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Don't Count Them Out Just Yet: Toward the Plausible Use of Race-Preference Student Assignment Plans

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Contrary to conventional wisdom, the Supreme Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[1] could serve to broaden the permissible use of race beyond the boundaries presently permitted by the Court. In this highly fractionalized decision, five justices ultimately agreed that the race-based student assignment plans before their review could not withstand judicial scrutiny. One of these justices, Justice Kennedy, agreed with the plurality's conclusion, but rejected the plurality's assessment that it is never permissible to use race-preference student assignment plans absent evidence of de jure segregation. His concurrence, when read together with the reasoning of the Court's four dissenting justices, offers a plausible scenario under which future courts could find precedential

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1. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1226 (W.D. Wash. 2001), *rev'd,* 285 F.3d 1236 (9th Cir. 2002), injunction granted, No. 01-35450, 2002 U.S. App. LEXIS 7678, at *1 (9th Cir. Apr. 26, 2002), *reh'g granted,* 294 F.3d 1084 (9th Cir. 2002), certifying questions to Wash. Sup. Ct., 294 F.3d 1085 (9th Cir. 2002), certified questions answered, 72 P.3d 151 (Wash. 2003), *rev'd,* 377 F.3d 949 (9th Cir. 2004), reh'g granted en banc, 395 F.3d 1168 (9th Cir. 2005), *aff'd,* 426 F.3d 1162 (9th Cir. 2005), *cert. granted,* 126 S. Ct. 2351 (2006), *rev'd,* 127 S. Ct. 2738 (2007).

support to uphold challenged race-preference student assignment plans as constitutionally permissible.

When the Court considered *Parents Involved*, the applicable law for evaluating equal protection challenges under the Fourteenth Amendment was fairly well settled. A plan or program that considered race to achieve diversity in a particular governmental setting would survive a challenge to its legality only if it passed the Court's strict scrutiny test.[2] Under this test, a defending governmental agency was required to demonstrate that its program served a compelling governmental interest and that the program or policy was narrowly tailored to meet that interest.[3]

The Court had previously articulated two seemingly distinct instances in which a government agency could prove a compelling governmental interest: remedying the present effect of past discrimination and assuring viewpoint diversity in classrooms of higher education.[4] As a general matter, the Court required strong and specific evidence that a program was created to remedy the present effects of past discrimination. Thus, in *United States v. Paradise*,[5] the Court found that the Alabama Department of Public Safety's one-black-to-one-white promotion plan supported

2. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 358 (1987)("Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny...").

3. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

4. *See* Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 85 NEB. L. REV. 631, 683 (2005)[hereinafter Garfield, *Back to Bakke*](noting the Court's differing treatment of challenges aimed at achieving diversity in the workplace and achieving diversity in the classroom).

5. 480 U.S. 149 (1987).

a compelling governmental interest in eradicating discrimination, since it was adopted pursuant to a district court consent decree.[6] In contrast, the Court held in *City of Richmond v. Croson*[7] that the city of Richmond could not successfully demonstrate proof of a compelling governmental interest in continuing its program, which set aside thirty percent of the city's construction funds for black-owned businesses, since the city could put forth only a general goal of remedying various forms of past discrimination in support of the program.[8]

The Court had also provided a clear test for evaluating when a program was narrowly tailored. To be narrowly tailored under the equal protection clause, a race-conscious admissions program could not unduly burden individuals who were not members of the favored racial and ethnic groups.[9] The *Paradise* Court best articulated the "narrowly tailored prong" of the strict scrutiny test. A reviewing court must consider (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship between the numerical goals and the relevant labor market; and (4) the impact of the relief upon the rights of third parties.[10] Where education is concerned, however, the Court defined a different test. In both

6. *Id.* at 153; *see* Garfield, *Back to Bakke*, *supra* note 4 (citing United States v. Paradise, 480 U.S. 149, 154-55 (1987)).

7. 488 U.S. 469, 501 (1989).

8. *Id.* at 511.

9. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995); Richmond v. A. Croson Co., 488 U.S. 469, 507 (1989) (plurality opinion); *See also* USCA Const. Amend 14.

10. *Paradise*, 480 U.S. at 171; *see also* Sheet Metal Workers v. E.E.O.C., 478 U.S. 421, 487 (1986) (Powell, J., concurring in part and concurring in judgment).

Grutter v. Bollinger[11] and *Gratz v. Bollinger*[12], the Court endorsed Justice Powell's language in *University of California v. Bakke*,[13] finding that policies that consider race as a plus and that allow for individual consideration of each applicant's attributes in relation to all other applicants are sufficiently narrowly tailored.[14] The use of quotas, or other numeric goals would violate the narrowly tailored prong. [15] Thus, in *Grutter*, the Court found that the law school's policy of engaging in "a highly individualized holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" did not sufficiently insulate one particular racial or ethnic group to defeat the narrowly tailored test.[16] The Court, however, found that the University of Michigan's Liberal Science and Arts schools plan, which assigned points based solely on membership in an underrepresented minority class, was not narrowly tailored because of its inflexible nature.[17]

It was against this legal landscape that the Court decided *Parents Involved.* The *Parents Involved* case considered two separate challenges to local school board race-preference student assignment plans. The Court chose to hear *Parents Involved* with another case,

11. *Grutter*, 539 U.S. 306 (2003).

12. Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

13. *Bakke*, 438 U.S. at 314-315 (1978).

14. *Id.* at 123 ("The Court endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions."); *Grutter*, 539 U.S. at 270–271 (discussing the importance of Justice Powell's opinion that race can be considered a plus in the admissions process).

15. *See Bakke*, 438 U.S. at 289.

16. *Id.* at 309.

17. *Gratz*, 539 U.S. at 271.

Meredith v. Jefferson County Pub. Schools,[18] because they presented the same issue: whether a school board could consider race in a voluntary student assignment plan absent a court order.[19] [20]

In *Parents Involved*,[21] the plaintiffs, a not-for-profit group of parents and community members,[22] challenged a city program aimed at achieving diversity in its ten public high schools.[23] Originally, the City of Seattle School District assigned students to a particular school based upon their neighborhoods. This student assignment plan resulted in de facto segregation in the schools and yielded a disproportionate mix among African American, Asian American, Latino, and Native American students.[24] In an effort

18. See McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), cert. granted sub nom., Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (2006), *rev'd sub nom.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. at 2746. (2007).

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

20. The decision also abrogated Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005) (upholding race-based assignments plan).

21. For a more detailed discussion of the Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1, *see generally* Leslie Yalof Garfield, *Envisioning the Glass Half Full: The Future of Race Preference Policies*, 63 N.Y.U. ANN. SUR. AM. L. 385 (2008)[hereinafter Garfield, *Glass Half Full*].

22. *See* Parents Involved in Community Schools, http://www.piics.org (last visited Apr. 14, 2007)). The parents involved mission statement provides, "We are a group of parents and community members who believe in promoting neighborhood public schools in the Seattle Public School District. Every child should have the right to attend their neighborhood school, if that is their choice." *Id.*

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

24. *See Parents Involved in Cmty. Sch.*, 426 F.3d at 1166. At the time of the Parents Involved decision, approximately 70 percent of Seattle residents were white and approximately 30 percent were nonwhite. *Id.* Seattle's public school system students were comprised of approximately 40 percent white and 60 percent nonwhite. *Id.* Approximately 84 percent of all African American students,

to diversify its high schools, the Seattle School Board allocated the available spaces in each of its five high schools according to the choice of the individual pupils, regardless of the neighborhood in which they lived.[25] When a school was oversubscribed, the Seattle School Board chose who could attend that school based upon a series of four tiebreakers, the second of which was race.[26]

In *Meredith*, the District Court for the Western District of Kentucky considered whether the 2001 Jefferson County school assignment plan, which the courts termed "the Louisville Plan," violated the Equal Protection Clause.[27] The 2001 Plan mandated

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74 percent of all Asian American students, 65 percent of all Latino students, and 51 percent of all Native American students lived in the same area, south of downtown Seattle. *Id.*

25. *Id.* at 1169. A majority of the city's nonwhite students live south of downtown, and, as a result, the schools located in those neighborhoods were disproportionately segregated. *See id.* at 1166. As a result, the district has historically struggled with racial isolation among its individual neighborhoods. *Id.* Students list the high school they would like to attend in order of preference. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d. at 1226. Approximately 82 percent of students entering high school in 2000 selected one of five schools as their first choice. *Id.*

26. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1169. Consideration is first given to students who have siblings in the school. Second, the school used a racial tie-breaker. If following that, the school resulted in a student body that resulted in more than a 15% racial make-up the race of a student is considered. *Id.* at 1169-1170. Third, students were admitted according to the distance between their home and the school, and if there is still room left in the particular school, then, fourth the school district used a lottery. The lottery, however, was "virtually" never used. *Id.* at 1173.

27. *McFarland*, 330 F. Supp. 2d at 836. Four families brought suit against the Louisville School district. Among them, plaintiff David McFarland filed on behalf on his two sons, Stephen and Daniel; both were denied entry to traditional schools. *Id.* at 838 n.3. Plaintiff Crystal Meredith filed on behalf of her son Joshua McDonald, who was unable to enroll in his school of residence because it was filled to capacity; he was denied admittance because it would have had an adverse effect on the racial composition of the original school he was attending. *Id.* at 837-38. The Court ruled that with the exception of Mer-

that each public school seek a black student enrollment of at least fifteen percent and no more than fifty percent.[28] Students in the system were permitted to choose the school they wanted to attend.[29] Like the Seattle plan, when a particular school was over-subscribed, school administrators selected students for assignment to a school based upon a variety of factors, including race.[30]

Each case made its way through the federal court system. The District Court for the District of Washington granted summary judgment in in favor of the Seattle School Board.[31] *Parents Involved*

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edith, none of the plaintiffs denied entry to the traditional school had proven sufficient injury to support their claims. *Id.* at 838. McFarland subsequently appealed. *McFarland*, 416 F.3d at 513. For a general discussion of the Meredith case, *see generally* Leslie Yalof Garfield, *Adding Colors to the Chameleon: Why the Supreme Court May Adopt a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans,* 56 KAN. L. REV. 277 (2008) [hereinafter Garfield, *Colors to the Chameleon*].

28. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d at 842.

29. Schools were divided into three types: traditional magnet schools, non-traditional magnet schools, and residential type schools called resides schools. *Id.* The school board assigned students to a "resides school," based on the residence of their parent or guardian. *Id.* at 843-43. Traditional magnet schools offer the regular curriculum in a particular environment and are not considered "resides schools." *Id.* at 845-46. With the exception of two schools, each traditional school has its own geographic zone. *Id.* at 846. Students may apply for admission to a traditional school in their zone. Non-traditional magnet schools offer "specialized programs and curricula." *Id.* at 843. Students may apply for admission to any non-traditional magnet schools in the district regardless of their residential area. *Id. See also* Garfield, *Glass Half Full, supra* note 21 at 406.

30. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d at 847. Factors included place of residence, school capacity, and program popularity. *Id.* If, after all other considerations, the school remained over-subscribed, the school board composed four random draw lists; one list each for black males, black females, white males and white females. *Id.*

31. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

appealed.[32] After winding its way through the court system,[33] the Ninth Circuit considered the merits of the case.[34] The court agreed with the district court, finding a compelling governmental interest in promoting diversity in the Seattle school classrooms and an interest in avoiding the harm that results from racially concentrated schools.[35] The Court of Appeals also found that the program's use of a raced based tiebreaker was narrowly tailored.[36] *Parents Involved* appealed the decision to the Supreme Court.[37]

In contrast to the District Court in Washington, the District Court for the Western District of Kentucky struck down as unconstitutional that portion of the Louisville plan that assigned applicants to traditional schools based upon race, because it was

32. *Parents Involved in Cmty. Sch.*, 285 F.3d 1236 (9th Cir. 2002).

33. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 285 F.3d 1236 (W.D. Wash. 2002) (withdrawal of opinion on grant of rehearing); Parents Involved in Cmty Schools v. Seattle Sch. Dist. No. 1, 294 F.3d 1084 (9th cir. 2002)(certification of question to Supreme Court of Washington as to whether use of racial tie-breaker based on race or ethnicity violated state statute); Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 72 P.3d 151 (Wash. 2002); Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 294 F.3d 1084 (9th Cir. 2002) (withdrawing opinion and vacating injunction); F.3d 949, (9th Cir. 2004) (reversing and remanding with instructions to issue injunction); Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 395 F.3d 1168 (9th Cir. 2005)(ordering rehearing en banc).

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

35. *Id.* at 1178. The District is entitled to pursue the benefits of racial diversity and avoid the harms of segregation in the absence of a court order deeming it in violation of the Constitution." *Id.* at 1179.

36. *Id.* at 1188-90. The tiebreaker policy was necessary and the most race neutral alternative since the tiebreaker preference allowed the realization of the compelling interests and discouraged a return to enrollment patterns based on racially segregated housing patterns. *See id.*

37. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 126 S. Ct. 2351 (2005) (granting *cert.*).

not narrowly tailored to meet the stated objective of achieving diversity in the classroom.[38] The Supreme Court, wishing to decide the *Meredith* and *Parents Involved* cases together, took certiorari directly from the Western District.[39]

Chief Justice Roberts delivered the "majority" opinion, which Justices Scalia, Thomas and Alito joined.[40] Justice Kennedy was the swing vote, concurring in the judgment, but agreeing with only part of the plurality's reasoning.[41] Justices Breyer wrote a dissent, which Justices Stevens, Ginsburg and Souter joined.[42]

Because the plans under consideration were voluntary and were not created in response to a court order, the parties could not justify their policies as necessary to remedy the present effects of past discrimination.[43] The Court then considered whether the plans met its previously identified interest in achieving viewpoint diversity in education.[44] The plurality dismissed the compelling governmental interest limb of achieving viewpoint diversity in the

38. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 864 (W.D. Ky. 2004) (finding that the 2001 Louisville Plan was not narrowly tailored because "(1) the assignment process put Black and White applicants on separate assignment tracks, and (2) the use of the separate lists appeared completely unnecessary to accomplish the Board's goals.").

39. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005), *cert. granted,* 126 S. Ct. 2351 (Jun. 6, 2006) (No. 05-908).

40. Justice Stevens wrote a separate dissent questioning the need for strict scrutiny. *Id.* at 2797 (Stevens, J., dissenting). Justice Thomas' concurrence questioned the dissent's wisdom as to allowing local school boards to define what is compelling. *Id.* at 2768 (Thomas, J., concurring). In Justice Thomas' opinion, racial imbalance is not the same as segregation, and racial imbalance can never justify infringing on the Equal Protection Clause. *Id.* at 2775.

41. *Id.* at 2788 (Kennedy, J., concurring).

42. *Id.* at 2797 (Breyer, J., dissenting).

43. *Id.* at 2752.

44. *Id.* at 2753; *see also Grutter*, 539 U.S. at 329; *Bakke*, 438 U.S. at 312.

classroom as inapplicable and asserted that such considerations, first raised in *Bakke* and then reaffirmed in *Grutter* and *Gratz* were unique to "institutions of higher education."[45]

The plurality suggested that the only time it would find the use of race justified would be when the governmental entities defending the policy could establish proof of de jure segregation.[46] Thus, without evidence that a previous government had taken affirmative steps to create racial segregation or that a consent decree or court order had mandated that the state take steps to reverse identified discrimination, it would never find a compelling governmental interest.[47] Under the plurality's analysis, a desire to remedy de facto segregation is not enough to justify the use of race-preference policies.[48] Nor was it sufficient to retain a program to assure that a particular school system continued to guarantee diverse classes.[49]

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45. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754 (citing *Grutter*, 539 U.S. at 329). The Court found that *Grutter* only applied to institutions of higher education and distinguished institutions of higher education from other educational facilities, stating that "in light of the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.* (internal quotation marks omitted).

46. "The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling." *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

47. *Id.* at 2771. Chief Justice Roberts noted that evidence of de jure segregation is easily identifiable since, "[i]n most cases, 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.*

48. *Id.* at 2761.

49. *Id.*

Justice Kennedy joined the plurality but sharply disagreed with much of its reasoning.[50] Justice Kennedy found that the Louisville and Seattle programs were not narrowly tailored to meet their identified goals.[51] The Jefferson County Board considered applicants merely in terms of black or white, while the Seattle School Board considered applications in terms of non-white or white.[52] In each instance, the plans were drafted based upon widely drawn categories of specific races and ethnicities. Each school board's practices did not fit within the *Bakke* construct, which promoted "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single, though important, element."[53] Justice Kennedy's concurrence provided the fifth vote that invalidated both the Louisville and the Seattle programs.

Justice Kennedy did not, however, agree with the plurality's assessment that diversity in education is not a compelling governmental interest, writing instead: "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[54] In Justice Kennedy's view, the plurality, which limited permissible compelling governmental interest to instances of remedying de jure segregation, was "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[55] According to

50. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2790-91 (Kennedy, J., concurring in part and concurring in the judgment) (agreeing that the Court had jurisdiction in this case, that the matter was subject to strict scrutiny and that neither school board plan was narrowly tailored).

51. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2795-96.

52. *Id.* at 2791.

53. *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 325).

54. *Id.* at 2789.

55. *Id.* at 2791.

Justice Kennedy, the plurality was "profoundly mistaken"[56] in its conclusion that "the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools."[57] In his opinion, "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children."[58] Consistent with this view, "a compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."[59] A compelling interest also exists in achieving a diverse student population, and school boards may consider race as "one component of that diversity," though "other demographic factors, plus special talents and needs, should also be considered."[60] Ultimately, Justice Kennedy concluded that the decision should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic and economic backgrounds. "Due to a variety of factors . . . neighborhoods in our communities do not reflect the diversity of our Nation as a whole."[61] Although Justice Kennedy found a compelling governmental interest, he voted nevertheless to strike down the programs, because the school boards did not demonstrate that their approaches were the only means of avoiding racial isolationism.[62]

In his dissent, Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, wrote that both the Louisville and Seattle race-

56. *Id.*
57. *Id.*
58. *Id.* at 2797.
59. *Id.* at 2797.
60. *Id.*
61. *Id.*
62. *Id.* at 2790-91.

conscious school board plans withstood the longstanding Court-mandated test of strict scrutiny.[63] Both plans served a compelling governmental interest[64] and were narrowly tailored.[65] For these reasons, the dissenting justices voted to uphold the plans.[66]

Justice Breyer described the "compelling interest" in the Louisville and Seattle plans as "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."[67] He noted that this compelling interest possesses three essential elements: "the historical and remedial" element of rectifying consequences of prior segregation; the "educational" element of overcoming the "adverse educational effects produced by and associated with highly segregated schools"; and the "democratic" element of producing an educational environment that reflects "the pluralistic society in which our children will live."[68] After considering each element, Justice Breyer determined that the districts' interest in eradicating primary and secondary public school segregation involved all three elements. He asked

63. *Id.* at 2820 (Breyer, J., dissenting). Justice Breyer would have used a more lenient standard than strict scrutiny since the plans do not result in race-based harm, but concluded that the plans survived even the strictest of scrutiny. *Id.*

64. Justice Breyer disagreed with the plurality's conclusion that a compelling governmental interest in instances other than in higher education is limited to remedying de jure rather than de facto segregation. *Id.* at 2802, 2810. Both school districts were "highly segregated in fact" prior to the districts' desegregation plans and thus were in need of a remedy. *Id.* at 2802.

65. *Id.* at 2825.

66. *See id.* at 2800-37.

67. *Id.* at 2820.

68. *Parents Involved in Cmty. Sch.*, 127 S. Ct at 2820-21 (quotation omitted).

rhetorically, "[if] an educational interest that combines these three elements is not 'compelling,' then what is?"[69]

In addition to concluding that the districts' plans addressed a compelling interest, also concluded that the plans were narrowly tailored.[70] The plans limited the use of race and also strongly relied upon other non-race conscious elements. The history and the manner in which the districts developed and modified their approaches further supported a finding that they were narrowly tailored. As support to show that the racial balancing programs were narrowly tailored, Justice Breyer cited the fact that each school board had devised a plan that imposed a lesser burden than previous court-approved plans, and that the school boards had a lack of reasonably evident alternatives.[71]

Synthesizing Justice Kennedy's concurrence with Justice Breyer's dissent yields a fairly definitive strict scrutiny test for evaluating future race-preference challenges, a test which is supported by a majority of the Court. Justice Kennedy premised

69. *Id.* at 2823. Justice Breyer disagreed with the plurality's conclusion that a compelling governmental interest in instances other than in higher education should be limited to remedying de jure rather than de facto segregation. *Id.* at 2802, 2810. He concluded that the distinction is "meaningless in the present context." *Id.* at 2802. Irrespective of the cause, he pointed out, both school districts were "highly segregated in fact" prior to the districts' desegregation plans and thus were in need of a remedy. *Id.* at 2802. The plurality counters that the dissent "elides this distinction between de jure and de facto segregation," and that the distinction between segregation by state action and racial imbalance caused by other factors "has been central to our jurisprudence in this area for generations" *Id.* at 2761 (citing Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)). In the present cases, argued the plurality, race-conscious remedies were inappropriate because the Seattle school district was never segregated by law and the Louisville district had previously been deemed "unitary" by a federal court. *Id.*

70. *Id.* at 2824.

71. *Id.* at 2829-30.

his need for a compelling governmental interest on the societal promise that all children are assured an equal education regardless of race.[72] His opinion suggests that there exists a constitutional mandate that the Court not disassemble programs that were created to redress previous wrongs.[73] Justice Kennedy would also extend the compelling governmental interest in diversity education, first articulated in *Bakke*, to schools at the K-12 grade levels.

Justice Breyer, writing for three other justices, agreed with Justice Kennedy's conclusion that there is a compelling governmental interest in honoring the historic commitment the Court has made to eradicating segregation.[74] Indeed, this fear of eradicating the strides school boards have made since *Brown v. Board of Education*[75] was of evidently paramount concern to Justices Breyer and Ginsberg during oral arguments. In their view, anything short of upholding the challenged student assignment plans would mean that "what is constitutional one day is no longer constitutional the next."[76]

Justice Kennedy's concurrence coupled with the views of those in the dissent present two instances of a compelling governmental interest. First, the justices would find a compelling governmental interest in ensuring viewpoint diversity in grades K-12. Justice Bryer recognized the democratic interest in producing an educational environment that reflects the "pluralistic society" in which our children live and learn. Quoting *Grutter*, he wrote that diverse classrooms "promote cross-racial understanding, helps

72. *Id.* at 2791.

73. *Id.*

74. *Id.* at 2802.

75. *Id.* at 2816.

76. Adam Liptak, Brown v. Board of Education, *Second Round,* N.Y. TIMES, Dec. 10, 2006 (quoting Justice Ginsburg).

to break down racial stereotypes, and enable [students] to better understand persons of different races."[77] Justice Kennedy agreed with the dissent writing that there is a compelling governmental interest in encouraging "a diverse student body, one aspect of which is its racial composition."[78] These five justices would extend to grades K-12 the Court's identified interest in assuring a compelling governmental interest in assuring diverse classrooms.

The five justices would also find a compelling governmental interest in retaining programs, the dismantling of which would result in a return to the evil that the challenged program was originally created to redress. The need to retain such programs is most evident when considered in relation to race-based student assignment plans, many of which have their genesis in court ordered desegregation plans.[79] In many ways, these programs are a safeguard against a return to segregated classrooms.

Justice Kennedy's concurrence echoed demographic studies that show that a failure to use student assignment plans has inevitably led to the racial, ethnic and socio-economic segregation of public schools.[80] Most school systems use neighborhood student assignment plans, which assign students to classes based upon housing patterns. These plans draw school zones that are based upon the geographical location of a particular school and the proximity of a student's home to that school. But, as Justice

77. *Parents Involved in Cmty. Sch.*, 127 S.Ct. at 2821.

78. *Id.* at 2792.

79. *Id.* at 2749. The Louisville plan was originally created in response to a court ordered desegregation plan and was only dismantled in 2000 "when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation. *Id.* (citing Hampton v. Jefferson Cty. Bd. of Educ., 102 F. Supp. 2d 358, 360 (2000).

80. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2795.

Kennedy pointed out, "neighborhoods in our communities ...do not reflect the diversity of our nation as a whole."[81] In 2000, the typical neighborhood of a white metropolitan resident was eighty percent white.[82] De facto segregation that occurs as a result of individual housing selection or that is dictated by neighborhood housing prices and affordability means that, absent a student assignment plan, the retreat to segregated schools becomes inevitable. For these reasons, a school board in a geographically segregated community, such as Jefferson County or Seattle, would most certainly be able to present evidence of a compelling governmental interest.

Even if a future court were to adopt the compelling governmental interest advanced by a majority of its current members and the defending governmental entity could support that interest through evidence, there would still be no guarantees that a proposed program would withstand constitutional scrutiny. To establish the second prong of the strict scrutiny test, a defending party must prove that the designed program was narrowly tailored. Under the narrowly tailored prong, a defending party show that its program is among the least restrictive alternatives to solving the identified program.[83]

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81. *Id.* at 2795.

82. Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 277 (2007); *see* Michael A. Stevens, *Down but Not Out: How School Districts May Utilize Race-Conscious Student Assignments in the Wake of* Parents Involved in Community Schools v. Seattle School District No. 1 (unpublished).

83. Grutter v. Bollinger, 539 U.S. at 339 (citing Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 n.6)("narrow tailoring 'require[s] consideration' of 'lawful alternative and less restrictive means'").

The Court has rarely found programs using race to be narrowly tailored.[84] Even so, the four dissenting justices in *Parents Involved* found that the Seattle and Louisville plans were more narrowly tailored than plans the Court had previously found constitutionally valid. At the outset, Justice Breyer, writing for the dissent, subjected the plan to the "rigorous judicial review" that Justice Kennedy called for in his dissent in *Grutter*.[85] Even under such rigorous review, the dissent concluded, the program was narrowly tailored. With regard to these plans, "(1) their limited and historically-diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with prior plans, and (5) the lack of reasonably evident alternatives together show that the districts' plans are 'narrowly tailored."[86]

Justice Kennedy did not brush with such broad strokes when considering the narrowly tailored test. In fact, it was because of this prong that the program seemed to fail.[87] The failure of each school board to make individual considerations, as mandated by *Grutter*, or merely to consider race as one of several factors, as Justice Powell mandated in *Bakke*, meant that the program did not meet the Court's previously articulated narrowly tailored test. In his concurrence, however, Justice Kennedy wrote that while decisions fashioned solely upon the basis of a systematic, individual typing by race fail under the narrowly tailored test,

84. *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 793 (2006).

85. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

86. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2829-30.

87. *Id.*

a school board could construct a plan that satisfied the second prong of the strict scrutiny test.[88] Justice Kennedy even went so far as to suggest other means that he might find appropriate to meet the narrowly tailored test, such as strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; recruiting students and faculty in a targeted fashion; and tracking enrollments and performance.[89]

Justice Kennedy's identified instances of appropriately narrowly tailored programs seem to comprise the least common denominator among those justices that would allow for race-based student assignment plans. A defending school board, therefore, could succeed if its program allowed for individual review of each student or if the school drew attendance zones or placed new schools in sites that were strategically selected to draw from a diverse group of students.

Justice Kennedy's offer to find programs narrowly tailored if they are based upon strategic site selections and creatively districted school zones is hollow in many ways. The de facto segregation that plagues American neighborhoods makes diversity based upon this plan virtually impossible to achieve. County-wide and metropolitan school districts have been successful in creating desegregation. In such instances, the school board may draw from across a large group of students in a population.[90] These plans,

88. *Id.* at 2792.

89. *Id.*

90. *See* Mark C. Rahdert, *Obstacles and Wrong Turns on the Road from* Brown: Milliken v. Bradley *and the Quest for Racial Diversity in Education,* 13 TEM. POL. & CIV. RTS. L. REV. 785, 800 (2004)(citing GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 73-143 (1996)(the countywide or metropolitan school districts in metro Charlotte and metro Raleigh, North Carolina, for producing

however, have generally been successful in response to mandatory desegregation plans and have involved cross-county bussing, rather than neighborhood assignment.[91] For local school boards, Justice Kennedy's suggestion is significantly more problematic. In these instances, where the school system is limited to one town, the school board does not have as diverse a population from which to draw.[92]

School boards would be better advised to rely on individual considerations to assure that the racial balance of each class is adequate to meet the dual compelling governmental interest of assuring that all students have an equal education and that the schools in the particular district do not become re-segregated if the local school board's authority to assign students to classes is removed. The notion of individual choice as a precondition to assuring that the program is narrowly tailored originated with Justice Powell in the *Bakke* decision. In that case, Justice Powell wrote that race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.[93] Most public schools do engage in an individual review of sorts. The

"large scale mandatory desegregation across city and suburban lines and substantial growth in both the overall district and white enrollment, with minority enrollment up 18% and white enrollment soaring 37% since 1976.").

91. *See* Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV., 1273 (2005).

92. Tracy Miller, *Desegregation and the Meaning of Equal Education Opportunity*, 17 HARV. C.R.-C.L. L. REV 555 (1982) (citing Milliken v. Bradley, 433 U.S. 267 (1977)). Although meaningful desegregation was practically impossible without some sort of multi-district remedy since the Detroit district was overwhelmingly black, the Court maintained that a more effective remedy would be improper, stressing the importance of local autonomy, and the need for judicial restraint. *Id.*

93. *Bakke*, 438 U.S. at 317.

learning styles, personalities, and general dispositions of students are taken into account when making student assignments, at least at the elementary or middle school levels. A policy that expands the personal considerations of an individual to include race, as one of the other factors schools consider when assigning students to classrooms, particularly in terms of how race would contribute to the make-up of a particular class, is virtually identical to the policy behind the plan the Court approved in *Grutter*.[94]

Individual review is only practicable when school boards are presented with a manageable number of students to consider. Chief Justice Rehnquist, writing for the majority in *Gratz*, acknowledged that given the enormous number of students who applied to the University of Michigan undergraduate program, individual review was not feasible.[95] The same Court approved of the University of Michigan Law School affirmative action admission policy, because it allowed for individual review. The law school, however, considered fewer than ten percent of the number of applicants than did the undergraduate school. Local school boards may be concerned with more students than there are applicants to the University of Michigan School of Law, but, for the most part, these school boards oversee significantly fewer students than the 27,474 students who applied to the University of Michigan in 2007, making the process tenable in most situations.[96]

The tenuous make-up of the Court's various opinions in *Parents Involved* means that no clear precedent has yet emerged

94. *See Grutter*, 539 U.S. 306 (2003).

95. *Gratz*, 539 U.S. at 275 ("the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.").

96. Univ. of Mich., *U-M Enrollment Up In 2007-08*, http://www.ns.urnich.edu/htdocs/releases/story.php?id=6152 (Nov. 1, 2007). The school admitted 5,992 students. *Id.*

to prohibit race-based policies from surviving the strict scrutiny test in the future. To be sure, it is very difficult to survive strict scrutiny. Indeed, the Court's test is considered "strict in theory but fatal in fact".[97] This may not necessarily be the case. A recent study found that almost thirty percent of governmental programs survive strict scrutiny.[98] This fact, coupled with the window left open by Justice Kennedy's concurrence, suggests that a change in the current Court to replace a current member of the plurality with one who has more liberal leanings could certainly allow future courts to uphold race-based policies. For these reasons, the *Parents Involved* case is neither strict in theory nor fatal in fact.

97. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). Gerald Gunther first coined the phrase "strict in theory but fatal in fact." *Id.* In response, in *Bakke,* Justice Powell, citing Gunther wrote "our review under the Fourteenth Amendment should be strict-not 'strict in theory and fatal in fact.'" *Bakke,* 438 U.S. at 362. *See also* Adarand v. Pena, 515 U.S. 200 (1995) ("It is not true that strict scrutiny is strict in theory but fatal in fact."). *See generally* Winkler, *supra* note 84.

98. *See generally* Winkler, *supra* note 84.