The Constitution and Racial Diversity in K-12 Education: A Legal Analysis of the Supreme Court Ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*

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Summary

The diversity rationale for affirmative action in public education has long been a topic of political and legal controversy. Many colleges and universities have established affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Although the Supreme Court has recognized that the use of race-based policies to promote diversity in higher education may be constitutional, the Court had never, until recently, considered whether diversity is a constitutionally permissible goal in the elementary and secondary education setting. To resolve this question, the Supreme Court recently agreed to review two cases that involved the use of race to maintain racially diverse public schools and to avoid racial segregation. In a consolidated ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court held that the Seattle and Louisville school plans at issue violated the equal protection guarantee of the Fourteenth Amendment. This report provides an overview of the Court's decision, as well as a discussion of its implications for future educational efforts to promote racial diversity.

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I. Introduction

The diversity rationale for affirmative action in public education has long been a topic of political and legal controversy. Many colleges and universities have established affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Although the Supreme Court has recognized that the use of race-based policies to promote diversity in higher education may be constitutional in two cases involving the University of Michigan's admissions policies—namely *Grutter v. Bollinger* and *Gratz v. Bollinger*[1]—the Court had never, until recently, considered whether diversity is a constitutionally permissible goal in the elementary and secondary education setting.[2]

To resolve this question, the Supreme Court agreed to review two cases that involved the use of race to maintain racially diverse public schools. The cases were *Meredith v. Jefferson County Board of Education*—formerly *MacFarland v. Jefferson County Public Schools*—and *Parents Involved in Community Schools v. Seattle School District No. 1*.[3] In *Parents Involved in Community Schools v. Seattle School District No. 1*, a consolidated ruling that resolved both cases, the Court ultimately struck down the school plans at issue, holding that they violated the equal protection guarantee of the Fourteenth Amendment.[4] This report provides an overview of the Court's decision, as well as a discussion of its implications for future educational efforts to promote racial diversity.

Background

The two cases that the Court reviewed involved challenges to school assignment and transfer plans in Louisville and Seattle. In *MacFarland v. Jefferson County Public Schools*,[5] issued on the first anniversary of the University of Michigan decisions and the 50th anniversary of *Brown v. Board of Education*, a federal district court in Kentucky upheld a Louisville district's voluntary consideration of race in making student assignments to achieve racial integration in the public schools. Jefferson County Public Schools (JCPS) were ordered by judicial decree to desegregate in 1975. Under the desegregation plan, each school was to have between 15% and 50% African-American enrollment and students were bused, if necessary, to ensure racial diversity. Twenty-five years later, in 2000, the federal courts ended their supervision of the desegregation plan, but the JCPS voluntarily opted to maintain its integrated schools through a "managed choice" plan that involved consideration of geographic boundaries, special programs, and school choice, as well as race. The plan was challenged in a lawsuit in 2000 by black parents whose children were denied admission to Central High School, which was already at the upper percentage limit for minority enrollment. The district court upheld the school plan, finding that the managed choice plan served numerous compelling state interests, many of which were similar to interests upheld by the Supreme Court in *Grutter*, and that the student assignment plan was narrowly tailored in

[1] 539 U.S. 306 (2003); 539 U.S. 244 (2003).

[2] For more information on affirmative action and diversity in higher education, see CRS Report RL30410, *Affirmative Action and Diversity in Public Education: Legal Developments*, by (name redacted).

[3] 416 F.3d 513 (6th Cir. 2003) (per curiam), cert. granted, 126 S. Ct. 2351 (U.S. 2006); 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 126 S. Ct. 2351 (U.S. 2006).

[4] 2007 U.S. LEXIS 8670 (U.S. 2007).

[5] 330 F. Supp. 2d 834 (W.D.Ky. 2004).

all respects but one, which the district was required to revise.[6] For reasons "articulated in the well-reasoned opinion of the district court," the Sixth Circuit summarily affirmed the district court's decree without issuing a detailed written opinion.[7]

Meanwhile, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[8] the Ninth Circuit applied *Grutter* and *Gratz* to approve a school district's plan to maintain racially diverse schools. Under Seattle's "controlled choice" high school student assignment plan, students were given the option to attend high schools across the district, but if the demand for seats exceeded the supply at a particular school, a student's race was considered as a tie-breaker in determining admittance to the oversubscribed school. The racial tie-breaker applied only to schools whose student bodies deviated by more than 15 percentage points from the overall racial makeup of the district, then "approximately 40% white and 60% nonwhite." The Seattle plan was voluntarily adopted to "achiev[e] diversity [and] limit racial isolation" in the schools, not as a part of a desegregation remedy.

In an *en banc* decision, the Ninth Circuit ruled that the school district had a compelling interest in the educational and social benefits of racial diversity and in avoiding racially concentrated or isolated schools. Further, the court held that the district's plan was sufficiently narrowly tailored to pass constitutional muster. The ruling reversed an earlier three-judge appellate panel's contrary decision that the school district's plan to maintain racially diverse schools was not sufficiently narrowly tailored.[9]

As noted above, the Supreme Court granted review in *MacFarland v. Jefferson County Public Schools*—now *Meredith v. Jefferson County Board of Education*—and *Parents Involved in Community Schools v. Seattle School District No. 1* to consider the question of what steps a public school district may take to maintain racial diversity in elementary and secondary schools. In a consolidated ruling that resolved both cases, the Court ultimately struck down the school plans, holding that they violated the equal protection guarantee of the Fourteenth Amendment.[10]

Past Supreme Court Cases Involving Racial Diversity in Public Education

Prior to its ruling in *Parents Involved in Community Schools*, the Supreme Court had considered the constitutionality of school plans to promote racial diversity on three separate occasions. In all three of these cases, however, the Court considered the issue in the context of higher education. Nevertheless, the Court's reasoning in its three higher education cases guided its review in *Parents Involved in Community Schools*. Therefore, the three cases—*Regents of the University of California v. Bakke*,[11] *Grutter v. Bollinger*, and *Gratz v. Bollinger*—are described below.

[6] Id. at 837.

[7] McFarland v. Jefferson County Pub. Schs., 416 F.3d 513 (6th Cir. 2003).

[8] 426 F. 3d 1162 (9th Cir. 2005) (*en banc*).

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

[10] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 2007 U.S. LEXIS 8670 (U.S. 2007).

[11] 438 U.S. 265 (U.S. 1978).

The *Bakke* Decision

The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action. The notion that diversity could rise to the level of a compelling constitutional interest in the educational setting sprang more than a quarter century ago from Justice Powell's opinion in the case. While concluding that a state medical school could not set-aside a certain number of seats for minority applicants, Justice Powell opined that a diverse student body may serve educators' legitimate interest in promoting the "robust" exchange of ideas. He cautioned, however, that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element."[12]

A "notable lack of unanimity" was evident from the six separate opinions filed in *Bakke*. Justice Powell split the difference between two four-Justice pluralities in the case. One camp, led by Justice Stevens, struck down the admissions quota on statutory civil rights grounds. Another led by Justice Brennan would have upheld the medical school's policy as a remedy for societal discrimination. Justice Powell held the "dual admissions" procedure to be unconstitutional, and ordered Bakke's admission. But, he concluded, that the state's interest in educational diversity could warrant consideration of students' race in certain circumstances. For Justice Powell, a diverse student body fostered the "robust" exchange of ideas and academic freedom deserving of constitutional protection.

Justice Powell's theory of diversity as a compelling governmental interest did not turn on race alone. He pointed with approval to the "Harvard Plan," which defined diversity in terms of a broad array of factors and characteristics. Thus, an applicant's race could be deemed a "plus" factor. It was considered on a par with personal talents, leadership qualities, family background, or any other factor contributing to a diverse student body. However, the race of a candidate could not be the "sole" or "determinative" factor. No other Justice joined in the Powell opinion.

Although Justice Powell's opinion announced the judgment of the Court, no other *Bakke* Justices joined him on that point. Justice Powell ruled the "dual admission program" at issue to be unconstitutional and the white male plaintiff entitled to admission, while four other Justices reached the same result on statutory rather than constitutional grounds. Another four Justice plurality concluded that the challenged policy was lawful, but agreed with Justice Powell that the state court had erred by holding that an applicant's race could never be taken into account. Only Justice Powell, therefore, expressed the view that the attainment of a diverse student body could be a compelling state interest.

For nearly two decades, colleges and universities relied on the Powell opinion in *Bakke* to support race-conscious student diversity policies, although there was some disagreement among federal appeals courts regarding the meaning and application of the ruling. The judicial divide over *Bakke*'s legacy was vividly underscored by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of the University of Michigan,[13] the other voiding a special minority law school admissions program at the same institution.[14]

[12] Id. at 315.

[13] Gratz v. Bollinger, 122 F.Supp.2d 811 (E.D.Mich. 2000).

[14] Grutter v. Bollinger, 137 F. Supp. 2d 821, 848 (E.D. Mich. 2001) (concluding that "*Bakke* does not stand for the (continued...)

Restoring a degree of clarity to the law, the Supreme Court concluded its 2002-03 term with rulings in the Michigan cases. In *Grutter v. Bollinger*,[15] a 5 to 4 majority of the Justices held that the University of Michigan Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of "underrepresented" minority students. But in a companion decision, *Gratz v. Bollinger*,[16] six Justices decided that the University of Michigan's policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional scrutiny.

The *Grutter* Decision

Generally setting the bar for admission to the Michigan Law School was a "selection index" based on applicants' composite LSAT score and undergraduate GPA. A 1992 policy statement, however, made an explicit commitment to "racial and ethnic diversity," seeking to enroll a "critical mass" of black, Mexican-American, and Native American students. The objective was to enroll minority students in sufficient numbers to enable their participation in classroom discussions without feeling "isolated or like spokesmen for their race." To foster, "distinctive perspectives and experiences," admission officers consider a range of "soft variables"—e.g., talents, interests, experiences, and "underrepresented minority" status—in their admissions decisions. In the course of each year's admissions process, the record showed, minority admission rates were regularly reported to track "the racial composition of the developing class." The 1992 policy replaced an earlier "special admissions program," which set a written goal of 10-12% minority enrollment and lower academic requirements for those groups.

A notable aspect of the *Grutter* majority opinion was the degree to which it echoed the Powell rationale from *Bakke*. Indeed, the majority quoted extensively from Justice Powell's opinion, finding it to be the "touchstone for constitutional analysis of race-conscious admissions policies." Overarching much of the Court's reasoning were two paramount themes, both of which drew considerable criticism from the dissent. First, in applying "strict scrutiny" to the racial aspects of the Law School admissions program, the Court stressed the situational nature of constitutional interpretation, taking "relevant differences into account." Thus, the majority opined, "[c]ontext matters when reviewing race-based governmental action" for equal protection purposes and "[n]ot every decision influenced by race is equally objectionable," but may depend upon "the importance and the sincerity of the reasons advanced by the governmental decisionmaker" for that particular use of race. Second, and equally significant, was the deference accorded to the judgment of educational decisionmakers in defining the scope of their academic mission, even in regard to matters of racial and ethnic diversity. "[U]niversities occupy a special niche in our constitutional tradition," the Court stated, such that "[t]he Law School's educational judgment ... that diversity is essential to its educational mission is one to which we defer." Institutional "good faith" would be "presumed" in the absence of contrary evidence. One group of dissenters took particular exception to what it viewed as "the fundamentally flawed proposition that racial discrimination can be contextualized"—deemed "compelling" for one purpose but not another—or that strict scrutiny permits "any sort of deference" to "the Law School's conclusion that its

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proposition that a university's desire to assemble a racially diverse student body is a compelling state interest").

[15] 539 U.S. 306 (2003).

[16] 539 U.S. 244 (2003).

racial experimentation leads to educational benefits." Indeed, the dissenters found such deference to be "antithetical" to the level of searching review demanded by strict scrutiny.

Satisfied that the Law School had "compelling" reasons for pursuing a racially diverse student body, the Court moved to the second phase of strict scrutiny analysis. "Narrow tailoring," as noted, requires a close fit between "means" and "end" when the state draws any distinction based on race. In *Grutter*, the concept of "critical mass" won the majority's approval as "necessary to further its compelling interest in securing the educational benefits of a diverse student body." According to the Court:

> We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

The Court drew a key distinction between forbidden "quotas" and permitted "goals," exonerating the Law School's admission program from constitutional jeopardy. The majority observed that both approaches pay "some attention to numbers." But while the former are "fixed" and "reserved exclusively for certain minority groups," the opinion continues, the Law School's "goal of attaining a critical mass" of minority students required only a "good faith effort" by the institution. In addition, minority Law School enrollment between 1993 and 2000 varied from 13.5 to 20.1 percent, "a range inconsistent with a quota." In a separate dissent, the Chief Justice objected that the notion of a "critical mass" was a "sham," or subterfuge for "racial balancing," since it did not explain disparities in the proportion of the three minority groups admitted under its auspices.

Other factors further persuaded the Court that the Law School admissions process was narrowly tailored. By avoiding racial or ethnic "bonuses," the policy permitted consideration of "all pertinent elements of diversity," racial and nonracial, in "a highly individualized, holistic review of each applicant's file." The Court also found that "race neutral alternatives" had been "sufficiently considered" by the Law School, although few specific examples are provided. Importantly, however, the opinion makes plain that "exhaustion" of "every conceivable alternative" is not constitutionally required, only a "serious good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Consequently, the Law School was not required to consider a lottery or lowering of traditional academic benchmarks—GPA and LSAT scores—for all applicants since "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." And, because the admissions program was based on individual assessment of all pertinent elements of diversity, it did not "unduly burden" non-minority applicants. Nonetheless, the Court emphasized the need for "reasonable durational provisions," and "periodic reviews" by institutions conducting such programs. To drive home the point, the majority concluded with a general admonition. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

The *Gratz* Decision

Undergraduate admission to the University of Michigan had been based on a point system or "student selection index." A total possible 150 points could be awarded for factors, academic and otherwise, that made up the selection index. Academic factors accounted for up to 110 points, including 12 for standardized test performance. By comparison, 20 points could be awarded for one, but only one, of the following: membership in an underrepresented minority group, socioeconomic disadvantage, or athletics. Applicants could receive one to four points for "legacy" or alumni relationships, three points for personal essay, and five points for community leadership and service, six points for in-state residency, etc. In practice, students at the extremes of academic performance were typically admitted or rejected on that basis alone. But for the middle range of qualified applicants, these other factors were often determinative. Finally, counselors could "flag" applications for review by the Admissions Review Committee, where any factor important to the freshman class composition—race included—was not adequately reflected in the selection index score.

The four *Grutter* dissenters were joined by two Justices in striking down the racial bonus system for undergraduate admissions in *Gratz*. Basically, the same factors that saved the Law School policy, by their absence, conspired to condemn the undergraduate program in the eyes of the majority. Since the university's "compelling" interest in racial student diversity was settled in *Grutter*, the companion case focused on the reasons why the automatic award of 20 admission points to minority applicants failed the narrow tailoring aspect of strict scrutiny analysis. Relying, again, on the Powell rationale in *Bakke*, the policy was deemed more than a "plus" factor, as it denied each applicant "individualized consideration" by making race "decisive" for "virtually every minimally qualified underrepresented minority applicant." Nor did the procedure for "flagging" individual applications for additional review rescue the policy since "such consideration is the exception and not the rule," occurring—if at all—only after the "bulk of admission decisions" are made based on the point system. The Court rejected the university's argument based on "administrative convenience," that the volume of freshman applications makes it "impractical" to apply a more individualized review. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." Finally, the majority made plain that its constitutional holding in *Gratz* is fully applicable to private colleges and universities pursuant to the federal civil rights laws. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI [of the 1964 Civil Rights Act]."

II. Supreme Court Review

As noted above, the Supreme Court had never, until recently, considered the constitutionality of the voluntary use of race as a factor in achieving diversity in elementary and secondary education. All three of the federal appeals courts to consider the issue since *Grutter* and *Gratz* were decided upheld racial diversity measures in public schools,[17] but these opinions conflicted with pre-*Grutter*/*Gratz* appellate rulings that rejected such racially based plans.[18] Possibly as a result of

[17] Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005); McFarland v. Jefferson County Pub. Schs, 416 F.3d 513 (6th Cir. 2005); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005).

[18] See, e.g., Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Eisenberg ex rel. Eisenberg v. (continued...)

this conflict, the Supreme Court agreed to review whether the school diversity plans at issue in *Meredith* and *Parents Involved in Community Schools* violate the equal protection clause of the Constitution.[19]

Equal Protection

The Fourteenth Amendment of the Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*[20]

Under the Supreme Court's equal protection jurisprudence, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[21] Laws based on suspect classifications such as race or gender, however, typically receive heightened scrutiny and require a stronger state interest to justify the classification.[22] The highest level of judicial review, known as strict scrutiny, is applied to laws that contain classifications based on race. Such classifications will survive strict scrutiny only if the government can show that they: (1) further a compelling governmental interest, and (2) are narrowly tailored to meet that interest.[23]

The Decision

Ultimately, the Supreme Court held that the Louisville and Seattle school plans violated the equal protection clause. However, the decision was fractured, with five different Justices filing opinions in the case. Announcing the judgment of the Court was Chief Justice Roberts, who led a plurality of four Justices in concluding that the school plans were unconstitutional because they did not serve a compelling governmental interest. Although Justice Kennedy, who concurred in the Court's judgment striking down the plans, disagreed with the plurality's conclusion that the diversity plans did not serve a compelling governmental interest, he found that the school plans were unconstitutional because they were not narrowly tailored. In addition, Justice Thomas filed a concurring opinion, and Justices Stevens and Breyer filed separate dissenting opinions.

In the portion of his opinion that was joined by Justice Kennedy and that therefore announced the judgment of the Court, Chief Justice Roberts began by noting that the Court had jurisdiction in the case, thereby rejecting a challenge to the standing of the plaintiff organization Parents Involved in Community Schools (PICS).[24] Chief Justice Roberts then turned to the substantive

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Montgomery County Pub. Schs., 197 F.3d 123 (4th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[19] Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (U.S. 2006); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 126 S. Ct. 2351 (U.S. 2006).

[20] U.S. Const. amend. XIV, § 1 (emphasis added).

[21] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[22] *Id.*

[23] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[24] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 2007 U.S. LEXIS 8670, *32-33 (U.S. 2007).

merits of the claims involved, reiterating that governmental racial classifications must be reviewed under strict scrutiny. As a result, the Court examined whether the school districts had demonstrated that their assignment and transfer plans were narrowly tailored to achieve a compelling governmental interest.

In assessing the compelling interest prong of the strict scrutiny test, Chief Justice Roberts noted that the Court has recognized two interests that qualify as compelling where the use of racial classifications in the school context is concerned: remedying the effects of past intentional discrimination and promoting diversity in higher education. However, the Chief Justice found that neither of these interests was advanced by the school plans at issue. According to the Chief Justice, because Seattle schools were never intentionally segregated and because the lifting of its desegregation order demonstrated that Louisville schools had successfully remediated past discrimination in its schools, neither school district could assert a compelling interest in remedying past intentional discrimination.[25]

Likewise, the Court argued that the *Grutter* precedent, which recognized diversity in higher education as a compelling governmental interest, did not govern the current cases. According to Chief Justice Roberts, the compelling interest recognized in *Grutter* was in a broadly defined diversity that encompassed more than just racial diversity and that focused on each applicant as an individual. Because race was the only factor considered by the school districts rather than other factors that reflected a broader spectrum of diverse qualifications and characteristics, and because the plans did not provide individualized review of applicants, the plurality opinion found that the school districts' articulated interest in diversity was not compelling. Added the Chief Justice, "[e]ven 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."[26] In rejecting *Grutter* as applicable precedent, the Court also noted that the decision had rested in part on the unique considerations of higher education, and that those considerations were absent in the elementary and secondary education context.

Even if the school districts had met the first prong of the strict scrutiny test by establishing a compelling governmental interest in the use of racial classifications to make school assignments, the Court found the school plans would still have failed the second prong of the test because they were not sufficiently narrowly tailored to meet their stated goals. According to Chief Justice Roberts, in both Seattle and Louisville, only a few students were assigned to a non-preferred school based on race. As a result, "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications,"[27] especially in light of the fact that such racial classifications are permissible in only the most extreme circumstances. Additionally, the Court was concerned that the school districts had failed to consider methods other than racial classifications to achieve their goals, despite a requirement that narrowly tailored programs consider race-neutral alternatives.

Although Justice Kennedy joined the above portions of the plurality opinion, thereby forming a majority in favor of striking down the school plans, he did not join the remainder of the plurality opinion, which concluded for additional reasons that the school plans were unconstitutional. In these portions of his opinion, Chief Justice Roberts faulted the school plans for tying their

[25] Id. at *36-37.

[26] Id. at *41.

[27] Id. at *60.

diversity goals to each district's specific racial demographics rather than to "any pedagogical concept of the level of diversity needed to obtain the asserted educational benefits."[28] In other words, each district tried to establish schools with racial diversity that mirrored the percentages of racial groups in their respective overall populations. This effort, according to the Chief Justice, amounted to unconstitutional racial balancing because the plans were not in fact narrowly tailored to the goal of achieving the educational and social benefits that allegedly flow from racial diversity, but rather were tailored to racial demographics instead. Indeed, Chief Justice Roberts wrote, "[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[29] Such racial balancing could not, in the Chief Justice's view, amount to a compelling governmental interest even if pursued in the name of racial diversity or racial integration.

In another portion of the plurality opinion not joined by Justice Kennedy, Chief Justice Roberts criticized Justice Breyer's dissent for misapplying precedents that recognized a compelling interest in remedying past discrimination. According to the Chief Justice, the Court has recognized a compelling interest in remedying past discrimination when that discrimination is caused by governmental action but not when caused by other factors, such as social or economic pressures. Noting that the Seattle school district was never segregated due to state action and the Louisville school district had eliminated all vestiges of state segregation, the Chief Justice therefore argued that the cases cited by Justice Breyer as precedents for race-conscious school integration efforts were inapplicable to the current case.[30] The plurality opinion concluded with a discussion of *Brown v. Board of Education*,[31] in which the Court held that the deliberate segregation of schoolchildren by race was unconstitutional. According to the plurality:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.... The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[32]

Although he joined the Court in striking down the school plans, Justice Kennedy wrote a separate concurring opinion that provides additional insight into how the Justices might handle future cases involving the consideration of race in the educational context. As noted above, Justice Kennedy declined to sign on to the plurality opinion in full, in part because he disagreed with its implication that diversity in elementary and secondary education, at least as properly defined, does not serve a compelling governmental interest. According to Justice Kennedy, "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue,"[33] but neither Seattle nor Louisville had shown that its plans served a compelling interest in promoting diversity or that the plans were narrowly tailored to achieve that goal.

[28] Id. at *46.

[29] Id. at *52.

[30] Id. at *62-64.

[31] 347 U.S. 483 (1954).

[32] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 2007 U.S. LEXIS 8670, *83-84.

[33] Id. at *150.

Justice Kennedy also pointedly criticized the plurality opinion for "imply[ing] an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. ...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."[34] Justice Kennedy identified several ways in which schools, in his view, could constitutionally pursue racial diversity or avoid racial isolation, including strategic site selection of new schools, altering attendance zones, providing resources for special programs, and recruiting students and faculty. According to Justice Kennedy, such measures would be constitutional because, while race-conscious, they are not based on classifications that treat individuals differently based on race. However, Justice Kennedy would not limit schools to facially neutral methods of achieving diversity, saying that racial classifications might be permissible if based on "a more nuanced, individual evaluation of school needs and student characteristics" similar to the plan approved in *Grutter*.[35] Although no other justice joined his concurrence, Justice Kennedy's unique role in providing the pivotal swing vote in the case makes his concurring opinion significant to any future legal developments regarding the use of racial classifications in the education context.

Although Justice Thomas joined the plurality opinion written by Chief Justice Roberts in full, he also wrote a separate concurring opinion that took issue with certain aspects of Justice Breyer's dissent. Among other things, Justice Thomas disagreed with the dissent's assertion that the school plans were necessary to combat school resegregation, arguing that neither Seattle nor Louisville faced the type of intentional state action to separate the races that the school districts in *Brown* had.[36] In addition, Justice Thomas contested the dissent's argument that a less strict standard of review should apply when racial classifications are used for benign purposes, in part because Justice Thomas disagreed that the school plans—which, he wrote, inevitably exclude some individuals based on race and therefore may exacerbate racial tension—are as benign as the dissent asserted. More importantly, Justice Thomas argued that the perception of what constitutes a benign use of race-conscious measures is nothing more than a reflection of current social practice that relies too heavily on the good intentions of current public officials. According to Justice Thomas, "if our history has taught us anything, it has taught us to beware of elites bearing racial theories," adding in a footnote, "Justice Breyer's good intentions, which I do not doubt, have the shelf life of Justice Breyer's tenure."[37]

As noted above, both Justices Stevens and Breyer dissented from the Court's decision to strike down the school plans. In his brief dissent, Justice Stevens, who also joined Justice Breyer's dissent, described the Court's reliance on *Brown* as a "cruel irony" because it ignored the historical context in which *Brown* was decided and the ways in which subsequent precedents applied the landmark decision to uphold school integration efforts.[38] Meanwhile, in a lengthy and passionate dissent nearly twice as long as Chief Justice Roberts's opinion, Justice Breyer argued that the Court's holding "distorts precedent, ... misapplies the relevant constitutional principles, ... announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, ... threatens to substitute for present calm a

[34] Id. at *158-59.

[35] Id. at *162.

[36] Id. at *92-96.

[37] Id. at *146.

[38] Id. at *177-84.

disruptive round of race-related litigation, and ... undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality."[39]

III. Conclusion

Although the Court's decision to strike down the Seattle and Louisville school assignment and transfer plans will have a profound impact on similar plans at many of the nation's elementary and secondary schools, the *Parents Involved in Community Schools* case did not completely foreclose the possibility that school districts may constitutionally pursue certain measures to avoid racial isolation and promote racial diversity in their schools. However, it is not entirely clear what these measures might entail. While the methods identified in Justice Kennedy's concurring opinion—such as engaging in strategic site selection of new schools, altering attendance zones, providing resources for special programs, and recruiting students and faculty—seem more likely to survive judicial scrutiny, the fate of other kinds of race-conscious school plans may become apparent only as a result of legal developments that emerge over time.

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[39] Id. at *185.