students to determine whether students receive different, or even lesser, constitutional protection in schools than adults do in other settings.[448] Even in Establishment Clause cases arising in public school situations, the Court has engaged in a contextualized application of the various tests articulated to determine the boundaries of state action with regard to religion.[449] Thus, the uniquely important

---

[446] *Id.* at 725.

[447] *Parents Involved*, 551 U.S. 701, 847-48 (2007) (Breyer, J., dissenting).

[448] *See supra* Part II.A.

[449] *See supra* Part II.B.

purpose of schools, in addition to the special relationship between school authorities and their students, weigh heavily in favor of the Court adapting adjusted constitutional standards as both a practical and equitable approach to analyzing school district policies similar to those at issue in *Parents Involved*. In this subsection, we examine race-conscious student assignment plans to show that a contextualized application of strict scrutiny would be more consistent with the Court's collective education law jurisprudence.

As noted above, strict scrutiny, as with any rights-based constitutional test, begins with an examination of purpose. Applying this analysis requires the reviewer to ascertain whether the goal rises to the level of a compelling state interest. Without reiterating the interests listed by Justice Breyer in detail, it seems clear that the goals served by the assignment plans were grounded in considerations at least as strong, if not stronger, than those cited in support of lowered constitutional standards in other rights-based contexts.

For example, one major concern of all public school districts, including both Seattle and Louisville, is to improve the academic achievement of African American students in order to close identified achievement gaps.[450] Federal law supports the importance of addressing this issue. The No Child Left Behind Act (NCLB)[451] requires all students, including minority students, to achieve proficiency on all state standards for the school to attain adequate yearly progress (AYP).[452] Schools that fail to achieve AYP could be subjected to a variety of sanctions, ultimately including restructuring or conversion to charter schools.[453] Integration serves as a means to help schools comply with NCLB. According to the National Academy of Education, "there is a relatively common finding [in the

---

[450] *See, e.g.*, *School Board: District Vision, Mission, and Core Beliefs*, SEATTLE PUB. SCH., http://www.seattleschools.org/area/board/mission.xml (last visited Nov. 10, 2010) ("All students will achieve to their potential and the achievement gap will be eliminated as every student is challenged to learn at or above grade level."); *About JCPS, 2010-11 District Goals and Strategies*, JEFFERSON CNTY. PUB. SCH., http://www.jefferson.k12.ky.us/About/Mission.html (last visited Nov. 10, 2010) ("Strategic Goal 1" envisions that the district "will enhance teaching by engaging teachers in reflective practice that . . . will enable each student to attain high levels of performance and will facilitate the closing of achievement gaps.").

[451] 20 U.S.C. §§ 6301-7941 (2006).

[452] *Id.* § 6311.

[453] *Id.* § 6316.

social science research] that African American student achievement is enhanced by integrated schooling."[454]

Another major concern of school districts is to prepare students for life in a culturally pluralistic society. Because of the changing racial demographics in this country, schools can assert that it is essential to help students learn how to coexist with persons from other racial groups.[455] According to the U.S. Census, minorities will become the majority of the U.S. population in 2042.[456] In 2050, 30% of the country will be Hispanic, 15% of the population will be African American, and 9.2% of the population will be Asian.[457] The non-Hispanic white population is expected to drop from 66% in 2008 to 46% in 2050.[458] Research suggests that integrated schools help students cope with this new reality. According to the National Academy of Education, "The weight of the research evidence supports the conclusion that there are long-term benefits of desegregation in elementary and secondary schools. Under some circumstances and over the long term, experience in desegregated schools increases the likelihood of greater tolerance and better intergroup relations among adults of different racial groups."[459]

Note the parallels between these interests and that which justified the imposition of suspicionless random urinalysis programs in *Vernonia* and *Earls*. Both interests can be traced to general societal concerns—drug and alcohol use by students on the one hand, and enduring racial disparities in educational attainment on the other. Although Justice Thomas dismissed as "faddish"[460] the robust research base that substantiates the benefits of integrated schooling both for students of color and for all students,[461] neither he nor other

---

[454] Press Release, U.S. Census Bureau News, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), http://www.census.gov/Press-Release/www/releases/archives/population/012496.html.

[455] Brief of Amici Curiae the Council of the Great City Schools et al. 2, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915).

[456] *Id.*

[457] *Id.*

[458] *Id.*

[459] NAT'L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 2 (Robert L. Linn & Kevin G. Welner eds., 2007), *available at* http://www.naeducation.org/Meredith_Report.pdf.

[460] *Parents Involved*, 551 U.S. 701, 780 (2007) (Thomas, J., concurring).

[461] *See, e.g.*, Brief of the American Educational Research Association as Amicus Curiae in Support of Respondents 5-6, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915); Brief of 553 Social Scientists as Amici Curiae in Support of Respondents 4, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915).

members of the Court required comparable evidence that random urinalysis programs actually worked to lower student drug use. In fact, available research has yet to confirm such a link and some studies show either no diminution or even an increase in reported drug use when schools with random drug testing regimes are compared to similar schools without such requirements.[462] Neither did the Court require evidence that a school had an actual drug problem in order to justify the imposition of the test in absence of individualized suspicion of wrongdoing.[463] Rather, the "custodial and tutelary" responsibilities of schools were sufficient to rationalize even the encroachment on students' privacy interests.[464]

Likewise, the school speech cases countenance relaxed standards based on the special role schools play in training children for later life. Recall that in *Hazelwood*, the Court justified the adoption of less rigorous Free Speech Clause protection for curriculum-related speech because of the schools' role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment."[465] Similarly, the *Bethel* Court referenced the doctrine of *in loco parentis*[466] and schools' obligation to "inculcate the habits and manners of civility"[467] when concluding that school officials could legitimately curtail lewd and indecent speech. The Court in *Goss v. Lopez*, too, factored the educational aspects of suspension as a teaching tool into its articulation of constitutionally required due process procedures

---

[462] *See, e.g.*, Linn Goldberg et al., *Outcomes of a Prospective Trial of Student-Athlete Drug Testing: The Student Athlete Testing Using Random Notification (SATURN) Study*, 41 J. ADOLESCENT HEALTH 421, 426-27 (2007).

[463] *See supra* notes 276-93 and accompanying text.

[464] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995).

[465] Hazelwood v. Kuhlmeier, 484 U.S. 260, 272 (1988) (quoting *Brown I*, 347 U.S. 483, 493 (1954)).

[466] Justice Thomas discussed *in loco parentis* at length in both his concurrence in *Morse* and his dissent in *Safford*. In *Morse*, he argued that *in loco parentis* justifies a variety of actions taken with respect to student speech and concludes that *Tinker* should be overturned. Morse v. Frederick, 551 U.S. 393, 417-18, 422 (2007) (Thomas, J., concurring). Likewise in *Safford*, he cites *in loco parentis* as overriding a child's privacy interests even when subjected to a strip search by school officials. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2646 (2009) (Thomas, J., dissenting). In contrast, his opinion in *Parents Involved* makes no mention of the concept or its possible relationship to the adoption of these race-conscious intra-district school choice programs. *Parents Involved*, 551 U.S. 701, 748-52 (2007) (Thomas, J., concurring).

[467] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (quoting BEARD & BEARD, *supra* note 229, at 228).

for students facing discipline and the deprivation of the property interest of an education.[468] Likewise, the *Ingraham* Court referenced the educational utility of corporal punishment to conclude that no notice or hearing was necessary prior to the imposition of the traditional sanction.[469] Most recently, the Court in *Morse* permitted the disciplining of students whose speech school officials "reasonably regard" as promoting drug use, whether or not the student speaker intended such a message.[470] In each instance, the Court paid significant attention to the special context of schooling and factored considerations of the special relationship between schools and students into its analysis of purpose.

Turning to the narrow tailoring component of strict scrutiny, an interpretation of the Equal Protection Clause commensurate with other constitutional issues in schools would likewise consider a number of contextual factors stemming from the educational environment. We frame the question like the Court does when analyzing Establishment Clause concerns. That is, would a reasonable observer, knowledgeable about the history and context of the student assignment plan under examination, conclude that the plan primarily works to equalize opportunity or deny opportunity on the basis of race? To answer this question we must consider a number of factors, all of which have analogs in other constitutional jurisprudence applied to schools.

First, what is the history of the district's use of race to determine students' school assignments? Consideration of this inquiry would uncover whether the community was ever subject to a de jure school desegregation order. But it would also uncover voluntary actions taken to avoid a judicial decree of wrongdoing. So for example, rather than simply considering the judicially formalized remedial or nonremedial motivations as advised by the *Parents Involved* plurality, it would require a more in-depth examination of the history behind the plan—with "calm, dispassionate reflection upon what exactly has been done, to whom and why."[471] As Justice Marshall observed, "[t]he real irony" of relying on the remedial/nonremedial distinction is that such judicial formalism can only be

---

[468] Goss v. Lopez, 419 U.S. 565, 583 (1975).

[469] Ingraham v. Wright, 430 U.S. 651, 680-81 (1977).

[470] *Morse*, 551 U.S. at 408.

[471] Wygant v. Jackson Bd. of Educ., 476 U.S. 286, 312 (1986) (Marshall, J. dissenting).

sustained by a "complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court."[472] Many school districts entered into voluntary integration plans for the express reason of staying out of court and avoiding the imposition of a "remedy."[473] As such, none of these districts acted pursuant to a "remedial" order as the term is used by Justice Roberts in his plurality decision. Yet, a thorough contextual analysis of a race-conscious student assignment policy needs to examine its entire history. So just as the history of the policy was important in determining that school officials overstepped constitutional religious boundaries in the *Santa Fe* case,[474] the evolution of the policy would be dispositive in the narrow tailoring analysis under the Fourteenth Amendment.

Second, a constitutionally consistent application of narrow tailoring would examine how choice came to be granted to children. If the Court had engaged in that analysis, it would have been clear that the privilege to choose the school a child would attend was intended as an inducement, a special benefit, in order to further voluntary integration rather than by "drawing attendance zones with general recognition of the demographics of neighborhoods."[475] In other words, the privilege of selecting a school was conditioned on the parents volunteering to permit the race of their child to be considered.[476] Students have a legitimate expectation and right to a public school education.[477] However, they do not have a comparable expectation to attend a particular school. Student assignments are generally determined by the neighborhoods in which they live. Race-conscious student assignment plans do not interfere with a student's right to attend public school. If a child decides not to participate in the plan, then he can still enroll in his assigned school.

---

[472] *Id.* at 305.

[473] *Parents Involved*, 501 U.S. 701, 805 (2007) (Breyer, J., dissenting).

[474] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308-09 (2000); *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 862 (2005) (holding that displays of the Ten Commandments in a county courthouse are unconstitutional under the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985) (invalidating an Alabama moment of silence statute for lack of a secular purpose).

[475] *Parents Involved*, 551 U.S. at 789 (Kennedy, J. concurring).

[476] *See also* Mead, *supra* note 430.

[477] Goss v. Lopez, 419 U.S. 565, 583 (1977) (holding that education is a property interest protected by the Due Process Clause of the Fourteenth Amendment). For a discussion of the right to an education under state constitutions, see KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 1082-85 (7th ed. 2009).

Accordingly, just as the right-versus-privilege distinction played an important role in the constitutionality of the urinalysis plans at issue in *Vernonia*[478] and *Earls*,[479] this distinction should be a consideration in the analysis of student assignment plans. A "conscientious objector" to random urinalysis faces the sacrifice of ineligibility to participate in extracurricular sports and clubs.[480] Likewise, a conscientious objector to any consideration of race in student assignment would merely sacrifice the privilege of choice, not the right to a public education. [481] Therefore, the plans do not unduly intrude on the rights of conscientious objectors. While they may pay a serious price for not participating in the race-conscious assignment plan, those children are still able to receive a public school education.

Third, a contextual application of strict scrutiny would carefully examine any "burden" borne by a student whose application for transfer was denied in relation to the purpose of the program. In so doing, it may be helpful once again to borrow a metaphor from Establishment Clause jurisprudence. In those situations, the Court considers whether the "machinery of the state" has been employed to encourage or discourage religion.[482] Likewise in an Equal Protection analysis, a court should examine whether the "machinery of the state" has been employed to advantage or disadvantage the children of one race. It would then become constitutionally dispositive whether an assignment plan "impose[s] burdens on one race alone . . . stigmatize[s] or exclude[s]."[483] Moreover, a determination about whether a racial stigma has been attached to any denial of a choice would have to consider the parents' role in the process of selection. Recall that the Supreme Court, when considering whether the school officials advanced religion by allowing a religious club to meet after instructional hours at an elementary school, pointed to parents as the "reasonable

---

[478] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

[479] Bd. of Educ. v. Earls, 536 U.S. 822, 833 (2002).

[480] *Id.* at 851 (Breyer, J., concurring).

[481] This result is far less drastic than actions suggested by Justice Thomas. In both *Morse* and *Safford*, he argues that those unhappy with either speech or search policies "can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move." Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633, 2656 (2009) (Thomas, J., dissenting).

[482] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Sch. Dist. of Abington Twp. v. Schempp, 347 U.S. 203 (1963).

[483] *Parents Involved*, 551 U.S. 701, 799 (2007) (Stevens, J., dissenting).

observers" capable of discerning whether the school was endorsing religion or merely accommodating the club's request.[484] The Court reasoned that any coercion a child may have felt or any child's misperceived endorsement of religion could be effectively cured by the knowledgeable parent.[485] Analogously, the knowledgeable parent would provide the same buffer for any child's naïve interpretation of a choice program with race conscious controls in place to ensure that every child benefits from reasonably integrated school environments. Moreover, drawing again on Fourth Amendment precedent, just as students subjected to random urinalysis would be expected to learn that such restrictions on individual liberties were ultimately adopted "[f]or their own good and that of their classmates,"[486] so too would parents and teachers knowledgeable about the history and context of the programs be able to help children understand that the race-conscious measures ultimately exist for their benefit and the benefit of their classmates.

As a whole, then, consideration of all these school-based factors would have lead to the conclusion that the school assignment programs in Seattle and Louisville primarily worked to equalize opportunity on the basis of race. In addition, this contextualized review provides the mechanism by which to address Justice Kennedy's call for a "principled limit" to the use of racial classifications.[487] Moreover, since consideration of the school-based factors depends on context, and context varies from locality to locality, application of these factors would create a functional barrier to Kennedy's worry that Congress might assert the authority to mandate integration programs nationally.[488]

CONCLUSION

As the foregoing analysis shows, it is clear that if the Court had applied a contextualized review consistent with its previous constitutional analyses in schools, then it would have applied a standard of strict scrutiny to the race-conscious student assignment plans in *Parents Involved* that likewise

---

[484] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2000).

[485] *Id.*

[486] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995).

[487] *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring).

[488] *Id.*

took into full account the special function of today's public elementary and secondary educational institutions. Such an accounting would necessarily examine the compelling nature of school officials' goals to build and safeguard integrated learning environments. The enduring racial differences in achievement that motivated the racial analysis required by NCLB have a direct etiology in, and unbroken evolution from, our segregated history. As Barack Obama put it:

> Segregated schools were, *and are*, inferior schools; we still haven't fixed them, fifty years after *Brown v. Board of Education*, and the inferior education they provided, *then and now*, helps explain the pervasive achievement gap between today's black and white students.[489]

Furthermore as recognized by five members of the *Parents Involved* Court,[490] integration positively impacts all students' learning such that each child's opportunities are advanced by a program that seeks to guarantee the benefits of integrated educational environments for all children, regardless of race.

A contextualized application of strict scrutiny places no less emphasis on an examination of the race-conscious means, even when taken in furtherance of a worthy goal. Therefore, when examining whether the means are necessary and the use of race is narrowly tailored to the articulated interest, a series of contextual factors would need investigation. At a minimum, consideration should be given to:

> (a) whether facts exist to demonstrate the policy in question engenders feelings of "racial inferiority" by a disadvantaged group and whether facts link the policy to expressions of "racial hostility."
>
> (b) the history of the use of race in student assignment to schools including,
>
> > (1) whether the schools were ever subject to de jure segregation,
> >
> > (2) whether judicial findings to that end have ever been made, and
> >
> > (3) whether officials took voluntary action in order to avoid a judicial decree of wrongdoing.
>
> (c) whether the use of race relates to a student assignment plan or a student choice plan designed as an inducement to integrate; that is,

---

[489] Barack Obama, Speech at the Constitution Center, Phila., Pa.: A More Perfect Union (Mar. 18, 2008) (emphasis added).

[490] Justices Kennedy, Stevens, Souter, Breyer, and Ginsburg.

> does a denial implicate the privilege to choose a particular school or does a denial interfere with the right to attend any school, and what consequence must be accepted by conscientious objectors to the policy.
>
> (d) whether the "machinery of the state" has been employed to advantage or disadvantage the children of one race, including a full explication of any burden borne by a child denied a preference in relation to the purpose of the denial.

Given the purpose of the Fourteenth Amendment to broaden opportunity, these contextual factors should ultimately consider whether any race-conscious plan primarily works to equalize or deny opportunity on the basis of race.

Our argument for a contextualized application of strict scrutiny should not be confused with a call for unfettered discretion on the part of school officials or unquestioning deference on the part of judges. We believe that, just as the Court's speech, search, and due process tests have resulted in litigation both upholding and striking down school authority,[491] an application of strict scrutiny with full recognition of the variety of contextual factors associated with schools would likewise result in some plans being affirmed while others would be invalidated.

In the end, we believe Chief Justice Warren's framing of the issue in *Brown* applies with equal force today in relation to any analysis of race-conscious student selection plans:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[492]

Brown's implicit assumption that eradicating de jure segregation would be sufficient to equalize educational opportunities

---

[491] *See, e.g.*, Corales v. Bennett, 567 F.3d 554 (9th Cir. 2009) (holding that due process rights of students were not violated by discipline for leaving school grounds to participate in a protest); M.A.L. *ex rel.* M.L. v. Kinsland, 543 F.3d 841 (6th Cir. 2008) (upholding the constitutionality of a school district's policy on leaflet distribution); Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752 (8th Cir. 2008) (striking down school officials' discipline of students' non-disruptive protest against student dress code); Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489 (6th Cir. 2008) (striking down school's video surveillance of locker room changing areas); Doran v. Contoocook Valley Sch. Dist., 616 F. Supp. 2d 184 (D.N.H. 2009) (upholding dog sniff search of student belongings); Alexander v. Underhill, 416 F. Supp. 2d 999 (D. Nev. 2006) (allowing due process challenge to go forward in relation to discipline imposed after a school fight).

[492] *Brown I*, 347 U.S. 483, 492-93 (1954).

underestimated both the resistance that would follow the Court's decree[493] and the enduring effects of that "inherently unequal"[494] system. We believe a contextualized application of strict scrutiny that is vigilant but not rigid would be more consistent with the Court's treatment of other constitutional issues in schools. It would recognize that each student enjoys a number of constitutionally protected freedoms but that no right is absolute, and that all rights must be critically examined in light of the context in which they seek expression. Therefore, such an application of strict scrutiny merely considers voluntary school choice programs or any race conscious effort "in the light of [their] full development and [their] present place"[495] in today's educational systems and the important role schools play in crafting opportunities for all children.

---

[493] For a history of segregation and desegregation, see generally *School Segregation*, THE CIVIL RIGHTS PROJECT, http://www.civilrightsproject.ucla.edu/research/deseg/deseg_gen.php?&page=1 (last visited Sept. 17, 2010).

[494] *Brown I*, 347 U.S. at 495.

[495] *Id.*