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PARENTS INVOLVED AND RACE-CONSCIOUS MEASURES: A CAUSE FOR OPTIMISM

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I. INTRODUCTION

On June 28, 2007, the United States Supreme Court decided the much anticipated *Parents Involved in Community Schools v. Seattle School District No. 1*[1] case. Following the decision, the media frenzy was instantaneous with various commentators and reporters stating that the Court had in fact banned all uses of race in public schools. The sad reality is that those news pieces were probably the only information and understanding most school administrators and teachers would ever get on the case. In fact, we have found that a number of school administrators have this misperception of the decision, fueling a growing hesitancy to implement any race-conscious measures in their schools. Many of the media reports relied on Chief Justice Roberts' statement quoting *Brown v. Board of Education*[2] to say that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[3] However, the media failed to read the Chief

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

[2] Brown v. Bd. Of Educ. of Topeka, Kan., 349 U.S. 294 (1955). [hereinafter *Brown II*].

[3] *Id.* at 2768. *See, e.g.*, Bruce Fein, *Colorblindness Vindicated*, WASH. TIMES, July 3, 2007, at A12 (stating that "Chief Justice John Roberts sermonized in *Parents Involved*: The way to stop discrimination on the basis of race is to stop discrimination on the basis of race," and concluding that "From its inception, the signature creed of the United States has been the treatment of persons based on character, industry and achievement irrespective of skin color. The United States Supreme Court honored that creed in Parents Involved ... Inestimable national unity is gained through the constitutional doctrine that there is only one race in the United States. It is American. Renewed experiments with racial distinctions

Justice's opinion for context, particularly the preceding sentence in which the Chief Justice specifically limited this statement to "schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County."[4] Additionally, some of the news media outlets reported this statement as the holding of the Court, while in actuality this was merely a part of the plurality opinion written by Chief Justice Roberts.[5]

In this article we examine the various opinions in *Parents Involved.* We conclude that the use of race-conscious measures in public schools is not all unconstitutional. School districts should be able to use race-conscious measures if they comply with the various principles we discuss with the opinions here. We start out with a brief overview of the facts in order to contextualize the decision.

II. FACTS

Parents Involved was a consolidation of two cases involving the voluntary adoption of student assignment plans by two school districts to create racial balance in their schools: Seattle

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like those implicated in Parents Involved would fracture that unity") (internal quotes omitted). In fact, the headlines conveyed much misinformation about the case as well. *See, e.g.*, Terry Eastland, *Robert Rules; The Supreme Court Term Ends with a 5-4 Decision Against Racial Preferences*, WEEKLY STANDARD, July 9, 2007; Kristin Bender & Katy Murphy, *Justices Nix Race in School Decision*, INSIDE BAY AREA (Cal.), June 29, 2007; High Court: Districts May Not Use Race As An Admissions Criteria, Sch. Law Bulletin, August 1, 2007; Tony Cox, *Supreme Court Rejects Use of Race in Schools, Nat'l Public Radio*, June 28, 2007.

[4] Parents Involved, 127 S. Ct. at 2768. In essence, those school districts that have segregated on the basis of race and not removed the vestiges of past segregation may constitutionally use race-conscious measures for school assignments and ostensibly other purposes.

[5] Justice Kennedy did not join this part of Chief Justice Roberts' opinion. *Id.* at 2788. (Kennedy, J., concurring.)

School District No. 1 and the Jefferson County Public Schools.[6] In *Parents Involved I,* the Seattle school district implemented various tiebreakers for assigning students to oversubscribed high schools. Under the first tiebreaker, students with siblings in the oversubscribed school got assigned to the school. For the second tiebreaker—the tiebreaker challenged in the case—the school's racial demographics and the race of the applicant student were determinative.[7] Under the third tiebreaker, the geographic proximity of the school to the student's residence was dispositive. Parents Involved in Community Schools, a nonprofit corporation consisting of parents whose children were denied assignment and parents whose children may be denied assignment to the high schools of their choice in the future because of their race challenged the constitutionality of the racial tiebreaker under the Equal Protection Clause.[8] The Court found that the Seattle School

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[6] The cases are Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp.2d 1224 (W.D. Wash. 2001) [hereinafter *Parents Involved I*]; and McFarland v. Jefferson County Public Sch., 330 F.Supp.2d 834 (W.D. Ky. 2004) [hereinafter *McFarland I*]. Both cases involved school district efforts to achieve racial balancing, and since the Court's holding is applicable to both cases, the facts of each are not extensively discussed here.

[7] The goal of the school district for the 1999-2000 school year was to ensure racial balance in those schools not within 10 percent of the total white/nonwhite demographics of the district. *Parents Involved I*, 137 F. Supp. 2d at 1226. Approximately 40 percent of the district's students were white; the remaining 60 percent were classified by the school district as nonwhite for purposes of the school assignment plan. *Id.*

[8] Parents Involved in Community Schools also challenged the racial tiebreaker as a violation of Title VI of the Civil Rights Act of 1964 and the Washington Civil Rights Act. *Parents Involved I*, 137 F. Supp. 2d at 1226-27. The federal district court ruled that the racial tiebreaker did not violate the Washington Civil Rights Act. *Parents Involved I*, 137 F. Supp. 2d at 1240; *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved II*), 285 F.3d 1236 (9th Cir. 2002) (initially reversing the district court, based on the appellate court's interpretation of the Washington Consitution); and Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved III*), 294 F.3d 1084 (9th Cir. 2002) (withdrawing the opinion which initially reversed the district court). The Ninth Circuit Court of Appeals certified the state-law question to the state supreme court, Parents Involved in Cmty. Schs. v. Seattle

District had never operated segregated schools, nor been under a desegregation decree.[9]

Applying strict scrutiny, the district court found the racial tiebreaker narrowly tailored to achieve a compelling government interest.[10] A panel of the Ninth Circuit Court of Appeals reversed, ruling that while racial diversity and the avoidance of racial isolation are compelling interests, the racial tiebreaker was not narrowly tailored.[11] Rehearing the case en banc, the Ninth Circuit overruled the panel, finding the racial tiebreaker narrowly tailored.[12]

In *McFarland I*, Jefferson County Public Schools adopted a series of voluntary race-based assignment plans to bring the black enrollment in its non-magnet elementary schools to between 15 and 50 percent of the school population.[13] The Jefferson County Public Schools had run segregated public schools[14] and was consequently subjected to a desegregation decree in 1975.[15] The school district was under this decree until the year 2000 when a federal district court dissolved the decree, after finding that the

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Sch. Dist. No. 1 (*Parents Involved IV*), 294 F.3d 1085 (9th Cir. 2002), which held that the Washington Civil Rights Act only prohibits programs using race or gender to select less qualified applicants over more qualified ones. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved V*), 149 Wash. 2d 660 (2003) (en banc).

[9] *See Parents Involved*, 127 S.Ct. at 2747. The dissenting Justices disagreed with this however. *Id.* at 2812. ("The plurality's claim that Seattle was 'never segregated by law' is simply not accurate").

[10] *See Parents Involved I*, 137 F. Supp.2d at 1224.

[11] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved VI*), 337 F.3d 949 (9th Cir. 2004).

[12] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 *(Parents Involved VIII)*, 426 F.3d 1162 (9th Cir. 2005) (en banc).

[13] Approximately 34 percent of the district's students are black while a majority of the other 66 percent is white. *See* McFarland v. Jefferson County Public Schs., *330 F. Supp.2d 834, 840.*

[14] *See* Newburg Area Council, Inc. v. Board of Ed. of Jefferson County, 489 F.2d 925, 927 (6th Cir. 1974), vacated and remanded, 418 U.S. 918, reinstated with modifications, 510 F.2d 1358 (6th Cir. 1974).

[15] *See* Hampton v. Jefferson County. Bd. of Ed., 72 F. Supp. 2d 753 (W.D. Ky. 1999) (discussing desegregation lawsuits in Jefferson County) [hereinafter *Hampton I*].

school district had achieved unitary status.[16] The following year, the school district voluntarily adopted the race-based assignment plan challenged in this case. This plan assigns students to schools based on vacancies and the district's racial guidelines designed to ensure racial balance. If the assignment of a student to a school would result in racial imbalance of the school, the student was denied admission to the school.[17]

After her son was denied transfer to a school within proximity of his house because of racial imbalance, petitioner Crystal Meredith challenged the plan as a violation of the Equal Protection Clause. The federal district court ruled that the school district's plan was narrowly tailored to achieve a compelling interest in racially diverse schools.[18] The Sixth Circuit Court of Appeals affirmed.[19]

III. THE SUPREME COURT REVIEW

Parents Involved VII and *McFarland II*[20] were appealed to the United States Supreme Court. In both cases, the issue before the Court was whether a public school that had never run legally segregated schools (Seattle School District No. 1) or has been found to be unitary (Jefferson County Public Schools) may use racial classifications in assigning students to schools.[21]

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[16] *See* Hampton v. Jefferson County. Bd. of Ed., 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000) [hereinafter *Hampton II*].

[17] Subsequent to a student's assignment, however, he or she can apply to transfer; the transfer application can be denied due to oversubscription or yet still to avoid racial imbalance. *See* McFarland v. Jefferson County Public Schs., 330 F. Supp.2d 834, 844.

[18] *See id.* at 840.

[19] *See* McFarland v. Jefferson County Public Schs, 416 F.3d 513 (6th Cir. 2005) [hereinafter *McFarland II*].

[20] Crystal Meredith, one of the plaintiffs in McFarland I and II appealed the decision to the United States Supreme Court. Thus, in *Parents Involved*, the Supreme Court refers to the McFarland case decision appealed to the Court as Meredith v. Jefferson Cty. Public Schs. *See Parents Involved,* 127 S.Ct. 2738, 2747 and 2750.

[21] *See id.* at 2746.

The Court held that racial classifications for the purpose of achieving racial balancing are unconstitutional under the Equal Protection Clause. Chief Justice Roberts, Justices Alito, Kennedy, Scalia and Thomas made for the 5-4 judgment and the Court opinion. Justice Kennedy wrote an opinion concurring in part with the plurality opinion of Justices Thomas, Scalia, Alito and Chief Justice Roberts. Justice Thomas wrote a concurring opinion. Justice Breyer as well as Justice Stevens wrote dissenting opinions; Justice Breyer's dissent was joined by Justices Ginsburg, Souter and Stevens. We examine these opinions next, pointing out that the use of race-conscious measures by school districts is not all forbidden by the Justices.

Justice Kennedy, being the swing vote in the case, could play the pivotal role in a constitutional challenge to race-conscious measures. The dissenting Justices seem in favor of racial classifications in the context of schools, if used for beneficial purposes. Therefore, if Justice Kennedy votes with those Justices who dissented in *Parents Involved*, that would be adequate to uphold race-conscious measures against constitutional challenge. As demonstrated below, there is also a possibility that Chief Justice Roberts might be open to supporting race-conscious measures other than racial balancing. While the Chief Justice's vote would not be required for a majority to uphold race-conscious measures, it would be a "plus factor." In contextualizing the Court's opinion, it is important to keep in mind that the Court found classifications designed to achieve racial balancing unconstitutional in *Parents Involved*.[22] Chief Justice Roberts specifically emphasized this.[23] The various opinions in the case present some universal principles applicable to the Equal Protection racial classifications jurisprudence that could inform and help predict how the Court might analyze race-conscious measures challenged in the future. We identify these principles as part of the analysis of the opinions below.

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[22] *See id.* at 2753-54.
[23] *See id.* at 2766.

A. The Court Opinion

Chief Justice Roberts started out the Court opinion by iterating that Equal Protection Clause jurisprudence requires that racial classifications used to determine the distribution of government benefits or burdens must be reviewed under the strict scrutiny tier of constitutional review.[24] He declared that the Court had recognized two compelling reasons for school districts to use racial classifications: (i) remedying the effects of past intentional discrimination;[25] and (ii) enhancing diversity at the university

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[24] *See id.* at 2751-52. In support of this declaration that strict scrutiny applies to racial classifications used in the distribution of not only burdens but benefits as well, Chief Justice Roberts cited Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) in which the Court held that all racial classifications (including benign racial classifications), are subject to strict scrutiny. *Cf. id.* at 2816-17 (According to the dissenting Justices in *Parents Involved*, this holding in *Adarand* merely means that traditional strict scrutiny—i.e. strict scrutiny that is "strict in theory but fatal in fact" is applicable to exclusionary uses of racial classifications, while benign, beneficial or inclusionary uses of racial classifications are subject to strict scrutiny that is *not* "strict in theory but fatal in fact"). In other words, "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Id.* at 2817, (quoting Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003)). Explaining this distinction further, the dissenting Justices stated that "the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include.*" *Id.* (emphasis added). Castigating the plurality for seeking to apply strict scrutiny "strict in theory but fatal in fact" to inclusionary uses of racial classifications, the dissenting Justices stated: "Today's opinion reveals that the plurality would rewrite this Court's prior jurisprudence, at least in practical application, transforming the strict scrutiny test into a rule that is fatal in fact across the board. In doing so, the plurality parts company from this Court's prior cases, and it takes from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways." *Id.* at 2817-18 (internal quotes omitted).

[25] *Id.* at 2751-52, (citing Freeman v. Pitts, 503 U.S. 467 (1992)).

level,[26] specifically "[s]tudent body diversity ... not focused on race alone but encompass[ing] all factors that may contribute to student body diversity."[27] While Chief Justice Roberts' opinion only identified these two interests as compelling in the school context, the opinion does not foreclose the Court finding other interests to be compelling.[28] In other words, the identification of two does not make for exclusivity.

Turning to the facts of the case, the Court found that since the Seattle Public Schools had never been subject to a court-ordered desegregation decree nor segregated by law, the school

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[26] *Id.* at 2753 (citing *Grutter*, 539 U.S. 306). In his concurring opinion, Justice Kennedy seems to disagree with this part of the opinion limiting the compelling interest in diversity to higher education. *Id.* at 2793 (internal citations omitted) *See id.* (stating, "As the Court notes, we recognized the compelling nature of the interest in remedying past intentional discrimination in Freeman v. Pitts, and of the interest in diversity in higher education in *Grutter*. At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning"). *See also id.* at 2794 ("[T]o say that college cases are simply not applicable to public school systems in kindergarten through high school, this would seem to me wrong"; and "Seattle's plan, by contrast, relies upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race. If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application"). While the discussion of the compelling interest in student body diversity in higher education is included in the case as part of the majority opinion, to the extent it limits this interest to higher education, it is a plurality opinion.

[27] *Id.* at 2753 (internal citations omitted).

[28] *See id.* at 2752. (Chief Justice Roberts affirms this in stating, as a prelude to the two compelling interests identified in the case, that "*Without* attempting in these cases to set forth *all* the interests a school district might assert [as compelling], it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling." *Id.* (emphasis added) (alteration to original). The Chief Justice thereby acknowledges the possibility of other compelling interests for use of racial classifications in the distribution of burdens or benefits).

district had no compelling interest in remedying effects of past intentional discrimination.[29] Jefferson County Public Schools, on the other hand, had been subject to a desegregation decree until 2000 and been segregated by law.[30] According to the Court, however, dissolution of this decree and the coterminous finding that the school district had eliminated vestiges of past intentional discrimination meant the school district did not have a compelling interest in remedying effects of past intentional discrimination through its race-based plan.[31] A principle which emerges from this rationale is that those school districts which were previously segregated by law and are still subject to a desegregation decree could justify the use of race-conscious measures with the compelling interest in "remedying effects of past intentional discrimination."[32] In other words, as long as the "harm being remedied"[33] is "traceable to segregation,"[34] race-conscious measures might be upheld by at least a 5-4 Court. Per contra, once school districts attain unitary status, *Parents Involved* suggests that the Court would no longer recognize as compelling any school district's interest in remedying effects of past intentional discrimination.[35]

Chief Justice Roberts limited the compelling interest in student body diversity to the context of higher education.[36] As discussed below, however, Justice Kennedy disagreed with this limitation.[37] If the context of diversity is limited to higher education, race-conscious measures designed to achieve diversity

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[29] *Id.*

[30] *Hampton II*, 102 F. Supp. 2d at 360.

[31] *Parents Involved*, 127 S.Ct. at 2752 ("Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis").

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See id.* at 2753.

[36] *See id.*

[37] *See id.* at 2793. Justice Kennedy believes that the compelling interest in student body diversity is applicable to K-12 education as well.

in K-12 education cannot have a compelling interest in diversity.[38] Perhaps conceding the possibility of the student body diversity as a compelling interest in K-12 education, the Chief Justice took great pains to explain the nature and details of this interest,[39] suggesting

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[38] Moreover, the form of diversity the Court recognizes, at least in the context of admissions, is not one focused solely on race, as "there are many possible bases for diversity admissions" *Id.* at 2753. Examples include "admittees who [i] have lived or traveled widely abroad, [ii] are fluent in several languages, [iii] have overcome personal adversity and family hardship, [iv] have exceptional records of extensive community service, and [v] have had successful careers in other fields" *Id.*, quoting *Grutter*, 539 U.S. at 338. *See also id.*, quoting *Grutter*, 539 U.S. at 325 and University of California v. Bakke, 438 U.S. 265, 315 (1978) (opinion of Powell, J.) (stating that the compelling interest in student body diversity involves "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"). *See id.* at 2754 (suggesting that the Court endorses a broad notion of diversity in student admissions and faulting the plans under consideration in the case for the limited notion of diversity) ("Even when it comes to race, the plans here employ only a limited notion of diversity").

[39] In fact, the Chief Justice goes on to compare the admissions plan here to the University of Michigan undergraduate plan in Gratz v. Bollinger, 539 U.S. 244 (2003) (suggesting that if the plans in this case allowed for highly individualized consideration of applicants, it might be upheld by the Court). *See Parents Involved*, 127 S.Ct. 2753-54, quoting *Gratz*, 539 U.S. 276, 280 (O'Connor, J., concurring) (internal quotes omitted) ("Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here 'do not provide for a meaningful individualized review of applicants' but instead rely on racial classifications in a 'nonindividualized, mechanical' way"). Additionally, as part of Chief Justice Roberts' comparative analysis of K-12 and higher education jurisprudence, he suggests that student body diversity might have been a compelling interest in *Parents Involved* if the review of applicants had been highly individualized. After emphasizing the paramountcy of highly individualized review of applicants to a compelling interest in diversity, he stated: "*In the present cases, by contrast*, race is not considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas and viewpoints;' race, for some students, is determinative standing alone." *Parents Involved*, 127 S.Ct. 2753 (emphasis added). This extensive comparative analysis seems to confirm this concession. *Cf.* Chief Justice Roberts uses a similar rationale to express the concession inherent in an extensive discussion of a point in responding to Justice Breyer's dissenting opinion: "Certainly if...the stark use of race in these cases were as established as the dissent would have it, there

that if race is only "part of a highly individualized, holistic review,"[40] the use of racial classifications in admissions will be constitutional.[41]

Chief Justice Roberts stated that the justification for limiting diversity as a compelling interest to higher education is "the expansive freedoms of speech and thought associated with the university environment, [and because] universities occupy a special niche in our constitutional tradition."[42] A major problem with this justification is that it fails to explain why freedom of speech is not expansive in the K-12 environment or why universities, and not K-12 schools, occupy a special niche in constitutional tradition.[43] Therefore, if this justification is critically parsed, the Chief Justice might see reason to extend it to K-12 education.

Under strict scrutiny analysis, even when classifications serve a compelling interest, the means chosen to serve the compelling interest must be narrowly tailored.[44] *Parents Involved*, provides principles of the "narrow tailoring" requirement which

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would have been no need for the extensive analysis undertaken in *Grutter*." *Id.* at 2764.

[40] *Id.* at 2753.

[41] The emphasis on the use of race in admissions as only part of a "highly individualized" review is evident throughout the Court's opinion. *See, e.g., id.* (quoting *Grutter*, 539 U.S. at 337) ("[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount")). While individualized review is highly pertinent in the context of admissions, other race-conscious measures could be designed to be more global and generalized. In other words, while admissions allow for individualized consideration of each student, other race-conscious measures might not necessarily be tied to individualized consideration of each student. Moreover, admissions affect students on a highly individualized level as a particular student is specifically individually rejected or admitted.

[42] *Id.* at 2754.

[43] Justice Thomas, in his concurring opinion, agrees, adding that "education in the elementary and secondary environment generally does not involve the free interchange of ideas thought to be an integral part of higher education." *Id.* at 2781-82. However, he also fails to give a rationale beyond this conclusory statement.

[44] *See id.* at 2752.

could help illuminate how the Court would analyze future uses of race-conscious measures in schools. The Court found that the race-based assignment plans in Seattle and Jefferson County were not narrowly tailored because they had minimal impact on student assignments.[45] For example, the Court noted that "Jefferson County's use of racial classifications has only a minimal effect on the assignment of students."[46] Additionally, "[a]s Jefferson County explains, the racial guidelines have minimal impact in this process, because they mostly influence student assignment in subtle and indirect ways."[47] Accenting this "minimal effect/impact" principle of the narrow tailoring requirement, the Court stated that "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the *necessity* of using racial classifications."[48] It seems that race-conscious measures which impact on equal educational opportunity are neither subtle nor indirect and clearly beyond minimal might satisfy this "minimal effect/impact" principle articulated in *Parents Involved;* if they also satisfy a second principle, discussed next.

The second principle of narrow tailoring identifiable from the case is the "serious, good faith consideration of workable race-neutral alternatives."[49] Thus, school districts might seek to document serious good-faith consideration of workable race-neutral alternatives, if their race-conscious measures are to fully satisfy the "narrow tailoring" requirement. As the Court[50] noted in

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[45] *See id.* at 2759. *See id.* at 2759-60 (stating with respect to Seattle's plan: "Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools"; "[i]n over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no difference").

[46] *Id.* at 2760 (stating as well that "Jefferson County estimates that the racial guidelines account for only 3 percent of assignments.").

[47] *Id.* (internal quotation and citation omitted).

[48] *Id.* (emphasis added). The "necessity" language is indicative of the narrow tailoring requirement.

[49] *Id.* (quoting *Grutter*, 539 U.S. at 339).

[50] *See Grutter*, 539 U.S. at 339 and *Parents Involved*, 127 S.Ct. at 2760 (emphasis added).

Grutter, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[51] With respect to the student assignment plans in *Parents Involved*, the Court found each school district gave "little or no consideration"[52] to race-neutral alternatives.[53] Therefore, while the Court does not expect school districts to consider every conceivable race-neutral alternative, it expects them to give more than "little or no consideration" to the alternatives.

Another principle of narrow tailoring the Court applied was "the diversity of racial classification used."[54] For example, in the *Parents Involved* case, the Court declared that "even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County."[55] In essence, the Court would likely reject plans using binary racial classifications. School districts seeking to use race-conscious measures would increase their chances of surviving judicial scrutiny if their plans use "multivariate" racial classifications.[56] In other words, school districts might be better off not relying on strict binary categories of white versus nonwhite as in the Seattle plan or black versus "other" as in the Jefferson County plan.[57]

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[51] *Parents Involved*, 127 S.Ct. at 2760 (emphasis added).

[52] *Id,*

[53] *Id.* ("[I]n Seattle several alternative assignment plans...were rejected with little or no consideration ... Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications") (internal quotes omitted).

[54] *Id.* at 2754.

[55] *Id.*

[56] *Id.* In fact, in rejecting the binary racial classifications used in the Seattle and Jefferson County plans, the Court quoted Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 610 (1990), stating that "We are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals." *Id.*

[57] The same reasoning would apply if the binary classification of white versus Hispanic or white versus Asian American was used in a race-conscious plan.

B. The Plurality Opinion

The plurality opinion addressed the other interests the school districts presented as compelling interests in justification of their race-based plans. Seattle contended that it had compelling interests in: (i) decreasing racial concentration in its schools;[58] and (ii) in assuring access to the best schools for its nonwhite students, despite racially segregated housing patterns.[59] Jefferson County, on the other hand, claimed that it had a compelling interest in educating students in a racially-integrated environment.[60] The Court rejected these as compelling interests.

Both school districts claimed that: (i) educational benefits; and (ii) socialization benefits result from these compelling interests. Key to the plurality's rejection of these as compelling interests was the disputed nature of the evidence about the interests.[61] For example, the plurality expressed its unwillingness to accept the asserted interests because of the disputed nature of the evidence over whether racial diversity in schools actually has "a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits."[62] In essence, school districts that are able to document that their race-conscious measures have marked impact on education, measured by objective yardsticks, might have stronger confidence in gaining support from the plurality. Also, the less disputed the evidence in the "battle of experts" over whether race-conscious measures actually produce the educational and social benefits asserted by a school district, the

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[58] *See id.* at 2755.

[59] *See id.*

[60] *See Id.* According to the plurality racial balancing, racial integration, racial proportionality, and avoidance of racial isolation are all synonyms and cannot be relabeled as racial diversity to create a different meaning—diversity—while tied to racial demographics. *Id.* at 2758-59. *See also id.* at 2779 (Justice Thomas, concurring) (including "environmental reflection" as another synonym for racial balancing); *id.* at 2787 (including "racial engineering").

[61] *Id.* at 2755; *see also id.* at 2776-79 (Thomas, J., concurring).

[62] *Id.*

more likely it seems the plurality might support their use of race-conscious measures.

Besides, the plurality found that the race-based plans were not narrowly tailored to the educational and socialization benefits the school districts asserted would result from racial diversity. The failure of the school districts to link the plans to "any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits"[63] was evidence that the plans were not narrowly tailored. In essence, if race-conscious measures are linked to a pedagogic concept, rather than merely premised on district racial demographics, the measures might satisfy the "narrow tailoring" requirement.[64]

School districts might thus seek to ensure that their race-conscious measures are tailored to achieve asserted educational or socialization benefits, as opposed to racial balancing in itself.[65]

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[63] *Id.*

[64] *See id.* at 2755-56.

[65] Another indicium of narrow tailoring is the identification of a "meaningful number necessary to achieve a genuinely diverse student body." *Id.* at 2756-57. A problem the plurality found with the plans in *Parents Involved* with respect to this indicium included the fact that the numbers identified by the school districts as necessary for racial balancing sometimes seemed inconsistent, and consequently not meaningful, with respect to diversity. For example, the plurality notes that Seattle failed to show "how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as *diverse* under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated." *Id.* at 2756. As further example of this failure to demonstrate meaningful numbers for its goal of diversity, the plurality cited Franklin High School in Seattle, which racial demographics (below) the plurality characterized as substantially diverse with or without the tiebreaker "under any definition of diversity." *Id.* at 2757:

Underscoring this principle, the plurality noted with respect to the plans in this case, for example, that if

> the racial demographics in each district—whatever they happen to be—drive the required diversity numbers[,] [t]he plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead, the plans are tailored ... to the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics.[66]

Racial Demographics	Asian-American	African-American	Latino	Native-American	Caucasian
Without Racial Tiebreaker	39.6 %	30.2%	8.3%	1.1%	20.8%
With Racial Tiebreaker	30.3%	21.9%	6.8%	0.5%	40.5%

Furthermore, the plurality stated that meaningful numbers to diverse student bodies must be forward-working toward "the level of diversity that provides the purported benefits," rather than backward-working "to achieve a particular type of racial balance." *Id.* This might suggest also that race-conscious measures which are forward-working toward equal educational opportunity might have a better chance of surviving scrutiny. Interestingly enough, Justice Thomas in his concurrence, though fully agreeing with the plurality opinion, ("I wholly concur in THE CHIEF JUSTICE's opinion") (emphasis in original), uses what seems to be the same term in an ostensibly contradictory way to the Chief Justice's. *Id.* at 2768. Using the term, forward-looking, he chides the school districts for providing forward-looking interests, rather than remedial (backward-looking) interests as justifications for their plans, thus finding that the school districts had no constitutionally permissible interest in remedying past segregation or prior discrimination for which they were individually responsible. *Id.* at 2772.

[66] *Id.* at 2755-56 (internal quotes omitted). The fact "that the level of racial diversity necessary to achieve the asserted educational benefits happens to

In other words, what the plurality really objects to is racial balancing for its own sake.

School districts might be well-advised to ensure that any race-conscious measures adopted have a logical stopping point. In addition to the school districts' failures to satisfy the "narrow tailoring" principles above, the plurality rejected the race-based plans in *Parents Involved* as not narrowly tailored because there was no logical stopping point to the plans.[67] As evidence of this lack of a logical stopping point, the plurality noted that with eternal demographics shifts, so would the school districts' definition of racial diversity. Thus, school districts might want to avoid tying their race-conscious measures to demographic shifts. Moreover, as soon as the race-conscious measure achieves its purpose, mechanisms must be created in the plan to assure the measure lapses. School districts might also consider formative evaluations of their measures to ensure that the logical stopping point is triggered once the asserted interest(s) is achieved.

An additional reason the plurality rejected the Seattle plan under the "narrowly tailored" requirement was the "[t]he sweep of the mandate claimed by the district."[68] This mandate broadly encompassed the remedying of past *societal* discrimination which the Court has rejected as justification for race-conscious actions.[69] Societal discrimination is defined as "discrimination not traceable to its [school district's] own actions."[70] The lesson from this is that race-conscious measures that are not designed to remedy *societal*

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coincide with the racial demographics of the respective school districts," *Id.* at 2756, does not *per se* make a race-based plan not narrowly tailored, as long as the evidence of this coincidence is presented. *Id.* It is not sufficient to "simply assume that the educational benefits [asserted] track the racial breakdown of the district." *Id.*

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

[68] *Id.*

[69] *Id (*citing Croson, 488 U.S. at 498-99. *See also* Grutter, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

[70] *Id.* (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 288 (1986) (Connor, J., concurring in part and concurring in judgment)).

discrimination have a greater chance of surviving "narrow tailoring" muster. School districts might be helped to design their race-conscious measures as forward-working measures to attain equal educational opportunity.[71]

Strong evidence that race-conscious measures are not all unconstitutional contrary to widespread belief is evident in the following portion of the plurality opinion:

> other means—*e.g.*, where to construct new schools, how to allocate *resources among schools*, and which academic offerings, to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta.[72]

In essence, the plurality unequivocally stated that *Parents Involved* was not an invalidation of all race-conscious measures. It should also be welcome optimism that the plurality opinion concludes on this positive note, after copiously castigating the school districts for the use of racial-balancing plans.[73]

C. Justice Thomas' Concurrence

Of all the opinions filed in *Parents Involved*, Justice Thomas' is the one unmistakably against all uses of race-conscious measures. This is especially evident in his persistent and inexorable view that the Constitution is color-blind, precluding all uses of racial classifications.[74] Justice Thomas believes that giving school

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[71] The plurality also stated that school districts must not be given deference to use racial classifications for the distribution of burdens or benefits; rather, school districts have the burden of justifying their race-based policies. This is contrary to the dissenting opinion. *See infra* Part III.F.

[72] *Parents Involved*, 127 S. Ct. at 2766 (emphasis added).

[73] *Id.*

[74] *See id.* at 2768, 2782 (Thomas, J., concurring) (noting the view that the Constitution is color-blind was first articulated by Justice John Marshall Harlan (citing *Plessy*, 163 U.S. 559 (Harlan, J. dissenting))); *see also Grutter*, 539 U.S.

districts deference to implement race-conscious measures would be a throwback to the segregationist expedients.[75]

The crux of Justice Thomas' rejection of the racial balancing plans and the sole temper of his color-blind view is his distinction between racial imbalance and segregation.[76] While he would allow the use of race-conscious measures to remedy past segregation, he is certainly opposed to them for purposes of racial balancing. In the context of public schools, Justice Thomas defines segregation 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."[77] Au contraire, "[r]acial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large."[78] Furthermore, even though racial imbalance could result from past *de jure* segregation, innocent actions of private individuals such as

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at 378 (Thomas, J., concurring in part and dissenting in part).; *see also Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part and dissenting in part). The view that the Constitution is color-blind was first articulated by Justice John Marshall Harlan in his dissenting opinion in *Plessy*. Justice Kennedy believes this color-blind view is merely an aspiration and "cannot be a universal constitutional principle" in the real world. *Parents Involved*, 127 S. Ct. at 2792.

[75] *See Parents Involved*, 127 S. Ct. 2738, 2768 (2007) (Thomas, J., concurring).

[76] Fundamentally, Justice Thomas believes that "as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional." *Id.* at 2770-71. In making the distinction between racial imbalance and segregation, Justice Thomas uses the words segregation and resegregation interchangeably. Although he uses these words interchangeably, when distinguishing resegregation (or segregation) from *past* segregation, he appends the word "past" or "prior." While Chief Justice Roberts' opinion for the Court echoes this distinction between racial imbalance and segregation, Justice Thomas is the only one to make this explicit distinction of the terms. *Id.* at 2752. According to Justice Thomas, "the further we get from the era of state-sponsored racial segregation, the *less* likely it is that racial imbalance has a *traceable* connection to any prior segregation." *Id.* at 2773 (citing Freeman v. Pitts, 503 U.S. 467, 496 and Missouri v. Jenkins, 515 U.S. 70, 118 (1995) (Thomas, J., concurring)).

[77] *Id.* at 2769 (Thomas, J., concurring) (quoting Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 6 (1971) (internal quotes omitted)).

[78] *Id.*

voluntary decisions about residential locations[79] mostly foment racial imbalance.[80] This view and distinction accounted for Justice

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[79] *Id.* (emphasis in original). In Justice Thomas' view, to constitute *de jure* desegregation, "there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Id.* at 2771 n.4. *Cf. id.* at 2810 (dissenting justices) (stating that there is futility in "looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of "race-conscious" criteria" and "our predecent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws"). According to the dissenting Justices, the *de jure/de facto* distinction only serves to distinguish "what the Constitution *requires* school boards to do, not what it *permits* them to do." *Id.* at 2823 (emphasis in original). *See also id.* at 2823-24 (Breyer, J., dissenting) (explaining that "[a]s to what is *permitted,* nothing in our equal protection law suggests that a State may right only those wrongs that it committed. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is *voluntarily* allowed to do. That is what is at issue here ... significant as the difference between *de jure* and *de facto* segregation may be to the question of what a school district *must* do, that distinction is not germane to the question of what a school district *may* do") (emphasis in original))). Race-conscious measures voluntarily implemented by school districts should fall under the "permitted" as opposed to "required."

A distinction Justice Thomas makes between past *de jure* desegregation and racial imbalance goes to their logical stopping point as remedies; *see id.* at 2773. ("Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. Unlike *de jure* segregation, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing demographics. Thus, racial balancing will have to take on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point"). An incidental concern to that about the logical stopping point expressed in his opinion is the challenge of determining the proper scope of remedy if there is no logical stopping point. As noted earlier, however, school districts might enhance the chance of surviving scrutiny if their race-conscious measures are designed with logical stopping points, and not intended to be indefinite in scope or duration. In other words, the race-conscious measures should not be "ageless in their reach into the past, and timeless in their ability to affect the future," *Id.* at 2775 (quoting *Wygant*, 476 U.S. at 276). Arguably, a

Thomas' conclusion that, even if, the schools in Seattle and Jefferson County, might be in danger of racial imbalance, they were not in danger of resegregation.[81] Building on the distinction, Justice Thomas would allow the use of racial classifications to remedy *past* segregation in two "narrowly defined"[82] instances: (i) a school previously segregated by law, to remedy the prior segregation;[83] or (ii) a government agency seeking to remedy past discrimination for which that agency was responsible.[84] Under either exception, however, he would not defer to the school district, even if the district is acting in good faith.[85] There is optimism, however, for school districts falling under any of the two narrow exceptions Justice Thomas recognizes, for at least he indicates he is responsive to such uses of racial classifications.

Further asperity essential to gaining Justice Thomas' vote is evident in his requirement that school districts and other government agencies justify the need for racial classifications with a "strong basis in evidence."[86] To satisfy this standard, specific findings must be made on each of the following:[87] (i) the extent of

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logical stopping point might be the point of substantial equal educational opportunity.

[80] *Parents Involved*, 124 S. Ct. at 2769. Justice Thomas believes that school boards have no interest in using race to remedy past segregation that is not related to education. *See id.* at 2776 ("school boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as housing patterns, employment practices, economic conditions, and social attitudes"). Thus, in school districts where race-conscious measure is grounded in a proffered interest in remedying such "sundry consequences", Justice Thomas' vote might as well be counted as a negative in a constitutional challenge to the measure.

[81] *See id.* at 2769.

[82] *See id.* at 2770.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 2772 (quoting *Croson*, 488 U.S. at 500).

[87] Justice Thomas does not seem to limit the findings to a judicial finding or a jury finding, as long as the finding is in the record. He implies that the school district making the specific findings in the record might suffice. *See id.* at 2772 ("Neither school district has made any such specific findings").

the school district's past racial discrimination;[88] (ii) the scope of injury;[89] and (iii) "the necessary remedy [which] must be more than inherently unmeasurable claims of past wrongs."[90] In *Parents Involved*, Justice Thomas found the record was without strong basis in evidence to support any of these findings;[91] consequently, he declared the race-based plans unconstitutional under his general rule.[92]

The rigor of Justice Thomas' requirements for using racial classifications does not stop with those described earlier. He would also employ a very narrow and stringent test for determining what qualifies as a "compelling interest" under the strict scrutiny standard: "*only* those measures the State must take [i] to provide a bulwark against anarchy ... or [ii] to prevent violence and [iii] a government's effort to remedy past discrimination for which it is responsible constitute compelling interests."[93] It thus should be no surprise that this acerbic test led him to conclude that the school districts have not contended, "*nor could they,*"[94] that they had compelling interests for the plans under his test.[95] Under this test, race-conscious measures would have little chance of surviving Justice Thomas' strict scrutiny.

The apercu is that the harsh principles for reviewing racial classifications in Justice Thomas' concurrence seem to be the result of his pertinacious adherence to the view that the Constitution is color-blind which he basically interprets as a

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[88] *Id.*, at 2772 (quoting *Croson*, 488 U.S. at 504).
[89] *Id.* (quoting *Croson*, at 505).
[90] *Id.* at 2772 (quoting *Croson*, at 505-06) (internal quotes and citations omitted). Justice Thomas is amenable to upholding racial balancing as "a constitutionally permissible remedy for the discrete legal wrong of *de jure* segregation." *Id.* at 2773 (emphasis in original).
[91] *Parents Involved*, 127 S. Ct. at 2772.
[92] *See* text accompanying note 72, *supra*, for Justice Thomas' general rule.
[93] *Parents Involved,* 127 S.Ct. at 2782 (quoting *Grutter*, 539 U.S. at 351-53 (Thomas, J., concurring in part and dissenting in part)) (emphasis added) (internal quotes omitted).
[94] *Id.*
[95] *Id.*

foreclosure of all uses of race, as evident in the principles identified from his opinion herein and his general rule articulated *supra*.[96] In the final analysis, therefore, the lesson from Justice Thomas's concurrence in *Parents Involved* is that his vote is unlikely to favor race-conscious school measures in a constitutional challenge except in the two narrow exceptions discussed herein.

D. Justice Kennedy's Concurrence

Justice Kennedy's concurrence provides the greatest optimism for the use of race-conscious measures. Even while clearly opposed to racial balancing for its own sake, he is amenable to the use of race-conscious measures.

Unlike the plurality, Justice Kennedy believed that both the Seattle and Jefferson County school districts had compelling interests in the use of the race-based assignment.[97] According to Justice Kennedy, avoidance of racial isolation is a compelling interest.[98] Additionally, he unequivocally stated that "diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[99] He described this compelling interest in diversity in K-12 education as an interest in "a diverse student body, one aspect of which is its racial composition."[100] Justice Kennedy emphasized the importance of the two compelling interests in declaring that:

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[96] *Id.* at 2782-83. *See also supra* text accompanying note 72. Further example of this harsh principle is his statement that "no contextual detail—or collection of contextual details—can provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." *Parents Involved*, 127 S.Ct. at 2786.

[97] *Id.* at 2788 (Kennedy, J., concurring in part and concurring in judgment).

[98] *Id.* at 2797.

[99] *Id.* at 2789.

[100] *Id.* ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition"); *see also id.* at 2797. This is clearly different from the plurality

> This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. *Likewise*, a district may consider it a compelling interest to achieve a diverse student population.[101]

This, in spite of his belief that the same traditional strict scrutiny standard the plurality relied on is applicable, and not some diluted version.[102]

To satisfy Justice Kennedy's "narrow tailoring" inquiry, school districts might be well-advised to have a "thorough understanding of how a [race-based] plan [they seek to implement] works."[103] In the context of race-based student assignments, for example, this means school districts "must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program."[104] The Jefferson County Public Schools fell short in this regard.[105] Evidence of the school district's lack of thorough understanding of its plan can be found in various internal inconsistencies in the plan; Justice Kennedy found the district was unable to demystify these internal inconsistencies.[106]

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opinion which limits the compelling interest in student body diversity to higher education. He also recognizes a compelling interest in avoiding racial isolation. *Id.* at 2797.

[101] *Id.* at 2797 (emphasis added). The word "likewise" highlights the fact that Justice Kennedy views diversity and avoidance of racial isolation as separate compelling interests.

[102] *Id.* at 2789. *See also* text accompanying note 24, *supra.*

[103] *Id.*

[104] *Id.*

[105] See *id.*

[106] *Id.* As example of this internal inconsistency, Justice Kennedy pointed out that while Jefferson County stated that it denied the petitioner's son's kinder-

A lack of "thorough understanding" of how a race-conscious measure works would also be evident from a school district's use of "broad and imprecise"[107] terms to describe the measure. For example, Justice Kennedy stated that Jefferson County did not have a "thorough understanding" of how its plan worked because in describing how the plan worked, it did so in "broad and imprecise"[108] terms. Seemingly, perspicuity on the following non-exclusive factors might have made the classifications not "so broad and imprecise that they cannot withstand strict scrutiny"[109]: (i) "who makes the decisions";[110] (ii) "what if any oversight is employed";[111] (iii) the precise circumstances in which race will determine an assignment;[112] and (iv) "how it is determined which of two similarly situated children will be subjected to a given race-based decision."[113] The lesson for school districts is that Justice Kennedy would want them to ensure that any race-based plans they seek to implement *not* be "broad and imprecise" nor internally inconsistent, as Jefferson County's plan.[114] These are indicia he would consider in determining the

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garten transfer request under its race-based guidelines, the school district also stated that the guidelines are not applicable to kindergartens. *Id.*

[107] *Parents Involved, 127 S. Ct.* at 2790.

[108] *Id.*

[109] *Id.* To make these factors applicable to race-conscious measures, one might substitute the word "measure" for "assignment."

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] For more of Justice Kennedy's findings on the Jefferson County plan's internal inconsistencies, *see id.* (discussing the internal consistencies and characterizing them as "competing propositions" and "far-reaching, inconsistent and *ad hoc*"). The internal inconsistencies as well as the imprecise descriptions of the plan made Justice Kennedy conclude the plan was broadly untailored. *Parents Involved*, 127 S.Ct. at 2789-90. Even though Justice Kennedy found Seattle's plan to be less imprecise *than* Jefferson County's, *Id.* at 2790, it was nonetheless imprecise and thus not narrowly tailored because the district "failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as white, it has employed the crude racial categories of white and non-white as the basis for its assignment decisions." *Id.*

district's thorough understanding of race-conscious measures, a determination he considers crucial to the narrow tailoring analysis. The need for perspicuity in the design of race-conscious measures is especially important for school districts, because "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State."[115]

School districts seeking to implement race-conscious measures might find optimism in Justice Kennedy's belief that the Constitution does not forbid school district efforts to respond to "*de facto* resegregation in schooling."[116] Further optimism for schools seeking to use such measures for equal educational opportunity is unmistakably evident in his statement that "[s]chool districts can seek to reach *Brown's* objective of equal educational opportunity."[117] Justice Kennedy recognizes equal educational opportunity as a legitimate government interest[118] and maybe even as a compelling interest.[119]

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at 2790-91 (internal quotes omitted). Thus, the racial categories used for the chosen measure of the school district relative to the racial composition of the district might be an additional factor to those identified above (However, even then, the school district must explain why and how the chosen racial categories further its goals. *Id.*). As mentioned earlier, Justice Kennedy noted that the factors are not exhaustive *Id.* at 2790-91; the important thing is to ensure that the race-conscious measure is as precise *Id.*; what would constitute precision for a pertinent race-conscious measure is yet a mystery until a constitutional challenge to that measure is presented to a court. Cf. *id.* at 2829 (Breyer, J., dissenting) (stating that the imprecisions referred to are "failures of explanation, not of administration" and therefore should not affect the legal determination of narrow tailoring).

[115] *Id.* at 2790.

[116] *Id.* at 2791. Unlike Justice Thomas, Justice Kennedy does not seem to distinguish voluntary separation via housing patterns, etc. from resegregation.

[117] *Id.* Additionally, he stated that school districts are not required to accept racial isolation as the status quo. *Id.*

[118] *Id.* ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race"). While "legitimate interest" is clearly a requirement of the rational basis standard of review, Justice Kennedy is fully aware that strict scrutiny is applicable to racial classifications as he himself stated, *Id.* at 2789. What is unclear is whether in *this* particular statement he was embracing equal

Perhaps, one of the two greatest sources of hope for school districts' use of race-conscious measures in Justice Kennedy's concurrence comes from his following statement: "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."[120] He not only welcomes the use of race-conscious measures, but also confers discretion in the devise of measures to school districts.[121]

One thing school districts must keep in mind is that any race-conscious measure they devise must deal with the problems being addressed in a general way, without *individual* typing by race.[122] In essence, what Justice Kennedy condemns is not typing

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educational opportunity as a compelling interest under strict scrutiny; especially, given the fact that what the plurality statement he was criticizing stated that the disputed nature of the evidence made the interest in equal educational opportunity proffered by the school district not *compelling*. Even if *this* particular statement was not an embrace of equal educational opportunity as a compelling interest, as noted below, Justice Kennedy seems to recognize this interest as compelling.

[119] *Id.* In his analysis of the compelling interest strand of strict scrutiny, Justice Kennedy clearly stated that school districts can constitutionally pursue an interest in providing equal educational opportunity. *Id.* at 2792.

[120] *Parents Involved,* at 2972 (emphasis added).

[121] *See id.* ("If school authorities are concerned ... they are free to devise race-conscious measures").

[122] *Id.* Justice Kennedy's opinion emphasizes the fact that race-conscious measures must be designed to address problems in a general way without individual typing by race. The key word is "individual." Kennedy believes that decisions about admissions are very specific at the individual level, e.g., specific individual students are individually denied admission to specific schools based on that specific individual's race. Thus, admissions decisions based on race would necessarily involve *individual* typing by race. Illustrative of his disapproval of plans that individually type students by race, Justice Kennedy repeatedly emphasizes the words "each" and "individual" to convey the highly personal and individual level use of race which he disapproves. *See, e.g., id.* at 2792 ("Assigning to each student a personal designation according to a crude

by race, but rather *individual* typing by race.[123] That is the reason Justice Kennedy is willing to allow school districts to pursue compelling interests in student body diversity or equal educational opportunity by typing by race.[124] While school admission decisions

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system of *individual* racial classifications is quite a different matter"). *See, also, id.* ("Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition . . . individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest"). Thus, while Justice Kennedy strongly disapproves of individual typing by race, he will allow it "as a last resort to achieve a compelling interest."*Id.* at 2972. He seems more willing to accept it even as this last resort in cases of *de jure* as opposed *de facto* discrimination, though he does not foreclose it in cases of *de facto* discrimination, as long as alternatives to individual treatment by race are considered. *See id.* at 2796 ("The Court has allowed school districts to remedy their prior *de jure* segregation by classifying *individual* students based on their race. The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on *individual* racial classifications. The cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here") (internal citations omitted).

[123] *Parents Involved*, 127 S.Ct. at 2792. Individual typing would include, for example, the "assignment of individual students by race" *Id.*, with the key emphasis on the impact of the typing on the *individual* student at a personalized level.

[124] *Id.* ("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* [i.e. typing by race] 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") (emphasis added). To reiterate this important point in yet another way,, it seems all that Justice Kennedy would prohibit are mechanisms or means that *individually* type by race, i.e. mechanisms that "lead to different treatment based on a classification that tells *each* student he or she is to be defined by race." *Id.* (emphasis added). It is very important to keep this in mind to fully contextualize Justice Kennedy's opinion.

and use of race in admissions that are highly personal and individualized to each student affected, race-based measures that are more global and at a generalized level might be looked at more favorably by Justice Kennedy. Optimism lives on even for race-conscious measures which individually type by race, if they are "a last resort to achieve a compelling interest."[125]

The second of the two greatest sources of hope in Justice Kennedy's concurrence can be found in the following statements:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.[126]

It should be welcome news to school districts that he seems to endorse a wide range of means; moreover, the list is not exclusive.[127] School districts might also be encouraged to learn that Justice Kennedy is not likely to subject such means as identified above to strict scrutiny because they do not involve individual typing by race.[128] Two essential points that might better inform school districts seeking to implement race-conscious measures

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[125] *Parents Involved*, 127 S.Ct. at 2792.

[126] *Id.*

[127] *Id.*

[128] *Id*, ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.*, citing *Bush v. Vera*, 517 U.S. 952, 958 (1996)).

emerge from this analysis. First, the use of race-conscious measures in a generalized fashion, i.e., global approach, might not be subjected to strict scrutiny under a Justice Kennedy analysis. While it remains a mystery whether he would apply intermediate scrutiny or some modified version of rational basis review,[129] without question, either would be more favorable for race-conscious measures than strict scrutiny. Secondly, even if the race-conscious measure involves individual typing by race, in which case strict scrutiny applies, as a last resort to satisfy a compelling interest, Justice Kennedy might find the means constitutionally permissible.[130]

Justice Kennedy subscribes to the "minimal effect/impact" principle of the narrow tailoring requirement.[131] Therefore, to survive Justice Kennedy's narrow tailoring analysis, school districts might seek to ensure that the race-conscious measure has more than a minimal impact. Furthermore, school districts might have a more favorable audience with Justice Kennedy if their race-conscious measure comprehends "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[132] Justice Kennedy concludes on an optimistic note, urging school districts to be creative in the use of race-conscious measures to achieve compelling interests.[133] In all, Justice Kennedy's concurrence seems to indicate an opportunity

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[129] Justice Kennedy is ostensibly opposed to the use of rational basis in reviewing racial classifications, *see Parents Involved*, 127 S.Ct. at 2793.

[130] Recall, compelling interests Justice Kennedy recognizes include student body diversity and equal educational opportunity. *Id.* at 2791, 2793.

[131] *See* discussion of this principle under Court Opinion, section III.A, *supra*; *see also Parents Involved*, 127 S.Ct. at 2760.

[132] *Id.* at 2793. He amplified, however, that this approach "would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools." *Id.* In fact, this reference to "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component" is actually a reference to the use of race as a plus factor in admissions which the Court approved of for higher education admissions in *Grutter*.

[133] *Id.* at 2797.

for the benignant swing vote in a constitutional challenge to race-conscious measures which satisfy the principles we have identified from his opinion in this article.

E. Justice Steven's Dissent

While in absolute accord with Justice Breyer's opinion for the dissenting Justices,[134] Justice Stevens wrote separately to register his condemnation of the plurality's decision to subject all racial classifications to strict scrutiny.[135] The crux of Justice Steven's dissent lies in the fact that he would apply strict scrutiny to racial classifications that exclude members of a minority group on account of race and a less stringent standard to classifications designed to include members of a minority group, especially in the context of education.[136] The actual substance of the less stringent standard he would apply remains a mystery.[137] One thing we do know is that Justice Breyer condemns "a rigid adherence to tiers of scrutiny [because it] obscures *Brown's* message."[138] Another purpose Justice Stevens recognizes for inclusion is use of race-conscious measures to employ more minority teachers.[139] In sum, Justice Steven's dissent seems positive for school districts seeking to use race-conscious measures for purposes of inclusion, even without a finding of past intentional discrimination.[140]

F. The Dissenting Opinion

The dissenting opinion, written by Justice Breyer, reveals that the four dissenting Justices would permit school districts to

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[134] *See infra* section III.F.
[135] *Parents Involved*, 127 S.Ct. at 2798-99.
[136] *Id.* at 2798, n.3.
[137] However, we do know from Justice Breyer's opinion for the dissenting Justices that this less stringent standard is clearly *not* "strict in theory, but fatal in fact." Id. at 2817.
[138] *Id.* at 2799.
[139] *Id.* at 2798, nn. 3-4.
[140] *Id.* at 2798-99.

use race-conscious measures and would scrutinize such measures under a less stringent standard of review than traditional strict scrutiny.[141] This follows from their recognition of constitutional merit for inclusionary race-conscious measures as opposed to disfavored exclusionary measures.[142] Thus, it is no surprise that they found the race-based plans in *Parents Involved* to be inclusionary plans that were narrowly tailored to serve compelling interests.[143] According to the Justices, "[a] longstanding and

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[141] *See id.* at 2816-17 (explaining that while foundational cases apply the traditional "strict scrutiny test in a manner that is 'fatal in fact' only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*") (emphasis in original).

[142] *See id.* at 2815 ("*Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion ... There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together ... Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter") (internal quotes and citations omitted). *See also id.* ("Sometimes Members of this Court have disagreed about the degree of leniency that the Clause affords to programs designed to include ... But I can find no case in which this Court has followed Justice THOMAS' colorblind approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races") (emphasis in original) (internal quotes and citations omitted).

[143] *Id.* at 2800, 2802, 2820-31. Unlike the plurality, the dissenting Justices believe that the distinction between de jure and de facto discrimination is futile. They also believe that the Constitution does not rule out all race conscious programs that attempt to create racially diverse –instead of racially segregated – schools. *See id.* at 2802-11 (The critical point is that "[a] court finding of *de jure* segregation cannot be the crucial variable."). With respect to narrow tailoring, the dissenting judges found no example in precedent that would allow less use of race classifications than the race-based assignment plans in this case, affirming their conclusion that the plans were narrowly tailored. *See id.* at 2827 ("Yet, I have found *no* example or model that would permit this Court to say to Seattle and to Louisville: 'Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans.' And, if the plurality cannot suggest such a model--and

unbroken line of legal authority tell 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."[144] The dissenting four are willing to give wide latitude to school districts. Changing demographics, the need to meet learning goals, to recruit and retain effective teachers, parents' views, commitment to public education and insufficiency of the school district's knowledge and good faith to adequately address challenges requires that, with respect to means, school districts have broad discretion so that they can experiment with diverse strategies and "gravitate toward those that prove most successful or seem to them best to suit their individual needs."[145] In fact, the dissenting Justices criticized the plurality for their invalidation of the Seattle and Jefferson County race-conscious measures, warning that: "The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret."[146]

The dissenting Justices would review race-conscious measures designed for benign or beneficial purposes under strict

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it cannot--then it seeks to impose a 'narrow tailoring' requirement that in practice would never be met").

[144] *Parents Involved*, 127 S.Ct. at 2811. Similarly, the dissenting Justices stated that it is a constitutionally valid legal principle "that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself." *Id.* at 2814. This would favor race-conscious measures. Where race-conscious measures present concerns raised by Justices Thomas and Kennedy, the dissenting Justices would still give school districts discretion to decide whether the interests in using the measures nonetheless outweigh those concerns. *Id.* at 2819.

[145] *Id.* at 2811, quoting *Comfort v. Lynn School Comm.*, 418 F.3d 1, 28 (1st Cir. 2005) (Boudin, C.J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring)), *cert. denied*, 546 U.S. 1061 (2005).

[146] *Id.* at 2837.

scrutiny that is *not* "strict in theory but fatal in fact."[147] Contra to strict scrutiny that *is* "strict in theory but fatal in fact" used to invalidate exclusionary race-conscious measures; strict scrutiny that is *not* "strict in theory but fatal in fact" is not likely to invalidate race-conscious measures with benign purposes.[148] This is a positive for school districts seeking to use race-conscious measures for benign ends.

The Justices recognized a compelling interest in racial integration of the school districts.[149] This interest has three elements: (i) remedial;[150] (ii) educational;[151] and (iii) democratic.[152] The interest represented in the remedial element is the "interest in continuing to combat the *remnants* of segregation caused in whole or in part by these [legal or administrative] school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes."[153] This remedial element is founded on school districts'

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[147] *Id.* at 2816-18. Even under strict scrutiny that is not "strict in theory but fatal in fact", school districts must show that they have a compelling interest and that the means chosen are narrowly tailored to achieve those interest. *Id.* at 2820. The application of these requirements however is more lenient. *Id.* at 2819. This standard still requires "judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need." *Id.*

[148] *Id.* at 2816-18.

[149] According to the dissenting Justices, this interest is also known as the interest in racial diversity or racial balancing. *Id.* at 2820. This interest refers to "the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience." *Id.* The Justices fortitudinously characterize the interest as *racial* diversity, rather the general interest in *student body* diversity (of which race is only one component) the plurality recognized in the case.

[150] *Id.*

[151] *Id.* at 2820-21.

[152] *Id.* at 2821

[153] *Id.* (emphasis added). This is not an interest in eliminating the remnants of general *societal* discrimination, "but of [eliminating the remnants] of primary and secondary school segregation." *Id.* at 2823. Remedial interests do not "vanish the day after a federal court declares that a district is unitary." *Id.* at 2824 (internal quotes omitted).

interest "in preventing what gradually may become the *de facto* resegregation of America's public schools."[154] It seems that since the interest represented in the remedial element embraces both *de facto* segregation and remnants of segregation, the Justices would permit race-conscious measures designed to combat *de facto* segregation and the remnants of segregation.[155]

The educational element represents the "interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."[156] This language suggests that the Justices would uphold race-conscious measures designed to overcome adverse educational impacts in highly segregated schools.

The democratic element represents the "interest in producing an educational element that reflects the 'pluralistic society' in which our children will live."[157] If school districts design their race-conscious measure for this end, this democratic element indicates that the Justices would uphold the measure.[158]

A conglomerate of factors made the Justices find the race-based plans in *Parents Involved* narrowly tailored. These factors might serve as helpful guidelines for school district's design of race-conscious measures more likely to survive the "narrow tailoring" analysis of the dissenting Justices. One factor indicates that race-conscious measures that merely "set the outer bounds of

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[154] *Id.* at 2820.

[155] While in *Parents Involved*, the three elements were included in the discussion of racial integration, nothing in the language of the discussion of the remedial and educational elements indicates that the Justices would necessarily limit their application to the cases of racial integration and not apply them to other race-conscious measures. Even if the language is somehow interpreted to limit their application, the same rationales underlying the elements would seem to apply to race-conscious measures beyond racial balancing.

[156] *Id.* at 2820.

[157] *Id.* at 2821 (internal quotes omitted).

[158] In his dissent, Justice Breyer also describes this element as "an interest in helping our children learn to work and play together with children of different racial backgrounds." *Id.*

broad ranges"[159] are more likely to be favored by the Justices. In other words, race-conscious measures that "constitute but one part of plans that depend primarily upon other, nonracial elements."[160] Thus, race-conscious measures for which race is merely a "plus factor" might find four approbatory Justices.[161]

A second factor provides that if broad-range limits are used in race-conscious measures, they might pass "narrow tailoring" muster, as the dissenting Justices do not view broad-range limits as very burdensome.[162] For example, the Justices explained that the broad-range limits used in the race-based assignment plans were not burdensome because they assured that race only played a role in a fraction of non-merit-based assignments as opposed to large numbers of merit-based assignments.[163]

A third factor provides that race-conscious measures which embody local experiences and community consultation, and reflect a diminishing use of race relative to prior race-conscious measures in the given community, such as mandatory busing, might be more likely to pass "narrow tailoring" muster.[164] The Justices deemed

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[159] *Id.* at 2824. *See also id.* at 2825 (stating that "the broad ranges are less like a quota and more like the kinds of 'useful starting points' that this Court has consistently found permissible").

[160] *Id.* at 2824. According to the Justices, the primary element in the race-based assignment plans in *Parents Involved* was student choice not race. *See id.* at 2825 ("In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). *Choice,* therefore, is the "predominant factor" in these plans. *Race* is not") (emphasis in original).

[161] In fact, in all at least five Justices would approve plans in which race is merely a plus factor. As pointed out earlier, Justice Kennedy indicated the use of race as a plus factor is acceptable when he stated that "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component" is constitutionally permissible. *Id.* at 2793.

[162] *Id.* at 2824.

[163] *Id.*

[164] *Parents Involved,* 127 S.Ct. at 2825-26.

the fact that the race-based assignment plans in Seattle and Jefferson County reflected a diminishing emphasis on race relative to mandatory busing, for example, as a plus factor in its "narrow tailoring" analysis.[165]

A fourth factor indicates that the lack of reasonable alternatives could boost a race-conscious measure's chances of passing the dissenting quartet's "narrow tailoring" muster.[166] The demonstration of a lack of reasonable alternatives does not require "proof that there is no hypothetical *other* plan that could work as well."[167] Thus, it is a more lenient standard than a cursory examination would have revealed.

IV. CONCLUSION

In this article, we have analyzed the various opinions filed in the *Parents Involved* case, to determine the constitutional viability of race-conscious measures in school districts. Contrary to widespread misperception based on media reports in the days following the decision, we have revealed that *Parents Involved* does not foreclose all future uses of race-conscious measures in schools. Each of the opinions in the case identifies certain principles discussed herein which might increase the likelihood that a school district's race-conscious measure would be upheld by the applicable Justices or group of Justices. Therefore, there might be cause for school districts to remain optimistic and work toward bringing their race-conscious measures in compliance with principles the Justices are likely to give weight to in a constitutional challenge.

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[165] *Id.* Given the dissenting Justices' view that local school districts have great expertise in matters affecting education and should enjoy judicial deference to experiment for educational excellence, the Justices seem willing to encourage school district creativity as to measures which relatively progressively deemphasize race. *Id.* at 2826.

[166] *Id.* at 2829.

[167] *Id.* at 2827.

While the ideological divide on the Court indicates that the dissenting Justices are more likely to favor race-conscious measures, as evident in the 5-4 split in the decision Justice Kennedy's swing vote is not lost. Our analysis indicates that if certain principles such as we have discussed herein are satisfied, Justice Kennedy might uphold the measure. A 6-3 decision is not totally out of the question either, given Chief Justice Roberts' indication that he is willing to listen. The key to surviving constitutional scrutiny of a race-conscious measure might be in school districts ensuring that their measures comply with the various principles important to the *Parents Involved* plurality, the dissenting Justices *and* Justice Kennedy, the pivotal vote, rather than merely trying to comply with principles of the plurality of Justices or that of the dissenting quartet. In other words, the design of measures should not reflect a "pick and choose" approach in which school districts decide what principles of the various opinions they want to implement. They might better maximize the prospect of surviving scrutiny if efforts are targeted toward satisfying as many principles in the various opinions as possible. As we have revealed herein, Justice Kennedy is only a principle away from voting with the dissent to uphold a race-conscious measure.

We end on the positive note that even after *Parents Involved,* there remains cause for optimism, for race-conscious measures are still constitutionally viable; after all, "we have not yet realized the promise of *Brown*."[168]

[168] *Id.* at 2837 (Breyer, J., dissenting).