

FULFILLING THE PROMISE OF *BROWN*?  
WHAT *PARENTS INVOLVED* MEANS FOR  
LOUISVILLE AND THE FUTURE OF RACE  
IN PUBLIC EDUCATION

*Meaghan Hines\**

INTRODUCTION

In the summer of 2007, the Supreme Court declared unconstitutional the Jefferson County<sup>1</sup> Board of Education's race-based student-assignment plan in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>2</sup> The decision was both long-awaited and controversial.<sup>3</sup> *Parents Involved* marked the first time that the Roberts Court was given the opportunity to address the issue of race in public education. The Court's invalidation of the Seattle and Louisville public school assignment plans demonstrated what some perceived to be the Court's clear movement to the right, prompting Justice Breyer to declare from the bench, "It is not often in the law that so few have so quickly changed so much."<sup>4</sup> This Note explains what *Parents Involved* means for the future of race-based student assignment plans. Specifically, *Parents Involved* will be examined through the vantage point of the community of Louisville, whose leaders have attempted to rework the city's

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\* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.A., Rhodes College, 2006. I would like to thank Professor Jennifer Mason McAward for her invaluable aid in all facets of the Note writing process, as well as my father, Bruce Hines, for his assistance in the historical research.

1 The city of Louisville is located within the boundaries of Jefferson County, Kentucky.

2 127 S. Ct. 2738 (2007).

3 The case was the oldest on the docket by the time the opinion was issued, with oral arguments having been heard on December 4, 2006. Some speculate that the reason for the delay was an effort by both the plurality and the dissent to edge Justice Kennedy closer to their respective points of view. See, e.g., Linda Greenhouse, *Justices*, 5-4, *Limit Use of Race for School Integration Plans*, N.Y. TIMES, June 29, 2007, at A24.

4 Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

student assignment policy to meet the constitutional guidelines set out in the decision.

Louisville first implemented its desegregation plan to comply with *Brown v. Board of Education*'s<sup>5</sup> prohibition on separate but equal public educational facilities.<sup>6</sup> Prior to *Brown*, Louisville assigned students to schools on the basis of race in order to keep schools segregated. After *Brown*, the city adopted a plan to assign students on the basis of race in order to integrate schools. Ironically, this plan was struck down in *Parents Involved* on principles that seem different from those espoused in *Brown*. While *Brown* sought to *achieve* integration by prohibiting discrimination on the basis of race, *Parents Involved* essentially *forbade* integration by what a plurality of the Court interpreted to be discrimination on the basis of race.<sup>7</sup> This Note argues that the legacy of *Brown* may still be honored after *Parents Involved*. Diversity in education is still a compelling interest and may be used to foster integration. *Parents Involved* has merely narrowed the circumstances in which voluntary educational integration may be achieved. School districts must be careful to create plans that will pass a strict scrutiny analysis, taking into consideration such factors as broad concepts of diversity, limited and necessary uses of race, and consideration of race-neutral alternatives.

Before the Court issued its opinion in *Parents Involved*, Louisville employed a student assignment plan that used racial percentages to determine admissions and transfers to public elementary and high schools. The plan had been lauded as a progressive measure that allowed children to reap the benefits of a racially diverse learning environment.<sup>8</sup> However, the policy was not always accepted by the community. The Jefferson County Board of Education implemented the policy in the 1970s after the city was forced to desegregate its public school system and was met with widespread disapproval and outrage. The city's struggle to integrate and the subsequent changes made to its desegregation plan are examined in Part I.

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5 (*Brown I*), 347 U.S. 483 (1954).

6 *See infra* Part I.

7 *See infra* Part III.A.

8 *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2776 (2007) (Thomas, J., concurring) ("Supporting the school boards, one *amicus* has assured us that 'both early desegregation research and recent statistical and econometric analyses . . . indicate that there are positive effects on minority student achievement scores arising from diverse school settings.' Another brief claims that 'school desegregation has a modest positive impact on the achievement of African-American students.'" (alteration in original) (citations omitted)).

*Parents Involved* was significant not only for the city of Louisville, but also for dozens of other communities throughout the nation that had implemented similar assignment plans under the assumption that the use of race in such plans was constitutional. This assumption was based partly on the Supreme Court's established permission for the use of racial classifications in efforts to integrate or diversify public education in general, coupled with the lack of any clear opinion on the permissibility of such classifications in lower education specifically. Although *Parents Involved* is the first Supreme Court case to consider the use of voluntary race-based assignment policies in elementary and secondary education, it is the latest in a long line of Supreme Court cases examining the use of race in public education generally. These decisions laid the groundwork for *Parents Involved*. Part II traces the jurisprudence of the Supreme Court from *Brown* forward, analyzing the Court's decisions concerning the implementation of desegregation plans, their limits, and the use of racial classification in higher education admissions.

Part III analyzes the decision in *Parents Involved* itself and how the Roberts Court answered the pertinent constitutional questions presented in the case. Part IV examines the implications that the holding created for the future of race in public education. This Part aims to be especially instructive for secondary and elementary schools. In particular, it lays out several requirements and prohibitions for school assignment plans, both explicit and implicit, that can be gleaned from *Parents Involved*. It creates an advisory checklist for school boards to formulate student assignment plans that will pass muster under current constitutional guidelines. Additionally, it examines Louisville's response to *Parents Involved*: what the community is saying, what its leaders are doing, and what is in store for its students in the years to come.

The plurality opinion in *Parents Involved* left many questions unanswered, particularly *how* school boards are lawfully to consider race in determining admissions to public schools. While the decision's future impact on race in education is not immediately clear, one can be certain that the Court's opinion in *Parents Involved* will have a lasting effect. This Note aims to take a first step in analyzing that effect, and in answering the questions left unresolved.

## I. A LONG ROAD TO BUSING: THE INTEGRATION OF THE JEFFERSON COUNTY PUBLIC SCHOOL SYSTEM

A full telling of [the history of equal protection as applied to the public schools in Jefferson County] would begin by describing the

pain, inhumanity, and social degradation caused by state imposed school segregation. It would describe the individual potential which segregation suppressed; the spirit and determination of those who overcame the obstacles it imposed; and the moral strength of those who fought the legal, social, and political battle against it and other forms of discrimination. It would necessarily describe the confusion and outrage at Judge Gordon's busing order which seemed to tear this community apart as it sent children from their own neighborhoods to places that many of both races had never before seen. Finally, it would describe a school community which in many respects came together for a common purpose and worked at understanding one another well enough to overcome all these traumatic events. In doing so, at the very least, the Jefferson County schools created something positive and workable.<sup>9</sup>

The "positive and workable" system in place in Jefferson County, Kentucky, at the turn of the twenty-first century came about through an arduous, explosive, and decades-long struggle. Before the Supreme Court's landmark decision in *Brown*,<sup>10</sup> both Louisville and Jefferson County operated dual school systems by law.<sup>11</sup> *Brown's* famous declaration that separate is "inherently unequal" in the context of public education set the stage for desegregation in the city of Louisville and throughout Jefferson County.<sup>12</sup> In the wake of *Brown*, Louisville began to integrate its school system in 1956 when its Board of Education adopted an assignment plan that utilized a geographic attendance zone and a transfer policy.<sup>13</sup> In 1959, the city employed a faculty desegregation plan.<sup>14</sup> Jefferson County likewise began to desegregate in 1956; from 1956 to 1963, the county eliminated its all-black schools, and assigned black pupils to county schools by geographic district.<sup>15</sup>

However, progress in both districts was slow. In 1972, parents and students filed two federal class action lawsuits, one against the

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9 *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 755 (W.D. Ky. 1999).

10 For a more in-depth discussion of *Brown I*, see *infra* notes 86–88 and accompanying text.

11 *See Newburg Area Council, Inc. v. Bd. of Educ.*, 489 F.2d 925, 927, 929 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918, 918 (1974), *reinstated as modified*, 510 F.2d 1358, 1359–61 (6th Cir. 1974).

12 *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

13 *See Hampton*, 72 F. Supp. 2d at 755–56.

14 *See id.* at 756.

15 *See id.* at 757.

Board of Education of Jefferson County and another against the Louisville Board of Education<sup>16</sup> for a failure to eliminate segregation effectively, as mandated by *Brown II*.<sup>17</sup> The plaintiffs sought the desegregation of both public school systems, proposing to merge the Louisville and Jefferson County school districts.<sup>18</sup> District Judge James Gordon dismissed both cases, finding that the school districts operated unitary school systems and had eliminated all vestiges of state-imposed segregation.<sup>19</sup> Judge Gordon's understanding of a "unitary" school system was informed by *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>20</sup> which he interpreted to mean that "'the existence of some small number of one race or virtually one-race schools within a district is not in and of itself a mark of a system that still practices segregation by law.'"<sup>21</sup> Judge Gordon decided that only drastic actions such as cross-town busing would improve integration, a remedy which he perceived to be "totally unrealistic."<sup>22</sup>

The Sixth Circuit, however, disagreed with Judge Gordon's reasoning and reversed both cases on appeal.<sup>23</sup> The Court stated that the residual effects of past discrimination had not been stamped out of the Louisville and Jefferson County school systems and found that three out of the seventy-four Jefferson County elementary schools contained fifty-six percent of the black student population, and that over

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16 The Kentucky State Board of Education ordered the Jefferson County and Louisville school systems to merge, effective as of April 1, 1975, thereby eliminating the Louisville Board of Education. See *Cunningham v. Grayson*, 541 F.2d 538, 539 (6th Cir. 1976).

17 *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955). In *Haycraft v. Board of Education*, No. 7291 (W.D. Ky. Mar. 8, 1973), the plaintiffs alleged that the city board's attendance zone and transfer system allowed segregation to continue and caused the creation of racially identifiable schools. *Id.* slip op. at 4-5. In *Newburg Area Council, Inc. v. Board of Education*, No. 7045 (W.D. Ky. Mar. 8, 1973), the plaintiffs made the same contentions, specifically citing the concentration of black students at three elementary schools, and blaming the county for purposeful segregation. See *id.*; see also *Hampton*, 72 F. Supp. 2d at 757-58.

18 *Hampton*, 72 F. Supp. 2d at 757-58. While the district of Anchorage, Kentucky, was also a proposed defendant, see *id.*, Anchorage was not included in the ultimate desegregation remedy. The district court judge only considered reassignment plans for the Louisville Board of Education and the Jefferson County Board of Education in constructing his remedy. See JACK LYNE, *SCHOOLHOUSE DREAMS DEFERRED* 250 (1998).

19 See *Newburg Area Council, Inc. v. Bd. of Educ.*, 489 F.2d 925, 927 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918, 918 (1974), *reinstated as modified*, 510 F.2d 1358, 1359-61 (6th Cir. 1974).

20 402 U.S. 1 (1971). For a more in-depth discussion of *Swann*, see *infra* notes 102-09 and accompanying text.

21 *Hampton*, 72 F. Supp. 2d at 759-60 (quoting *Swann*, 402 U.S. at 31).

22 See *id.*

23 See *Newburg Area Council*, 489 F.2d at 929, 931.

eighty percent of Louisville's public schools were racially identifiable.<sup>24</sup> "Until the dual system is eliminated 'root and branch,'" the Court stated, "the school district[s] [have] not conformed to the constitutional standard set forth by *Brown* nearly 19 years ago."<sup>25</sup>

The case was remanded to Judge Gordon in order to formulate a desegregation plan for the Louisville and Jefferson County school districts that would eliminate all vestiges of state-imposed segregation.<sup>26</sup> The school boards petitioned the Sixth Circuit for a stay of its mandate, which the circuit ultimately denied, after which the school boards filed a writ of certiorari to the Supreme Court in April 1974.<sup>27</sup> Meanwhile, a hearing was set for July 1974, in which Judge Gordon, who had already received numerous death threats because of his involvement in the desegregation efforts, would require both districts to submit new assignment plans to him.<sup>28</sup> On July 23, 1974, after reviewing the proposed plans from the city and county, Judge Gordon announced his plan for desegregation—"Plan X."<sup>29</sup> Two days later, the Supreme Court issued its opinion in *Milliken v. Bradley*,<sup>30</sup> a separate but related school desegregation case. It also issued an order remanding the Louisville and Jefferson County desegregation cases back to the Sixth Circuit for reconsideration in light of the ruling in *Milliken*, an order which Gordon considered to invalidate Plan X summarily.<sup>31</sup>

While Louisville antibusing advocates breathed a sigh of relief at the judicial postponement of Gordon's policy, this respite was short-lived. In December 1974, the Sixth Circuit ruled that its original decision was still valid under *Milliken* and authorized Judge Gordon to reorder a desegregation plan.<sup>32</sup> On July 17, 1975, the Circuit set a

24 *See id.* at 930.

25 *Id.* at 928 (quoting *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968)).

26 *See id.* at 932.

27 *See* Reply Brief at 4, *Bd. of Educ. v. Newburg Area Council, Inc.*, 418 U.S. 918 (1974) (mem.) (No. 73-1430), 1974 WL 186320.

28 *See* LYNE, *supra* note 18, at 248.

29 "Plan X" was viewed as a compromise plan between the city-proposed and county-proposed plans, "Plan A" and "Plan C." Plan X involved the use of a black student ratio of twelve percent to thirty percent and a method of assignment in which students would have several years advance notice of the years in which they would be bused. *See id.* at 250.

30 418 U.S. 717 (1974). For a more in-depth discussion of *Milliken*, see *infra* notes 120–25 and accompanying text.

31 *See Newburg Area Council, Inc.*, 418 U.S. 918; LYNE, *supra* note 18, at 242.

32 The Sixth Circuit decided that *Milliken* did not bar an interdistrict remedy involving both the city and county school districts because both school authorities had ignored and crossed district lines in the past, resulting in segregation. *See* *Newburg*

due date: Judge Gordon's plan was to take effect that coming fall.<sup>33</sup> Thirteen days later, Gordon announced a plan that was reminiscent of "Plan X," calling for the realignment of school districts, transfer of teachers, and cross-town busing.<sup>34</sup> The intended result was a system in which each school maintained no less than twelve percent and no more than forty percent black enrollment.<sup>35</sup>

The new school assignments for black students in grades seven through eleven were announced on August 21, 1975, a little over three weeks after Judge Gordon's plan was announced to the city and less than two weeks before the start of the school year.<sup>36</sup> The plan involved busing based on a method of school "clustering" and student assignments to "home" schools; each predominantly black school in the city was clustered with several other predominantly white schools in the city, and each student was assigned a "home" school based on geographic proximity to the school.<sup>37</sup> Students would attend either their home school or a school in their cluster.<sup>38</sup>

However, the city and county resisted busing until the bitter end. Throughout the summer and fall of 1975, the *Louisville Courier-Journal* was replete with letters and advertisements from various organizations exhibiting antibusing sentiments. Groups like Concerned Parents, Inc. and Parents for Freedom hosted speakers who urged parents to keep their children out of schools.<sup>39</sup> The Kentucky Ku Klux Klan planned five gatherings in the three-week period surrounding

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Area Council, Inc. v. Bd. of Educ., 510 F.2d 1358, 1359–61 (6th Cir. 1974). Consequently, the Sixth Circuit reinstated its previous opinion with minor modifications. *See id.* at 1361.

33 *See* Linda Stahl, *Jefferson Schools Ask Appeals Judge for Busing Delay*, COURIER-J. (Louisville, Ky.), Aug. 19, 1975, at A1.

34 *See* Ken Loomis, *Grayson Asks Parents to Send Children to School Today*, COURIER-J. (Louisville, Ky.), Sept. 4, 1975, at A1.

35 *See* Stahl, *supra* note 33. Additionally, "[u]nder the plan, black students [we]re to be bused up to 10 of their 12 years in school and white students two of their 12 years." *See Timeline: Desegregation in Jefferson County Public Schools*, COURIER-JOURNAL.COM, Sept. 4, 2005, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=2005509040428> [hereinafter *Timeline*] (describing the nature and stages of the Louisville area racial assignment plans in public education).

36 *See* Linda Stahl, *School Assignments Set for Blacks in Grades 7-11*, COURIER-J. (Louisville, Ky.), Aug. 22, 1975, at A1.

37 *Id.*

38 *See id.*

39 *See Antibusing Groups Urge 'Strike', Constitutional Amendment for Halt*, COURIER-J. (Louisville, Ky.), July 11, 1974, at C3; *Parents Urged to Keep Children Out of School*, COURIER-J. (Louisville, Ky.), July 11, 1974, at C3.

the beginning of the school year.<sup>40</sup> In mid-August, the Jefferson County Board of Education and the former Louisville Board of Education appealed to the Sixth Circuit for a stay of the busing order.<sup>41</sup> The court unanimously denied the motion just two days later, as it was said to “fly in the face” of the Sixth Circuit’s July 17 order.<sup>42</sup> An appeal was subsequently made to the Supreme Court, and on the day before school was to begin, Justice Blackmun denied the final pending request for the stay.<sup>43</sup> Busing would proceed, with or without the city’s support.

On the eve of the first day of school, the largest antibusing rally of the summer—drawing an estimated 10,000 to 12,000 people—was held at Louisville’s State Fair and Exposition Center.<sup>44</sup> The event began with a round of wild applause for a man carrying a sign reading, “Hitler relives, Taking our children, Gestapo guards on buses, Concentration camps.”<sup>45</sup> That same night, Superintendent Ernest Grayson made a televised plea for parents not to keep their students out of school, assuring listeners that the schools were safe and ready for their children.<sup>46</sup> However, his plea was not well-received. The first day of school was met with monumentally poor attendance rates, reaching lows of twenty-one percent at the high school level, nineteen percent in middle school, and seventeen percent in elementary school.<sup>47</sup>

Aside from the low attendance rates, the school day itself seemed to go off without incident. It was at the close of class that trouble began. As students were let out for the day, a few schools drew angry crowds.<sup>48</sup> Protesters shouted racial epithets and made obscene gestures at the black children boarding the buses, with some throwing stones and pounding on bus doors and windows.<sup>49</sup> The abuse was not

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40 See Jim Adams, *Concerned Parents Rally Cancelled for Prayer Vigil*, COURIER-J. (Louisville, Ky.), Aug. 18, 1975, at A1.

41 See Stahl, *supra* note 33.

42 Linda Stahl, *Appellate Judges Reject Jefferson County’s Plea for Delay in Busing Plan*, COURIER-J. (Louisville, Ky.), Aug. 21, 1975, at A1.

43 See Linda Stahl, *Blackmun Denies Stay of Busing*, COURIER-J. (Louisville, Ky.), Sept. 4, 1975, at A1.

44 See *Busing Foes Hear Plans for Marches*, COURIER-J. (Louisville, Ky.), Sept. 4, 1975, at A1.

45 *Id.*

46 See Loomis, *supra* note 34.

47 *First-Day Attendance*, COURIER-J. (Louisville, Ky.), Sept. 5, 1975, at A5; see *An Area-By-Area Look at the First Day of Busing in Jefferson County*, COURIER-J. (Louisville, Ky.), Sept. 5, 1975, at A3 [hereinafter *Area-By-Area Look*].

48 See *Area-By-Area Look*, *supra* note 47.

49 See *id.*

directed towards one race alone; protesters hurled obscenities at white children and schoolteachers for participating in the busing and jeered at the “Nazi” policemen.<sup>50</sup> One bus was pelted with egg on its route,<sup>51</sup> and another parked bus was fired at as it sat in a bus driver’s driveway later that night.<sup>52</sup> The worst, however, was still to come. The city’s most violent demonstrations took place during the late afternoon of September 5 and early on September 6.<sup>53</sup>

At Southern High School, in the south end of Louisville, about 600 people gathered on the evening of Friday, September 5 on the school grounds, where three buses were set ablaze over the course of the night and a police helicopter circling overhead was fired upon.<sup>54</sup> Shortly before midnight, the unruly crowd—which had, by this point, swelled into the street bordering Southern High School—found itself facing a squad of baton-equipped and gas-mask-clad police officers. The crowd began to toss cans, bottles, and larger objects such as tire-rims at the police force, who responded with tear gas canisters.<sup>55</sup>

At Valley High School, in the southwest end of Louisville, about 2,500 protesters gathered.<sup>56</sup> Over the course of the night, at least twenty people were injured, including a three-year-old (who was hit by a brick while riding in a car), an eleven-year-old (who was injured after the crowd reportedly “turned on” him at the riot),<sup>57</sup> and a thirteen-year-old (who was hit in the head with a brick as he watched the scene from across the street).<sup>58</sup> Additionally, thirty police officers were injured, and one officer lost an eye after the crowd began using sling shots to propel fishing sinkers.<sup>59</sup> The officers and their police cars were also pelted with rocks, bricks, and bottles.<sup>60</sup> Tear gas and riot sticks ultimately had to be used on the crowd and seventy-five protesters were eventually arrested.<sup>61</sup>

50 *See id.*

51 *See The Drivers . . . One Boycotts, One Gets an Egg on the Windshield*, COURIER-J. (Louisville, Ky.), Sept. 5, 1975, at A7.

52 *See Shots Fired into School Bus Parked in Driver’s Driveway*, COURIER-J. (Louisville, Ky.), Sept. 5, 1975, at A6.

53 *See Clashes at Protests Bring Injuries, Arrests*, COURIER-J. (Louisville, Ky.), Sept. 6, 1975, at A1 [hereinafter *Injuries, Arrests*].

54 *See id.*

55 *See id.*

56 *See id.*

57 *See id.*

58 *See Paul Bulleit, Boy, 13, Goes from Watcher to Victim*, COURIER-J. & TIMES (Louisville, Ky.), Sept. 7, 1975, at B1.

59 *See Injuries, Arrests*, *supra* note 53.

60 *See id.*

61 *See id.*

While early September marked the city's most dramatic response to busing, it was neither the beginning nor the end of the outcry. Throughout the late summer and fall of 1975, opinions about busing filled the editorial pages of the local *Courier-Journal*, which became sated with antibusing comments from citizens who believed that forced busing rode "roughshod" over parents' rights,<sup>62</sup> eroded and destroyed the citizenry's constitutional heritage,<sup>63</sup> and stripped citizens of their freedom.<sup>64</sup> The University of Louisville Law School student newspaper even published an editorial entitled *Busing is Cruel and Unusual Punishment*, which endorsed boycotts and peaceful protests in response to busing.<sup>65</sup> The editorial cited a Gallup Poll which demonstrated the widespread disapproval of the plan, indicating that 97% of whites and 92% of blacks surveyed opposed busing.<sup>66</sup> One incensed Louisvillian began handing out cards containing the number to the "Hot Line to the White House," and during the first week of busing the White House comment office received over 4,000 calls about busing, all but three in opposition and only a handful not concerning Louisville.<sup>67</sup>

Despite this outcry, busing remained in full effect in Louisville. In 1978, three years after his busing order took effect, Judge Gordon ended active court supervision of the plan, finding that all of Louisville's schools had mostly complied with the racial guidelines, but left the desegregation decree in place.<sup>68</sup> The student assignment system underwent several modifications in subsequent decades. Between 1984 and 1996, the school board changed the plan at least three times to keep schools in compliance with racial guidelines and maximize educational benefits.<sup>69</sup>

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62 See, e.g., Everett A. Hayes, Letter to the Editor, *COURIER-J.* (Louisville, Ky.), Aug. 23, 1975, at A12.

63 See, e.g., Charles B. Fort, Concerned Parents, Inc., Letter to the Editor, *COURIER-J.* (Louisville, Ky.), Aug. 23, 1975, at A12.

64 See Garland D. Haynes, Letter to the Editor, *COURIER-J.* (Louisville, Ky.), Aug. 23, 1975, at A12.

65 See Keith Runyon, *Paper Urges Legal Antibusing Action*, *COURIER-J.* (Louisville, Ky.), Sept. 11, 1975, at A18.

66 See *id.*

67 See Charles R. Babcock, *Antibusing Calls Flood White House 'Hot-line'*, *COURIER-J.* (Louisville, Ky.), Sept. 11, 1975, at C3.

68 See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2807 (2007) (Breyer, J., dissenting); *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 765 (W.D. Ky. 1999).

69 In 1984, the middle school and high school plans implemented a zone and satellite system so that most students were able to attend schools based on where they lived. See *Timeline*, *supra* note 35. The racial guidelines were also changed; elemen-

In 1998, however, the current student assignment plan came under attack when six black parents sued the County Board of Education to throw out the fifty percent black enrollment cap at Central High School—a historically black school—arguing that their children had been unfairly denied admission because of the high school’s required racial composition.<sup>70</sup> After a thorough examination of the county’s history of desegregation, the district court judge, John Heyburn, ultimately concluded that the racial guidelines at Central High School were legally permissible because the 1975 desegregation order issued by Judge Gordon had never actually been dissolved.<sup>71</sup> However, Judge Heyburn spoke of the possibility of judicial dissolution of the decree after proper motion by the plaintiffs, and in 2000 the parents filed suit to dissolve the 1975 order.<sup>72</sup> The change in the filing of the suit allowed Heyburn to grant the plaintiffs the relief they had been denied in their first attempt in court. The Judge stated:

Confronted with the complete disappearance of de jure discrimination, the impracticability that any further Board policy will appreciably change our racial demography, vibrant democratic debate about educational policy, and decades of good faith on the part of the Board, the Court concludes that [Jefferson County Public Schools] should be free to adopt its student assignment plans without the dictates of a continuing Decree.<sup>73</sup>

Despite its newly-bestowed freedom to formulate a different assignment plan, in 2001 the Board elected to keep the current policy in place for all non-magnet schools by a vote of 5–1, requiring a minimum black enrollment of fifteen percent and a maximum black

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tary schools required enrollment of 23–43% African American students; middle schools required 22–42%, and high schools 16–36%. *Timeline, supra* note 35. In addition to the redrafting of school zone boundaries, so-called “magnet” schools were established. *See Hampton*, 72 F. Supp. 2d at 766. In 1992, Project Renaissance replaced the system of citywide busing, and was designed to give parents a choice of schools in the desegregation efforts. *Timeline, supra* note 35. Racial guidelines were again changed; elementary schools required 15–50% African American students, middle schools required 16–46%, and high schools required 12–42%. *Timeline, supra* note 35. In 1996, the district changed the plan once more so that all schools required between 15–50% African American students. *See Timeline, supra* note 35.

70 *See Hampton*, 72 F. Supp. 2d at 755, 757 n.5.

71 *See id.* at 773.

72 *See Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 377 (W.D. Ky. 2000).

73 *Id.* Additionally, Heyburn exempted magnet schools from the Board’s assignment plan, making Central High School exempt from any racial quotas. *See Timeline, supra* note 35.

enrollment of fifty percent.<sup>74</sup> The district kept the racial requirements in place at these schools because officials believed that the twenty-six years of past integration had helped to improve student achievement in the schools, as demonstrated by higher statewide test results.<sup>75</sup> Although the school board held public forums before voting, parents expressed concern at the lack of parental involvement and input in the decision.<sup>76</sup> Not surprisingly, the legal battles were not over.

This readopted policy came under attack when Joshua McDonald, a white kindergartener in the Louisville public school system, was prevented from transferring to a school because it would have an “adverse effect on desegregation compliance” for the school from which he sought to transfer.<sup>77</sup> Joshua was assigned to Young Elementary, a predominantly black school, and sought to transfer to Bloom Elementary, which was only a mile from his home. However, under the Louisville school assignment plan, if a school had reached the “extremes of the racial guidelines,” assignments and transfers were made or denied in order to improve a school’s racial balance.<sup>78</sup> Because Joshua’s transfer from Young Elementary to Bloom Elementary would have forced Young’s racial composition to fall outside of the desired racial guidelines, his transfer was denied.<sup>79</sup>

Joshua’s mother, Crystal Meredith, brought suit in the Western District of Kentucky, claiming that the Board of Education’s assignment plan violated the Equal Protection Clause of the Fourteenth Amendment.<sup>80</sup> Both the district court and the Sixth Circuit upheld the assignment plan as narrowly tailored to serve the Board’s compelling interest in diversity.<sup>81</sup> The Supreme Court granted certiorari, ultimately deciding the appeal—together with a similar appeal from

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74 See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2749 (2007); Holly Coryell, *Board Lifts Quotas at 4 Magnet Schools*, COURIER-J. (Louisville, Ky.), Apr. 3, 2001, at A1.

75 See Holly Coryell, *Some Target School Racial Quotas*, COURIER-J. (Louisville, Ky.), Mar. 16, 2001, at B1.

76 See Coryell, *supra* note 74.

77 *Parents Involved*, 127 S. Ct. at 2749–50 (internal quotation marks omitted).

78 See *id.*

79 See Chris Kenning, *Racial Guideline Suit May Add Voice*, COURIER-J. (Louisville, Ky.), Apr. 16, 2003, at A1; Chris Kenning, *School Desegregation Plan on Trial*, COURIER-J. (Louisville, Ky.), Dec. 8, 2003, at A1.

80 U.S. CONST. amend. XIV, § 1.

81 See *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 861–62 (W.D. Ky. 2004), *aff’d*, 416 F.3d 513, 514 (6th Cir. 2005), *rev’d*, *Parents Involved*, 127 S. Ct. 2738.

the Ninth Circuit—in *Parents Involved*.<sup>82</sup> The stage was set for the Court's first decision on race-based assignment plans in integrated elementary and secondary schools.

In a 5–4 vote, the Court ultimately struck down the assignment policies as unconstitutional, ushering in a new era for the use of race in public education. The decision affected not only Louisville and Seattle, but school districts around the country that had administered similar assignment programs that operated under the assumption that such plans were constitutional. Those assumptions were based on the school districts' various interpretations of Supreme Court cases addressing the issue of race use in education, beginning with *Brown* and ending with *Grutter v. Bollinger*<sup>83</sup> and its companion case, *Gratz v. Bollinger*.<sup>84</sup>

## II. COURT-ORDERED DESEGREGATION: BROWN AND ITS PROGENY

The Roberts Court decided *Parents Involved* against a backdrop of previous Supreme Court cases addressing race and public education. However, because the Court never fully addressed the precise issue of voluntary integration efforts in K–12 education before *Parents Involved*, an examination of the judicial history of the use of race in school assignments is instructive in illuminating the precedent set in place at the time *Parents Involved* was decided. “[T]he historical and factual context in which [*Parents Involved*] ar[ose] is critical.”<sup>85</sup>

### A. *Implementing Desegregation: Brown I, Brown II, Green, and Swann*

#### 1. *Brown I*

A thorough examination of the desegregation cases must begin with *Brown*, which invalidated the holding of *Plessy v. Ferguson*<sup>86</sup> and laid the foundation for a long line of cases clarifying how, and under what circumstances, desegregation remedies may be implemented. *Brown I* was a consolidation of four Equal Protection suits filed by parents of black children who had been denied admission to white

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82 *Parents Involved*, 127 S. Ct. at 2749.

83 530 U.S. 306 (2003). For a more in-depth discussion of *Grutter*, see *infra* notes 162–70 and accompanying text.

84 539 U.S. 244 (2003). For a more in-depth discussion of *Gratz*, see *infra* notes 171–74 and accompanying text.

85 *Parents Involved*, 127 S. Ct. at 2801 (Breyer, J., dissenting).

86 163 U.S. 537, 550–52 (1896) (holding that a state statute requiring separate accommodations for whites and blacks in railroad compartments was constitutional), *overruled by* *Brown v. Bd. Of Educ (Brown I)*, 347 U.S. 483 (1954).

schools due to various state laws permitting segregation.<sup>87</sup> The Court held in *Brown I* that “in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>88</sup> Consequently, in holding that de jure segregation denied black children the equal protection of the laws guaranteed under the Fourteenth Amendment, *Brown I* effectively ended the fifty-eight-year judicial endorsement of segregation in public schools.

## 2. *Brown II*

*Brown I* reserved the issue of *how* to successfully integrate public school systems for *Brown II*.<sup>89</sup> In this second installment of *Brown*, the Court charged the school boards of segregated school districts with several specific tasks to remedy segregation: assessing and solving local school problems, attempting a good-faith implementation of governing constitutional principles, and determining student admission to schools on a nonracial basis.<sup>90</sup> Notably, *Brown II* called for the implementation of integration “with all deliberate speed.”<sup>91</sup>

## 3. *Green*

After over a decade of massive resistance to desegregation, the Supreme Court in *Green v. County School Board*<sup>92</sup> effectively ordered schools districts to end segregation immediately.<sup>93</sup> New Kent County, a rural county in Eastern Virginia, operated two schools on different sides of the county.<sup>94</sup> The two schools were segregated until 1965, when the county adopted a “freedom-of-choice” plan to comply with

87 *Brown I*, 347 U.S. at 486 n.1, 487.

88 *Id.* at 495.

89 *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); *Brown I*, 347 U.S. at 495–96.

90 *Brown II*, 349 U.S. at 299.

91 *Id.* at 301. The *Brown* cases have been characterized by some as “judicial abdication,” in which the Court left the ultimate remedy to be decided by lower courts. See, e.g., Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 632 (stating that institutional concerns and racial politics led to such abdication); G. Edward White, *Chief Justice Marshall, Justice Holmes, and the Discourse of Constitutional Adjudication*, 30 WM. & MARY L. REV. 131, 140–41 (1988) (explaining that the problem in *Brown I* that invited such abdication was not the difficulty of enforcement, but the difficulty in justifying Court intervention in light of southern preferences and the lack of congressional action).

92 391 U.S. 430 (1968).

93 *Id.* at 439–40.

94 *Id.* at 432.

desegregation requirements under the *Brown* decisions.<sup>95</sup> After operating for three years under the “freedom-of-choice” plan, however, not a single white child had chosen to attend the former black school, and eighty-five percent of the black students still remained in the all-black school.<sup>96</sup>

The Supreme Court found that this plan was simply not sufficient to fulfill *Brown II*'s mandate. Allowing black children the option to attend former white schools was only the *first* step to desegregation.<sup>97</sup> The ultimate goal was the operation of a unitary, nonracial school system.<sup>98</sup> Accordingly, the burden on the New Kent County School Board was to come forward with a plan that would “promise[] realistically to work, and promise[] realistically to work *now*.”<sup>99</sup> Significantly, the Court did not hold that a freedom-of-choice plan was unconstitutional in and of itself, but only that a freedom-of-choice plan “is not an end in itself” if there are more effective ways of conversion to an integrated, unitary school system.<sup>100</sup>

*Green* represented a fundamental change in the jurisprudence of the Supreme Court. Prior to the decision, the Court seemed to “limit[] the scope of the *Brown* opinions to non-discriminatory student assignment policies, not compulsory integration.”<sup>101</sup> After *Green*, however, active integration became obligatory, and was to be accomplished with *Brown II*'s required “deliberate speed.”<sup>102</sup> Significantly, *Green*'s focus was directed at the powers and responsibilities of school boards and the obligations that arose as a result of the need for educational integration, not the power of the district courts to remedy segregation.

#### 4. *Swann*

Courts' remedial powers to achieve integration at the necessary speed were greatly broadened in *Swann*. In *Swann*, the petitioner claimed that the city of Charlotte's attempts at educational integration—an assignment plan based on geographic zoning with a free transfer provision—fell short of the active and immediate integration

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95 *See id.* at 433.

96 *Id.* at 441.

97 *Id.* at 436.

98 *See id.*

99 *Id.* at 439.

100 *Id.* at 440.

101 KEVIN BROWN, *RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA* 176 (2005).

102 *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

demanded in *Green*.<sup>103</sup> The district court of North Carolina agreed; as of June 1969, two-thirds of the black students in Charlotte attended twenty-one schools which were either all-black or ninety-nine percent black.<sup>104</sup> To remedy the existence of the dual school system, the district court imposed a student assignment plan that included possible rezoning and the busing of students.<sup>105</sup>

The Supreme Court unanimously upheld the district court's busing order.<sup>106</sup> The Court stated that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."<sup>107</sup> Accordingly, while

[n]o rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. . . .

. . . .

[i]n the[] circumstances [of the case], we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.<sup>108</sup>

The *Swann* Court recognized that "[t]he remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."<sup>109</sup>

The progressive steps endorsed by the Supreme Court in *Green* and *Swann*, coupled with the Civil Rights Act of 1964,<sup>110</sup> helped accelerate desegregation efforts in public schools and created a "dramatic and immediate" result.<sup>111</sup> Between 1968 and 1972, the percentage of black students attending predominantly-white schools nationwide

103 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 7 (1971).

104 *See id.*

105 *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 269 (W.D.N.C. 1970), *vacated*, 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1.

106 *See Swann*, 402 U.S. at 30, 32.

107 *Id.* at 15.

108 *Id.* at 29-30.

109 *Id.* at 28.

110 Title VI of the Civil Rights Act prohibits discrimination in federally assisted programs, providing that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000d (2000)).

111 BROWN, *supra* note 101, at 177.

increased from 23.4% to 36.4%.<sup>112</sup> In that same time period, the number of black students in schools enrolling 90% or more minority students had decreased from 64.3% to 38.7%.<sup>113</sup>

### B. *Limiting Desegregation Remedies: Keyes and Milliken*

#### 1. *Keyes*

However readily the Supreme Court appeared to grant district courts and school districts broad powers to achieve immediate and complete integration, later decisions made clear that those powers were not limitless. *Keyes v. School District No. 1*<sup>114</sup> marked the first time the Supreme Court addressed the issue of desegregation in a district that had never statutorily imposed segregation on its students.<sup>115</sup> On certiorari, the Supreme Court, without actually deciding whether judicial desegregation was a proper remedy for the Denver school district, drew a crucial distinction between de jure and de facto segregation and the availability of a judicial remedy in both instances. The Court stated that “the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.”<sup>116</sup> De jure segregation is, “stated simply, a current condition of segregation resulting from intentional state action directed specifically to the [segregated] schools.”<sup>117</sup> The lynchpin for the Court in identifying unconstitutional segregation that justified judicial intervention was intent. While de facto segregation alone, without an intent to segregate, is not a violation of the Fourteenth Amendment, policies that appear to be racially-neutral and result in de facto segregation will violate the Fourteenth Amendment if an intent to segregate is found.<sup>118</sup> *Keyes* was significant because it recognized an important

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112 *Id.*

113 *Id.*

114 413 U.S. 189 (1973).

115 The case involved the Denver, Colorado, school district, which had never mandated segregation in public education by law. *See id.* at 191. However, parents and students filing suit claimed that the school district was nevertheless to blame for the current segregation in its public schools. The lack of legal segregation was immaterial. *See id.* They argued that the school district, by using certain techniques such as manipulating the school attendance zones and selecting school sites while using a neighborhood school policy, had purposefully aimed to create racially segregated schools throughout the district. Accordingly, the petitioners sought a judicial decree ordering the desegregation of the entire school district. *See id.*

116 *Id.* at 208.

117 *Id.* at 205–06.

118 The Court stated that the respondent school board had deliberately aimed at racial segregation in schools that over one-third of the black population attended,

boundary of judicial and administrative desegregation remedies. It clarified the scope of judicial remedies, limiting intervention to instances of de jure segregation, and not instances of de facto desegregation.<sup>119</sup>

## 2. *Milliken*

*Milliken* further restricted courts' power to compel integration.<sup>120</sup> In *Milliken*, the Detroit National Association for the Advancement for Colored People (NAACP) brought suit, along with parents and students, against the city of Detroit for intentional segregation in violation of the Equal Protection Clause.<sup>121</sup> The district court found that Detroit had, in fact, manipulated its school assignment policies to maintain a segregated school system.<sup>122</sup> The district court ordered the state to prepare a busing remedy that included suburban Detroit areas where constitutional violations had occurred.<sup>123</sup>

The Supreme Court reversed the decision, concluding that absent an interdistrict violation—a violation “where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines [had] been deliberately drawn on the basis of race”—there can be no interdistrict remedy.<sup>124</sup> In this sense, *Milliken* dealt a “dramatic blow” to the progressive expansion of desegregation remedies, inhibiting districts from crossing an offending city's boundary into the adjoining suburbs and thus contributing to “white flight” from urban to suburban districts.<sup>125</sup>

### C. *Dissolving Desegregation Decrees: Dowell and Freeman*

#### 1. *Dowell*

Many of the desegregation orders issued in the 1970s resulted in *Brown II*'s desired integration. The question remained of what a school district could do once its school board had earnestly complied

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which “establishes a prima facie case of intentional segregation in the core city schools” and therefore “[the School Board's] neighborhood school policy is not to be determinative ‘simply because it appears to be neutral.’” *Id.* at 213 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971)).

119 *See id.* at 211.

120 *See Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

121 *See id.* at 722–23.

122 *See id.* at 725.

123 *See id.*

124 *Id.* at 745.

125 *BROWN*, *supra* note 101, at 211.

with a court order and eliminated de jure segregation in its school system. The Supreme Court answered this question in *Board of Education v. Dowell*.<sup>126</sup> The decision in *Dowell* marked the culmination of several decades of litigation centering on a desegregation order that had been issued by a federal district court in 1972. The decree authorized the busing of students and allowed elementary students to attend neighborhood schools.<sup>127</sup> After examining the Oklahoma City School District's long history of implementing the desegregation plan, the Supreme Court held that when a school board has made a sufficient showing of constitutional compliance with a desegregation order and has eliminated the vestiges of past discrimination to the extent practicable, the order can be judicially dissolved. According to the Court, desegregation decrees are not meant to "operate in perpetuity."<sup>128</sup>

## 2. *Freeman*

A school district does not have to be in compliance with every aspect of a desegregation decree in order to receive a judicial dissolution of that decree; partial dissolution may be granted in cases where partial compliance is demonstrated. In *Freeman v. Pitts*,<sup>129</sup> the Court held that a decree-issuing court can withdraw its supervision over parts of the order in which a school district has achieved compliance and in "incremental stages, before full compliance has been achieved in

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126 498 U.S. 237 (1991).

127 See *Dowell v. Bd. of Educ.*, 338 F. Supp. 1256, 1273 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972). After the Board had complied with the 1972 order for five years, they filed a "Motion to Close Case." *Dowell*, 498 U.S. at 240. The district court consequently terminated its jurisdiction over the desegregation of the school district and issued an "Order Terminating Case," stating that the school board had complied with the decree. *Id.* at 240–41. In 1985, the respondents of *Dowell* moved to reopen the case on the grounds that the school system had returned to a state of segregation and was no longer unitary. See *id.* at 242. The district court ultimately found that the present segregation in the city was the result of "imbalance in residential patterns," "economic pressures," and "voluntary preferences" and therefore not a remnant of de jure segregation warranting a re-opening of the case. See *Dowell v. Bd. of Educ.*, 677 F. Supp. 1503, 1521 (W.D. Okla. 1987). The court of appeals reversed, however, holding that, despite the unitary finding, the Board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects." *Dowell v. Bd. of Educ.*, 890 F.2d 1483, 1504 (10th Cir. 1989) (quoting *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979)).

128 See *Dowell*, 498 U.S. at 248–50. The Court remanded the case to the district court for further factfinding to determine if the decree could be dissolved due to the school's compliance. See *id.* at 248.

129 503 U.S. 467 (1992).

every area of school operations.”<sup>130</sup> Specifically, the district court found that the DeKalb County School System (DCSS) had complied with the desegregation order in terms of its student assignments, transportation policy, physical facilities, and extracurricular activities,<sup>131</sup> but had not fulfilled the decree in terms of its teacher and principal assignments, resource allocation, and quality of education.<sup>132</sup> Accordingly, a partial dissolution was appropriate.<sup>133</sup>

#### D. A Note on Requirement and Permissibility

Much has been said of district courts’ broad remedial powers upon a finding of intentional or de jure segregation and the lack of power absent such constitutional violations.<sup>134</sup> However, there is a notable absence of precedent concerning the permissibility of voluntary measures taken by K–12 school districts to remedy segregation. Several cases have been cited—most notably by Justice Breyer in his *Parents Involved* dissent—as establishing the proposition that schools may voluntarily and constitutionally undertake measures to remedy desegregation without the need for a court order.<sup>135</sup>

130 *Id.* at 490.

131 *See id.* at 474.

132 *See id.*

133 *See id.* Additionally, the district court found that while the school district had experienced a level of resegregation in recent years, this was due to demographic changes and not any intentional segregation on the part of the school board. Consequently, the racial imbalance in certain schools “was not a vestige of the prior *de jure* system.” *Id.* at 478. “[The actions of DCSS] achieved maximum practical desegregation from 1969 to 1986. The rapid population shifts in DeKalb County were not caused by any action on the part of the DCSS. These demographic shifts were inevitable as the result of suburbanization . . . .” *Id.* at 480 (alteration in original) (internal quotation marks omitted). *Freeman*, coupled with *Dowell*, serves to establish certain boundaries of desegregation decrees; such decrees must be limited in scope and duration and cannot be used to prevent resegregation that has resulted from private housing choices not attributable to state action.

134 *See, e.g.,* *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 211 (1973).

135 Justice Breyer stated in his dissent in *Parents Involved*:

The opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake. As 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. And *Swann*, *McDaniel*, *Crawford*, *North Carolina Bd. of Ed.*, *Harris*, and *Bustop* made one thing clear: 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.

Dicta in those decisions has been construed as allowing school districts to take broad measures to remedy segregation, even without a judicial desegregation decree. In *Swann v. Charlotte-Mecklenburg*, the Court stated:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .<sup>136</sup>

Additionally, in *North Carolina State Board of Education v. Swann*,<sup>137</sup> Justice Burger, speaking for the Court, seemed to verify that proposition by stating that “school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”<sup>138</sup>

While the line between what school districts *may* do and what school districts *must* do in terms of integration is somewhat blurry in light of these precedents, any doubt pertaining to school districts’ powers of voluntary integration was laid to rest in *Parents Involved*, which clarified what school districts *cannot* do. While the Court in prior dicta had suggested that voluntary integration plans were constitutional,<sup>139</sup> *Parents Involved* explicitly limited the ability of school dis-

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Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2823–24 (2007) (Breyer, J., dissenting) (citations omitted).

136 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

137 402 U.S. 43 (1971).

138 *Id.* at 45.

139 In *McDaniel v. Barresi*, 402 U.S. 39 (1971), the Supreme Court upheld an integration plan (which required twenty to forty percent black students in schools) that was adopted without a court order, stating that “[t]he Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines.” *Id.* at 41. In *Board of Education v. Harris*, 444 U.S. 130 (1979), the Supreme Court recognized that a school district may be required to integrate its faculty pursuant to the Federal Emergency School Aid Act even when segregation is de facto and thus not a violation of the Fourteenth Amendment. *Id.* at 148–49. In *Crawford v. Board of Education*, 458 U.S. 527 (1982), the Supreme Court similarly acknowledged that a state constitution may impose a greater duty on school districts to desegregate than does the United States Constitution, requiring integration efforts even in the absence of intentional de jure segregation. *Id.* at 535–36. Such state constitution requirements were challenged in *Bustop, Inc. v. Board of Education*, 439 U.S. 1380 (1978), where the Court upheld a California desegregation plan issued under the authority of

tricts to use race-based assignment measures to remedy situations involving past de jure segregation or a court-ordered desegregation decree.

*E. Affirmative Action in Higher Education Admissions Policies:  
Bakke, Grutter, and Gratz*

1. *Bakke*

The Court turned its attention to the use of race in university admissions in *Regents of the University of California v. Bakke*.<sup>140</sup> Bakke concerned a university's voluntary efforts to integrate without any finding of prior discrimination, a question which had not yet crossed the Supreme Court's docket. Allan Bakke, a white male, applied to the Medical School of the University of California at Davis in 1973 and 1974.<sup>141</sup> He was denied admission both years and subsequently filed suit against the University, claiming that the Medical School denied him admission based on his race, in violation of the Equal Protection Clause of the Fourteenth Amendment and section 601 of Title VI of the Civil Rights Act of 1964.<sup>142</sup> Specifically, Bakke cited the University's "special admissions program"—which reserved a specific number of spots in the class for students who were economically or educationally disadvantaged or members of minority groups<sup>143</sup>—as the cause for his unconstitutional rejection.<sup>144</sup>

The Supreme Court granted certiorari to address the important constitutional issue, eventually producing a myriad of opinions in the decision—six in total—none of which definitively resolved the Fourteenth Amendment question. Instead, the Court only held that the University's special admissions program violated Title VI of the Civil

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the California Constitution, stating through Justice Rehnquist: "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." *Id.* at 1383.

140 438 U.S. 265 (1978).

141 *See id.* at 276 (opinion of Powell, J.).

142 *See id.* at 277–78.

143 *Id.* at 274–75. The Medical School apparently viewed these groups as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*

144 The applicants in the special admissions pool were rated by a separate committee, which was comprised primarily of minority members. *See id.* at 274. The special admissions candidates did not have to meet the minimum G.P.A. cutoff of 2.5 required for regularly admitted students and filled sixteen out of the one hundred spots in the class. *See id.* at 275. The Supreme Court of California found that the University's program violated the Equal Protection Clause of the Fourteenth Amendment and ordered Bakke's admission to the Medical School. *See id.* at 280–81.

Rights Act of 1964, thereby affirming the lower court's order to grant Bakke admission to the Medical School.<sup>145</sup> While the Court's holding dodged the constitutional issue, several separate opinions spoke to Bakke's constitutional claim. Notably, Justice Powell's opinion, the narrowest supporting the outcome, became extremely important for future decisions concerning the constitutionality of the use of race in public education admissions programs. Justice Powell viewed the University's program as a racial and ethnic classification system. Regardless of whether the admission of sixteen "specially admitted" students was viewed as a quota or a goal, Powell concluded that this was nevertheless a "line drawn on the basis of race and ethnic status," making the classification inherently suspect and subject to strict scrutiny.<sup>146</sup>

To address the University's contention that its racial classification served a beneficial purpose, Powell spoke briefly to the relevance of motives in a strict scrutiny analysis.<sup>147</sup> First, he stated that a benign

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145 See *id.* at 320; see also *id.* at 421 (Stevens, J., concurring in part and dissenting in part). Justice Stevens' opinion was joined by Chief Justice Burger and Justices Stewart and Rehnquist. The Supreme Court also reversed the decision of the California court enjoining the University from any consideration of an applicant's race in future admissions, because, according to Justice Powell, a state "has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320 (opinion of Powell, J.). This part of the decision, Part V-C, was joined by Justices Brennan, White, Marshall, and Blackmun.

146 See *id.* at 289–92. In deciding what level of scrutiny to apply, Powell cited *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."), and *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."). For additional discussion, see *Bakke*, 438 U.S. at 290–91 (opinion of Powell, J.).

147 Justice Powell particularly aimed his discussion of benign motives at countering the arguments of Justice Brennan, who took the analysis of the program out of a strict scrutiny context altogether, believing that the program could be justified merely by its aim to benefit, as opposed to stigmatize, a particular racial group. See *Bakke*, 438 U.S. at 359 (Brennan, J., concurring in the judgment in part and dissenting in part) ("[We] conclude that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977))); see also *id.* at 373–74 ("The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program."). Justice Powell responded that "it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to jus-

purpose is not always clear in a racially-based program.<sup>148</sup> Second, according to Powell, preferences that help one group may also cause harm by reinforcing a stereotype that the group is unable to achieve success without the aid of the program.<sup>149</sup> Finally, Powell explained that there is an inherent unfairness in asking an innocent person to suffer the burden of redressing an inequality that was not of his or her making.<sup>150</sup> Therefore, a “benign” motive is no defense to the use of racial classifications.

Justice Powell then moved on to a strict scrutiny analysis of the University’s use of race in admissions, setting out the two basic steps required in any such constitutional analysis: first, the state must identify a legitimate compelling interest, and second, the race-based program must be narrowly tailored to serve that interest.<sup>151</sup> Powell examined several possible interests that could be asserted by the University. First, he found that pure racial balancing is “discrimination for its own sake” and never constitutionally permissible.<sup>152</sup> Second, he stated that the University did have a legitimate and substantial interest in ameliorating the effects of identified discrimination; however, this required a finding of a constitutional or statutory violation causing harm to a racially identified group. In the event of such identified harm, the remedy had to be tailored to vindicate the specific rights that were violated.<sup>153</sup> The University made no such finding, and Justice Powell asserted that remedying “societal discrimination” alone, without a finding of a concrete statutory or constitutional violation, does not justify imposing burdens on students who bear no responsibility for the harm inflicted on the minority group.<sup>154</sup>

Finally, Powell examined the University’s interest in diversity in its student body. He concluded that in the context of higher education, diversity is a constitutionally permissible goal, as academic freedom has been a long-held concern for universities under the First Amendment.<sup>155</sup> Powell clarified, however, that the type of diversity

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tify such a classification an important and articulated purpose for its use must be shown.” *Id.* at 361 (opinion of Powell, J.).

148 *See id.* at 298 (opinion of Powell, J.).

149 *See id.*

150 *See id.*

151 *See id.* at 305.

152 *Id.* at 307.

153 *See id.* at 307–08.

154 *See id.* at 310. The third goal asserted by the University, not addressed here because of its unique applicability to medical schools, was promoting health care services to underserved communities; Powell found no evidence that the program was tailored to this goal. *See id.*

155 *See id.* at 311–12.

that furthers a compelling state interest “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>156</sup> A university must therefore show that its program is narrowly tailored to promote that kind of wide-ranging diversity.<sup>157</sup>

The University’s program failed to show such narrow tailoring. Powell found that the University’s special admissions program focused solely on ethnic diversity, operating as a racial classification system which actually hindered the attainment of legitimate diversity—diversity based on a broader array of qualifications than race alone.<sup>158</sup> Because the Medical School failed to show how its program was necessary to promote a compelling interest, Powell believed that the program was unconstitutional. He concluded:

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. . . . [T]hey are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. . . . [However,] the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner’s preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Such rights are not absolute. But when a State’s distribution of benefits or imposition of burdens hinges on ancestry or the color of a person’s skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. [The University] has failed to carry this burden.<sup>159</sup>

*Bakke* has been thought to represent a prohibition on quotas in educational affirmative action policies.<sup>160</sup> However, because Justice Powell wrote only for himself, *Bakke* left open the constitutional question of whether diversity can be asserted by a state as a compelling government interest. This question was not definitively answered by the Supreme Court for another twenty-five years, when a pair of cases concerning the University of Michigan’s undergraduate and law

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156 *Id.* at 315.

157 *See id.* at 314–15.

158 *See id.* at 315.

159 *Id.* at 319–20 (citation omitted).

160 *See, e.g.,* Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 174 n.207 (2006); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985, 1010–11 (2007).

school admissions policies—*Gratz* and *Grutter*—once again placed the constitutionality of race-based programs in higher education at the forefront of judicial discussion. The cases once and for all established the proposition that diversity in an educational setting is a compelling interest.<sup>161</sup>

## 2. *Grutter*

*Grutter* concerned the University of Michigan Law School's admission policy. The Law School sought to achieve a diverse student population, enrolling a "critical mass"<sup>162</sup> of underrepresented minority students to "ensur[e] their ability to make unique contributions to the character of the Law School."<sup>163</sup> In order to determine whether the Law School asserted a constitutionally legitimate interest to justify its use of race, the Court looked to Justice Powell's opinion in *Bakke*. Chief Justice Rehnquist, speaking for the Court, enumerated those interests which Powell rejected, and ultimately accepted the one interest that was approved by Powell as a legitimate goal for a university: "the attainment of a diverse student body."<sup>164</sup>

While the Court held that the Law School had asserted a compelling interest in attaining a diverse student body, the Court also required that the program be narrowly tailored to achieve that interest.<sup>165</sup> To be narrowly tailored, race-conscious systems cannot employ quotas, insulating "each category of applicants with certain desired

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161 See *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) ("We granted certiorari to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." (citation omitted)); *id.* at 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

162 See *id.* at 316. The then-Dean of the Law School, Jeffrey Lehman, also "indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 318–19.

163 *Id.* at 316 (alteration in original) (internal quotation marks omitted). The policy did not define diversity solely in terms of racial and ethnic status, but did reaffirm the Law School's longstanding commitment to one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.

*Id.* (internal quotation marks omitted).

164 *Id.* at 324 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978) (opinion of Powell, J.)).

165 *Id.* at 333.

qualifications from competition with all other applicants.”<sup>166</sup> The Court found that the Law School’s plan was narrowly tailored, as it allowed for individualized consideration of its applicants.<sup>167</sup> The Law School did not make race or ethnicity a predominant factor in an applicant’s admissions; rather, it weighed such variables equally against other considerations.<sup>168</sup> Moreover, the Law School was required to consider alternatives in good faith, but did not have to implement policies that would sacrifice the diversity of students or the academic quality of the students.<sup>169</sup> *Grutter* marked a shift from the importance of “necessity” to “individualized consideration” in the Court’s narrow tailoring analysis.<sup>170</sup> Indeed, the presence of this “individual consideration” distinguishes *Grutter* from *Gratz*.

### 3. *Gratz*

*Gratz* concerned the admissions policy of the undergraduate program at the University of Michigan. The admissions process involved the use of a 150-point “selection index,” in which applicants were automatically granted twenty points if they were members of underrepresented racial or ethnic minority groups.<sup>171</sup> After an examination of the program’s use of racial classifications under a strict scrutiny analysis, the Supreme Court found that while the school asserted a compelling interest in educational diversity,<sup>172</sup> its use of race was not narrowly tailored to achieve the asserted compelling interest because the program automatically distributed twenty points—twenty percent

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166 *Id.* at 334 (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

Quotas “impose a fixed number or percentage which must be attained, or which cannot be exceeded,” and “insulate the individual from comparison with all other candidates for the available seats.” In contrast, “a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself,” and permits consideration of race as a “plus” factor in any given case while still ensuring that each candidate “compete[s] with all other qualified applicants.”

*Id.* at 335 (alterations in original) (citations omitted). The Court stated that “[t]he Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.” *Id.* at 335–36.

167 *See id.* at 334–37.

168 *See id.* at 333–37.

169 *See id.* at 339–40.

170 *See* Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 523, 541 (2007).

171 *Gratz v. Bollinger*, 539 U.S. 244, 254–55 (2003).

172 *See id.* at 268.

of the points needed for admission—to every underrepresented minority based solely on his or her race.<sup>173</sup>

Again relying on Justice Powell's opinion in *Bakke*, the Court stated that a narrowly tailored plan should not "contemplate that any single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity," but that *each* characteristic of an applicant should be considered for admission.<sup>174</sup> The Court did not find such individualized consideration in the undergraduate college admissions policy because the twenty-point allocation for minorities made racial or ethnic status virtually dispositive in the admissions process. Therefore, the University's undergraduate admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

#### 4. The Impact of *Gratz* and *Grutter*

Before *Grutter*, many circuit courts assumed, without holding, that diversity in public schools was a compelling interest.<sup>175</sup> *Grutter* and *Gratz* augmented the line of cases involving the use of race in education by clarifying the permissibility of asserting a compelling interest in diversity in the higher education context: a school that had no history of racial segregation could nevertheless take race into account to foster a compelling interest in diversity. After *Grutter*, these assumptions were confirmed by actual holdings, and many circuit courts relied on *Grutter* in asserting that diversity was a compelling interest in K–12 education.<sup>176</sup> The extent to which this assumption was correct was clarified in the long-awaited opinion of *Parents Involved*, which examined the use of race-based admissions in public elementary and secondary schools.<sup>177</sup> The Court in *Parents Involved* used much of the language of *Gratz* and *Grutter* for analytical support,

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173 *Id.* at 270.

174 *Id.* at 271.

175 See Lisa J. Holmes, Comment, *After Grutter: Ensuring Diversity in K–12 Schools*, 52 UCLA L. REV. 563, 574–75 (2004). Cases include *Eisenberg v. Montgomery County Public School*, 197 F.3d 123, 130 (4th Cir. 1999); *Tuttle v. Arlington County School Board*, 195 F.3d 698, 705 (4th Cir. 1999); and *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998). See Holmes, *supra*, at 575–79.

176 See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2736 (2007); *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005), *rev'd*, *Parents Involved*, 127 S. Ct. 2738; *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 16 (1st Cir. 2005), *abrogated by Parents Involved*, 127 S. Ct. 2738.

177 The cases on appeal were *McFarland v. Jefferson County Public Schools*, 416 F.3d 513, and *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162.

but also raised additional considerations unique to elementary and secondary assignment programs.

Additionally, Justice Kennedy's dissent in *Grutter* foreshadowed his critical concurrence in *Parents Involved*, in which the actual operation of an admissions policy or assignment plan became essential. In *Grutter*, Justice Kennedy faulted the majority for "confus[ing] deference to a university's definition of its educational objective with deference to the implementation of this goal."<sup>178</sup> He stated that the majority had failed to examine how the Law School actually reached its "critical mass" of students and essentially operated an unconstitutional quota system.<sup>179</sup> According to Kennedy, the Law School failed to meet its burden of disproving the presumption of an unconstitutional racial classification.<sup>180</sup> *Parents Involved* echoes this concern of taking a school board at its word that its plan is designed to meet a permissible goal. In *Parents Involved*, the Supreme Court—and most specifically Justice Kennedy—seemed to decrease the level of deference it had previously given to school boards, requiring a critical analysis of the actual operation of the plan in question.<sup>181</sup> The Court heavily relied on *Gratz* and *Grutter* in reaching its holding in *Parents Involved*, modifying its analysis in specific ways to suit the K–12 context.

### III. PARENTS INVOLVED: THE DECISION ITSELF

*Parents Involved* addressed both the Louisville and Seattle school districts' public school assignment plans.<sup>182</sup> The Louisville plan used

178 *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

179 *Id.* at 389 ("[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."). After examining exactly *how* the admissions policy operated to achieve its "critical mass" and the result of that operation, Justice Kennedy noted that the narrow fluctuation in the percentages of each race admitted per year and the close correlation between the racial breakdown of applicants and admitted students suggested that the Law School did not engage in individual consideration. *See id.* at 390–91.

180 It seems that Justice Kennedy, then, would not be in complete agreement with Justice Powell's assertion in *Bakke* that when a program is facially race-neutral, a court will not assume that the university operates it as a cover for the equivalent of a quota and will instead presume good faith on the part of the university. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.). Instead, Justice Kennedy was concerned with the actual implementation and result of the policy, not its facial neutrality.

181 *See infra* notes 228–31 and accompanying text.

182 The Seattle School District first implemented its plan in 1998. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007). Under

race in both elementary and secondary student assignments and transfer requests, and aimed to keep the racial balance of schools between fifteen percent and fifty percent black students.<sup>183</sup> Louisville, unlike Seattle, operated a legally segregated system in the past, but was found to have eliminated the vestiges of segregation in 2000 when a district court ordered the dissolution of the desegregation decree under which the school had been operating.<sup>184</sup>

The question before the Supreme Court in *Parents Involved*, then, was “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.”<sup>185</sup> In its precedent-setting and controversial ruling, a majority of the Court answered the question in the negative.<sup>186</sup> The opinion can be seen as answering two separate questions: (1) can a school board assert a compelling interest in diversity, and (2) were the plans at issue narrowly tailored to pass strict scrutiny? A majority of the Court answered the first question with a “yes” (through Justice Breyer’s dissent and Justice Kennedy’s concurrence), while a majority of the Court answered the second question with a “no” (through Chief Justice Roberts’ plurality opinion and Justice Kennedy’s concurrence). In light of this configuration, the Court did not definitively close the door on the use of race in assignments in K–12 public education.

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this plan, incoming Seattle high school students ranked their high school choices in order of preference and were assigned to their selections based on availability; if a certain high school had been oversubscribed, a series of tiebreakers was employed to determine school assignments. One of those tiebreakers was based on race. *See id.* at 2747. The Seattle School District enrolled approximately forty-one percent white students, and fifty-nine percent “non-white” students, including African Americans, Asians, Latinos, and Native Americans. *See id.* at 2746 & n.2. If an oversubscribed school was not within ten percent of the district’s racial balance, students who could help the high school achieve the desired racial balance would be assigned to the school, while those who would add to the imbalance would not be assigned to their school of choice. *See id.* at 2746. Notably, Seattle never operated a legally segregated school system, and its tiebreaker was employed to remedy the effects of identifiable racial housing patterns. *See id.* The Seattle School District undertook its voluntary busing measures not because of prior suits for Fourteenth Amendment violations, but in order to prevent threatened lawsuits by civil rights groups for ineffective integration efforts. *See* Cassandra Tate, *Busing in Seattle: A Well-Intentioned Failure*, HISTORY LINK.ORG, Sept. 7, 2002, [http://www.historylink.org/essays/output.cfm?file\\_id=3939](http://www.historylink.org/essays/output.cfm?file_id=3939).

183 *Parents Involved*, 127 S. Ct. at 2749.

184 *See* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000).

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

186 *See id.* at 2751–54, 2759–60.

A. *Is Diversity a Compelling Interest in K–12 Education?*

Chief Justice Roberts' opinion never definitively answered the first question.<sup>187</sup> Instead, Roberts merely enumerated what legitimate interests the school boards had *not* asserted<sup>188</sup> (interests in remedying the effects of past de jure segregation<sup>189</sup> and diversity in higher education, as upheld in *Grutter*<sup>190</sup>). Chief Justice Roberts believed that the plans, in effect, operated to foster a compelling interest in racial balancing, "an objective [the Supreme] Court has repeatedly condemned as illegitimate."<sup>191</sup>

This part of Chief Justice Roberts' opinion was not joined by Justice Kennedy, because it suggested two possible interpretations of the compelling nature of diversity in lower education: either that diversity

187 Roberts stated that "[t]he debate [over the benefits of diversity in schools] is not one we need to resolve . . . because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity." *Id.* at 2755 (plurality opinion).

188 For Seattle, the asserted interest was "to reduce racial concentration in schools and to ensure that racially concentrated housing patterns [did] not prevent nonwhite students from having access to the most desirable schools," *id.* at 2755 (plurality opinion), and for Louisville, the asserted interest was "to educate its students 'in a racially integrated environment.'" *Id.* Chief Justice Roberts found, however, that neither school district made it clear how its plan's strict racial percentages were aimed at reaching the benefits of this type of diversity. *See id.* at 2756.

189 *Id.* at 2752 (majority opinion) (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)). The school districts here did not claim either interest; Seattle had never operated segregated schools, and Louisville was found to operate a unitary system. *See id.*

190 *Id.* at 2753. The Court delineated the limits of *Grutter*, explaining 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,'" and therefore *Grutter's* diversity did not reach the elementary and secondary assignment plans at issue. *Id.* at 2754 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)). Additionally, *Grutter's* diversity interest was one of "highly individualized, holistic review," and not an effort to achieve pure racial balancing. *Id.* at 2764 (plurality opinion) (quoting *Grutter*, 539 U.S. at 337). Therefore, neither Seattle nor Louisville asserted a previously judicially recognized compelling interest in this case.

191 *Id.* at 2755 (plurality opinion).

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to [the Court's] repeated recognition that "[a]t 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."

*Id.* at 2757 (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

in elementary and secondary education is not a compelling interest (the interpretation with which Justice Kennedy disagreed and which caused him to abstain from joining this line of reasoning),<sup>192</sup> or that the Seattle and Louisville school districts *may* have asserted a compelling interest, but failed the narrow tailoring prong of the analysis.<sup>193</sup> To the extent that the plurality opinion can be read to say that there is not a compelling interest in diversity in secondary and elementary education, Chief Justice Roberts' opinion is not controlling for the future of race in K–12 education. Justice Kennedy's opinion paves the way for the use of race in future school assignment plans, giving hope to school board members to “come together as a community” and to “improve and go forward” with new plans.<sup>194</sup> Justice Kennedy found that both the Louisville and Seattle school districts identified a compelling interest in increasing diversity, including the avoidance of racial isolation. Kennedy stated that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”<sup>195</sup> In his impassioned concurrence, Justice Kennedy wrote, “To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”<sup>196</sup>

The compelling interest in diversity in education is also explicitly endorsed as a compelling interest in Justice Breyer's dissent, which recognized that a school district may assert a compelling interest in diversity—an interest comprised of three essential elements: a histori-

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192 See *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

193 The latter suggestion seems to be supported by Chief Justice Roberts' statements that “the 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,’” *id.* at 2755–56 (plurality opinion) (citation omitted), and “[t]o the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end,” *id.* at 2759. Chief Justice Roberts appears to have indicated here that a certain type of diversity aimed at reaching demonstrated educational benefits *may* be a compelling interest; however, Roberts never explicitly identified this interest in his opinion.

194 *What School Board Members Are Saying*, COURIER-JOURNAL.COM, June 29, 2007, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20070629/NEWS01/70629006/0/NEWS01.html>.

195 *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

196 *Id.* at 2791.

cal and remedial element (righting the consequences of past segregation), an educational element (overcoming the adverse effects of segregated education), and a democratic element (producing an environment representative of the “pluralistic” society that children grow to experience).<sup>197</sup> This means that a majority of Supreme Court Justices would allow a school district to assert diversity as a compelling interest under strict scrutiny analysis.

*B. Were the Plans Narrowly Tailored to Pass Strict Scrutiny?*

Despite Justice Kennedy’s disagreement with the plurality over the possible nonexistence of a compelling interest, Kennedy agreed that the plans in these cases were not narrowly tailored to achieve a compelling government interest, meaning that a majority of the Court found that the plans failed the strict scrutiny analysis.<sup>198</sup> The part of Chief Justice Roberts’ opinion that was joined by Kennedy cited the minimal effect that race had on the assignments as a reflection of a lack of narrow tailoring, suggesting that other means would have been more effective in achieving the stated goals.<sup>199</sup> Additionally, Roberts invoked *Grutter*, contrasting the negligible impact of race in the Louisville and Seattle plans with the necessity of race in Michigan’s law school assignments.<sup>200</sup> Moreover, a majority of the Court recognized that while narrow tailoring requires a “‘serious, good faith consideration of workable race-neutral alternatives,’”<sup>201</sup> both Seattle’s and Louisville’s school districts failed to show that they seriously considered other plans.<sup>202</sup> According to Justice Kennedy, classifications based on

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197 *Id.* at 2820–21 (Breyer, J., dissenting).

198 *See id.* at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment) (“I join Part III-C of the Court’s opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means.”).

199 *See id.* at 2759 (majority opinion). In Seattle,

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

. . . .

Similarly, Jefferson County’s use of racial classifications has only a minimal effect on the assignment of students. . . . Jefferson County estimates that the racial guidelines account for only 3 percent of assignments.

*Id.* at 2759–60.

200 *See id.* at 2760.

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

202 *See id.*

race can only be considered legitimate “if they are a last resort to achieve a compelling interest.”<sup>203</sup> Despite the fact that both districts claimed there was no other way to avoid racial isolation than through their respective assignment plans, neither party proved this assertion to be true.<sup>204</sup> Accordingly, the plans were found to violate the Equal Protection Clause.<sup>205</sup>

#### IV. *PARENTS INVOLVED*: THE DECISION’S IMPACT

After *Parents Involved*, school districts have been left to sort through the court’s ruling to determine what plans will now pass muster under constitutional guidelines. How can race still be used in assigning students to schools, if at all? What interests can a school assert as “compelling” after the decision? More importantly, how can schools preserve racial and ethnic diversity without violating the Equal Protection Clause?

While the opinion seems ambiguous at times, several clear requirements and prohibitions have emerged to give guidance to school districts in developing race-conscious school assignment plans. This Note provides a list of suggestions for school districts to follow in attempting to adhere to the constitutional requirements concerning the use of race in education after *Parents Involved*.

##### A. *Requirements of a Constitutional Plan*

###### 1. School Districts Must Identify a Compelling Interest

The compelling interest requirement, necessitated by a strict scrutiny analysis, is still a constitutional requisite. Two compelling interests that the Court has clearly recognized in the past are remedying the effects of past societal discrimination<sup>206</sup> and diversity in higher education.<sup>207</sup> There also exists a third possible alternative. The plurality opinion in *Parents Involved* never actually forecloses the option of diversity in elementary and secondary schools as a compelling government interest, and both Justice Kennedy’s concurring opinion and

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203 *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

204 *See id.*

205 *See id.* at 2746 (majority opinion).

206 *See id.* at 2742 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)). Additionally, Justice Kennedy stated that “[t]he Court has allowed school districts to remedy their prior de jure segregation by classifying individual students based on their race.” *Id.* at 2796 (Kennedy, J., concurring in part and concurring in the judgment) (citing *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45–46 (1971)).

207 *See id.* at 2742 (majority opinion) (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

Justice Breyer's dissenting opinion<sup>208</sup> explicitly allow school boards the opportunity to assert diversity in education as a compelling government interest. A majority of the current Supreme Court appears to endorse this understanding of a compelling interest.

The concept of diversity is ever-elusive, but can be described as having both racial and nonracial components. Justice Kennedy explained the compelling interest at issue in terms of race, ethnicity, and economic background, as well as other demographic factors, special talents, and needs.<sup>209</sup> Justice Breyer described a compelling interest in diversity

as an interest in promoting or preserving greater racial "integration" of public schools. . . . [This means] eliminating school-by-school racial isolation . . . .

. . . .

. . . It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation.<sup>210</sup>

Justice Breyer also lauded the educational benefits of integration, explaining that integration lowers the achievement gap between blacks and whites, and "the earlier that black students are removed from racial isolation, the better their educational outcomes."<sup>211</sup> More importantly, Justice Breyer saw diversity as a crucial factor in preparing children to become conscientious citizens, stating that the compelling interest at issue "includes an effort to create school environments that provide better educational opportunities for all children; . . . to help create citizens better prepared to know, to understand, and to work with people of all races and back-

208 Justice Breyer's dissent stated:

In light of this Court's conclusions in *Grutter*, the "compelling" nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together."

*Id.* at 2822 (Breyer, J., dissenting) (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)). Justice Breyer was joined by Justices Ginsberg, Souter, and Stevens in his dissent.

209 See *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

210 *Id.* at 2820–21 (Breyer, J., dissenting).

211 *Id.* at 2821 (citing Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741–42 (1998)).

grounds . . . . If an educational interest that combines these three elements is not ‘compelling,’ what is?”<sup>212</sup>

## 2. School Districts Must Narrowly Tailor the Use of Racial Classifications to Achieve the Asserted Compelling Interest

A strict scrutiny analysis also examines a program’s practical application to determine if the program is narrowly tailored to achieve the state’s asserted compelling interest. Before *Parents Involved*, the Court’s decisions in *Bakke*, *Grutter*, and *Gratz* governed the narrow tailoring analysis of race use in public school admissions. However, these decisions applied to racial classifications in higher education; the issue of race-based admissions programs in secondary and elementary schools had never been examined by the Court. It is necessary, therefore, to determine what *Parents Involved* left intact of the *Bakke*, *Gratz*, and *Grutter* opinions in terms of their applicability to K–12 education, and what the majority changed.

The majority claimed that “the present cases are not governed by *Grutter*.”<sup>213</sup> However, the majority made this statement in a specific context, asserting that *Gratz* and *Grutter* were unique only in their recognition of a university’s claim to a specific type of compelling interest in broad-based diversity.<sup>214</sup> Therefore, K–12 schools cannot rely on the type of broad-based educational diversity that encompasses “‘the expansive freedoms of speech and thought associated with the university environment.’”<sup>215</sup> However, while *Gratz* and *Grutter* were pushed aside for purposes of the compelling interest analysis, they still apply to the narrow tailoring analysis of race-based programs, as this analysis is the same for universities and for K–12 institutions. Narrow tailoring merely requires that the program at hand is aimed at achieving a legitimate compelling interest.

In *Parents Involved*, Chief Justice Roberts’ opinion repeatedly invoked both *Grutter* and *Gratz* in its constitutional analysis. Roberts recalled *Grutter*—and its demand for individualized review in a narrowly tailored program—in examining the scope of the use of race in the Louisville and Seattle plans.<sup>216</sup> He faulted both plans for failing to consider race as one of *many* factors to further the broad idea of diversity that was at issue in *Grutter*, instead, making race *the* factor.<sup>217</sup> Simi-

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212 *Parents Involved*, 127 S. Ct. at 2823 (Breyer, J., dissenting).

213 *Id.* at 2754 (majority opinion).

214 *See id.*

215 *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

216 *See id.* at 2753.

217 *Id.*

larly, Roberts' opinion invoked *Gratz* in comparing its unconstitutional admissions program to the Louisville and Seattle plans, finding that all three failed to "provide for a meaningful individualized review of applicants' but instead rel[ie]d on racial classifications in a 'nonindividualized, mechanical' way."<sup>218</sup> The majority, therefore, still relied on the "individualized review" component of the narrow tailoring inquiry established in *Grutter* and *Gratz*.<sup>219</sup> Nowhere in *Parents Involved* did the majority explicitly alter its narrow tailoring analysis. Rather, *Parents Involved* clarified to what extent *Grutter* and *Gratz* may be invoked in a strict scrutiny analysis of voluntary K–12 integration efforts. These cases are still controlling in the sense that they may be applied to narrow tailoring analyses,<sup>220</sup> but only in the ways in which they were applied in *Parents Involved*, which itself will control future analyses of race use in lower education admissions.

This idea is supported by Chief Justice Roberts' invocation of *Grutter* to suggest that the use of race must somehow be necessary to achieve the compelling governmental interest: "In *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent."<sup>221</sup> Additionally, Roberts relied on *Grutter* in stating that narrow tailoring requires "'serious, good faith consideration of workable race-neutral alternatives.'"<sup>222</sup> It appears, then, that individualized review, an element of necessity, and good-faith examination of alternative plans are requirements for the narrow tailoring of lower education assignment plans.

However, not all of the elements of *Grutter's* narrow tailoring analysis apply to K–12 education; rather, some seem to be merely sug-

218 *Id.* at 2753–54 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276, 280 (2003) (O'Connor, J., concurring)).

219 Even though the majority realized that the school boards did not assert the same compelling interest at issue in *Grutter*, narrow tailoring still requires *Grutter's* component of individualization. Because individualized consideration for applicants in a non-merit assignment system is inherently different than consideration in a merit based system, the inquiry for K–12 education focuses more on the decisiveness of race in the assignment process—race cannot be used in a mechanical way that is contrary to the concept of individualized review. *See id.* at 2753–54.

220 Justice Kennedy stated in his concurrence that "[i]f the dissent were to say that college cases are simply not applicable to public school systems in kindergarten through high school, this would seem to me wrong," and deemed *Grutter's* opinion "controlling." *Id.* at 2794 (Kennedy, J., concurring in part and concurring in the judgment).

221 *Id.* at 2760 (majority opinion) (citing *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003)).

222 *Id.* (quoting *Grutter*, 539 U.S. at 339).

gested and not mandated, or inapplicable. Specifically, while *Grutter* required that race-conscious admissions policies be limited in time,<sup>223</sup> *Parents Involved* was silent on the issue of time limits for race-conscious assignment plans.<sup>224</sup> The *Grutter* requirement reflected the Court's concern that race classifications can be dangerous and must be used sparingly and with caution.<sup>225</sup> The *Grutter* Court suggested that this concern could be alleviated in university admissions "by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."<sup>226</sup>

The Court's silence on the issue in *Parents Involved* suggests that these concerns may be inapplicable to non-merit-based student assignments. This explanation appears highly likely, considering that the goal of university affirmative action programs is to attract more minority applicants so that race-conscious admissions policies will eventually be unnecessary to achieve diversity, while this is not so in K–12 education. Rather, the use of race in K–12 assignments will remain necessary so long as societal reasons for segregation remain; because segregation is often due to racial housing patterns and other factors not attributed to student choice, a more extensive use of race might be necessary to achieve the desired diversity.<sup>227</sup>

Additionally, after *Parents Involved*, a new addition to the narrow tailoring analysis may be called for: the requirement that school boards be prepared to explain precisely how an assignment plan works, including in what ways assignments are made and how and

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223 *Grutter*, 539 U.S. at 342.

224 The only mention of remedies limited in time was found in Justice Kennedy's concurrence, which did not invoke *Grutter*:

[A]llocation of benefits and burdens through individual racial classifications was found sometimes permissible in the context of remedies for *de jure* wrong. Where there has been *de jure* segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. The remedy, though, was limited in time and limited to the wrong.

*Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

225 *See Grutter*, 539 U.S. at 342.

226 *Id.*

227 The argument has been made that a sunset provision in a K–12 system would be hard to imagine because segregation in that area of education is due largely to housing patterns—which is not the same type of problem facing university admissions—and cannot be averted by the temporary use of race in the same way the problems in university admissions can be. *See* Christopher J. Sullivan, Note, *Grutter Effects: Implications for "Re-Desegregation" of Public Education in Georgia?*, 22 GA. ST. U. L. REV. 1031, 1045–46 (2006).

when race is used.<sup>228</sup> Justice Kennedy explained that “the inquiry into less restrictive alternatives demanded by the narrow tailoring analysis requires in many cases a thorough understanding of how a plan works.”<sup>229</sup> Kennedy faulted the Louisville plan for its failure to explain just how it employed its classifications:

Jefferson County in its briefing has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. . . . [I]t fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision.<sup>230</sup>

Kennedy similarly found error in the Seattle plan for failing 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.”<sup>231</sup> With that in mind, after *Parents Involved*, it appears a school board must be able to explain exactly how and why its racial goals are achieved.

### 3. Permissible Strategies

Aside from elucidating the guiding legal principles an assignment plan must satisfy to pass strict scrutiny analysis, Justice Kennedy listed several illustrative strategies that would be permissible means of achieving integration.<sup>232</sup> Such constitutionally sanctioned suggestions

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228 It has been suggested that *Grutter* and *Gratz* revealed the Court’s adoption of a “Don’t Tell, Don’t Ask” approach to individualized consideration: if universities don’t *tell* how much weight they give to race by quantifying racial preferences, then courts won’t *ask* probing questions about whether the preferences are differentiated and not excessive. If, however, universities do tell, then courts will conduct a searching review of the admissions program, examining whether preferences are in fact differentiated and not excessive.

Ayres & Foster, *supra* note 170, at 559. However, Justice Kennedy’s concurrence makes it apparent that “Don’t Tell, Don’t Ask” is no longer an option, *see supra* notes 198–204, nor was it an option for Kennedy under *Grutter*, in which his dissent reflected the need for a searching review of admissions statistics to discover the effects of policy designed to reach a “critical mass” of minority students. *See Grutter*, 539 U.S. at 389–91 (Kennedy, J., dissenting).

229 *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

230 *Id.* at 2789–90 (citation omitted).

231 *Id.* at 2790–91.

232 *See id.* at 2792.

are a helpful starting point for any school district in developing voluntary integration strategies. Those suggestions include the following.

a. Strategic Site Selection of New Schools

Admittedly, selecting sites for new schools is an infrequent occurrence, yet when the opportunity arises, certain techniques may be used to promote integration. Such methods include locating new schools in population centers or in designated growth areas, or renovating existing sites to establish new schools.<sup>233</sup> The location of schools in these areas is designed to attract minority students to the new facilities and improve the educational benefits of such students.

b. Drawing Attendance Zones with General Recognition of the Demographics of Neighborhoods

In many large cities, when attendance is decided based upon where a student lives in a district, segregated housing patterns result in segregated schools. This can be avoided through the use of software designed to take into account a district's demographic, socio-economic and racial and ethnic composition, and easily calculate the effect of attendance boundary changes within the district.<sup>234</sup>

c. Allocating Resources for Special Programs

Such special programs include magnet schools, as well International Baccalaureate, advanced placement, or bilingual/dual education programs. The creation of these types of programs may be extremely useful in attracting minority students to apply to schools outside of their residential areas.<sup>235</sup>

d. Recruiting Students and Faculty in a Targeted Fashion

This can be accomplished by holding information sessions, open houses, mentoring programs, and door-to-door outreach initiatives in predominantly minority neighborhoods. Similarly, schools can pro-

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233 See NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, ISSUE BRIEF: INTEGRATING SCHOOLS INTO HEALTHY COMMUNITY DESIGN 3-4 (2007), <http://www.nga.org/Files/pdf/0705SCHOOLSHEALTHYDESIGN.PDF>.

234 See NAACP LEGAL DEF. & EDUC. FUND, INC., STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 36 (2008), [http://www.naacpldf.org/content/pdf/voluntary/Still\\_Looking\\_to\\_the\\_Future\\_Voluntary\\_K-12\\_School\\_Integration;\\_A\\_Manual\\_for\\_Parents,\\_Educators\\_and\\_Advocates.pdf](http://www.naacpldf.org/content/pdf/voluntary/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A_Manual_for_Parents,_Educators_and_Advocates.pdf) [hereinafter NAACP LEGAL DEF.].

235 See *id.*

vide incentives for minority teachers to select particular locations for employment to increase each school's diversity.<sup>236</sup>

e. Tracking Enrollments, Performance, and Other Statistics by Race

The collection of such data, the reporting of which is often required under the Federal No Child Left Behind Act of 2001,<sup>237</sup> will help school districts identify schools that are struggling in achievement, as well as demonstrate the effects of racial isolation on student success.<sup>238</sup>

f. If Necessary, a More Nuanced, Individual Evaluation of School Needs and Student Characteristics That Might Include Race as a Component

This suggestion appears to be more difficult to evaluate in the K-12 setting. Indeed, Justice Kennedy stated 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."<sup>239</sup> In an elementary setting, individualized consideration does not take the form of the individualized consideration of a university admission's program. However, such consideration may be possible in special programs such as magnet schools, to which students are required to apply.<sup>240</sup>

g. Economic Integration

Although not explicitly endorsed by Justice Kennedy, economic integration has been championed by some as an effective alternative to race-based integration strategies. The purpose of economic integration is twofold. First, income levels often correlate with race, and can therefore be a viable substitute for race or ethnic origin.<sup>241</sup> Indeed, minority students are almost three times as likely to be low-

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236 See *id.* at 36-37.

237 Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

238 See NAACP LEGAL DEF., *supra* note 234, at 37.

239 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2793 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

240 See NAACP LEGAL DEF., *supra* note 234, at 38.

241 See Jonathan D. Glater & Alan Finder, *Diversity Plans Based on Income Leave Some Schools Segregated*, N.Y. TIMES, July 15, 2007, at A24.

income as white students.<sup>242</sup> Second, economic integration helps to promote achievement by placing poorer students in schools with more experienced teachers, or students who are more likely to motivate classmates to succeed.<sup>243</sup> Additionally, wealth classifications are not suspect and therefore not subject to an exacting strict scrutiny analysis.<sup>244</sup>

A successful example of such integration is the school district of Wake County, North Carolina. After its economic integration system—which capped the percentage of low income students at each school in the county to forty percent—was implemented in 1997, the percentage of black students who scored at their grade level in state reading tests rose from forty percent (in 1995) to eighty-two percent (in 2006).<sup>245</sup> However, studies have shown that the correlation in student success rates is not related to integration between blacks and whites per se, but between poor blacks and middle-class whites, which makes economic integration a seemingly more beneficial option in terms of student success rates than racial integration alone.<sup>246</sup> Therefore, Justice Kennedy’s opinion and the option of socioeconomic integration leave many choices available to searching school districts after the decision.

### B. Prohibitions

Several clear prohibitions to student assignment plans have also become apparent, and school districts should be wary of employing any of the following tactics.

#### 1. School Districts Cannot Allow Race to Be Decisive in and of Itself

The majority explained that the narrow tailoring analysis allows race to be used when it is part of a broad scheme to expose students to

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242 See RICHARD D. KAHLBERG, CENTURY FOUND., ISSUE BRIEF: A NEW WAY ON SCHOOL INTEGRATION 7 (2006), <http://www.tcf.org/publications/education/school-integration.pdf>.

243 See Glater & Finder, *supra* note 241.

244 See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

245 See Glater & Finder, *supra* note 241. It is important to note, however, that some less rigorous programs have met with less success. For example, San Francisco uses an economic integration system, but does set in place a minimum or maximum percentage of low-income students for each school, and allows student choice in school assignment and transfers. Additionally, San Francisco only uses economic status as a tiebreaker, and therefore undersubscribed schools are not affected by the plan. See KAHLBERG, *supra* note 242, at 9.

246 See KAHLBERG, *supra* note 242, at 5.

an expansive definition of diversity. Like the Michigan undergraduate admissions plan that was declared unconstitutional in *Gratz*, the Louisville and Seattle plans did not allow for meaningful review of applicants, but mechanically relied on racial classifications so that race was determinative for some students. This kind of dispositive racial classification is not constitutionally permissible.<sup>247</sup>

## 2. School Districts Cannot Limit the Concept of Diversity to White/Nonwhite or Black/Nonblack Terms

“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.”<sup>248</sup> The majority made it clear that a plan’s view of diversity must be “broadly diverse.”<sup>249</sup> Indeed, one reason the Seattle plan was struck down was because of its binary concept of diversity, labeling students “white” and “nonwhite.” Under the plan, a school in which fifty percent of the students were Asian-American, fifty percent were white, and zero percent were African-American, Native-American, or Latino, would be considered “diverse,” while a school in which thirty percent of the students were Asian-American, twenty-five percent were African-American, twenty-five percent were Latino, and twenty percent were white would not be considered “diverse.”<sup>250</sup> This type of grouping does not serve a broader goal of diversity.

Diversity, as described by the Court, encompasses more than just a binary racial divide. In *Bakke*, Justice Powell established a definition of diversity that furthers a compelling interest, which the Court later endorsed in *Gratz*: “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>251</sup> Notably, to qualify for the benefits of affirmative action plans in the United States, individuals must usually fall into one of four broad racial categories: Black, Asian, Hispanic, or Native

247 See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753–54 (2007).

248 *Id.* at 2754 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting)).

249 *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)).

250 See *id.*

251 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.). In *Gratz*, the Court stated, “The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.” *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

American.<sup>252</sup> “This ‘ethno-racial quadrangle’ has emerged as our quasi-official definition of what it means to be a ‘minority’ in the United States.”<sup>253</sup> However, controversy has arisen over this even broader idea of “minority” than just black and white, which excludes, for example, members of the Caucasian race that are of Middle Eastern origin, French Acadians, Hasidic Jews, and many other under-represented groups.<sup>254</sup> From the debate concerning the proper definition of “minority” in the United States today, it is abundantly clear that a white/nonwhite or black/nonblack concept of diversity is all too limited.

### 3. School Districts Cannot Use Demographic Statistics to Define Diversity or Set a Quota in Place

The plurality opinion disparaged each school board’s definition of diversity for mirroring the racial makeup of each of the districts’ demographic areas. Both plans called for an arbitrary racial make-up that reflected the racial composition of their districts without explaining why those percentages were needed to achieve the stated benefits of diversity.<sup>255</sup> Instead of diversity, the plurality found this to be racial balancing.<sup>256</sup>

Additionally, Justice Kennedy’s dissent in *Grutter* suggests that this kind of balancing is unconstitutional. Justice Kennedy found that the majority failed to look at the practical application of the Law School’s admissions policy in attaining its critical mass. In finding a “narrow fluctuation” between the percentages of admitted minorities, and the close correlation of the racial breakdown of admitted minorities to those in the applicant pool, Justice Kennedy considered this to be a potentially suspect use of race, and required the Law School to rebut

252 Sean A. Pager, *Antisubordination of Whom? What India’s Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 303 (2007).

253 *See id.*

254 *See id.* at 303–12.

255 *Parents Involved*, 127 S. Ct. at 2755–56 (plurality opinion).

256 *See id.* at 2758–59.

[The school districts] offer no definition of the interest [in diversity] that suggests it differs from racial balance. (“Q. What’s your understanding of when a school suffers from racial isolation? A. I don’t have a definition for that”); (“I don’t think we’ve ever sat down and said, ‘Define racially concentrated school exactly on point in quantitative terms.’ I don’t think we’ve ever had that conversation”); (“Q. How does the Jefferson County School Board define diversity . . . ?” “A. Well, we want to have the schools that make up the percentage of students of the population”).

*Id.* at 2759 (plurality opinion) (citations omitted).

that inference.<sup>257</sup> “Whether the objective of critical mass ‘is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,’ and so risks compromising individual assessment.”<sup>258</sup>

Therefore, a school district may not use racial balancing in assigning students for the purely aesthetic purpose of achieving student bodies that mirror the racial makeup of the area. Whether a quota is express or implied, if a correlation is found between demographics of a school district’s schools and the demographics of its attendance area, the school board will need to show that its means of assignment did not jettison individual consideration in the process.

#### 4. School Districts Cannot Use the Defense of Benign Motives

*Parents Involved* reaffirmed the proposition, established since *Bakke*,<sup>259</sup> that motive is irrelevant in a strict scrutiny analysis. The plurality opinion stated that the argument that different rules should govern policies meant to *include* rather than *exclude* has never been accepted.<sup>260</sup> Chief Justice Roberts wrote:

The reasons for rejecting a motives test for racial classifications are clear enough. “The Court’s emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility . . . . ‘[B]enign’ carries with it no independent meaning, but reflects only acceptance of the current generation’s conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.”<sup>261</sup>

Equipped with the foregoing recommendations, school districts should not find the task of creating constitutionally acceptable assignment plans after *Parents Involved* so daunting. Since the 2007 decision, the Jefferson County Board of Education has considered the various mandates and prescriptions at the center of the *Parents Involved* decision and begun the process of revising its student assignment plan. The city is aiming to preserve its commitment to diversity while adhering to these newest constitutional guidelines.

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257 *Grutter v. Bollinger*, 539 U.S. 306, 390–91 (2003) (Kennedy, J., dissenting).

258 *Id.* at 391 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.)).

259 *See Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

260 *Parents Involved*, 127 S. Ct. at 2764 (plurality opinion). While Justice Kennedy did not join in this part of the opinion, the historical precedent of the failure to accept the defense of benign motives has not been overturned and is thus still good law.

261 *Id.* at 2765 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 609–10 (1990) (O’Connor, J., dissenting)).

C. *Constitutional Compliance: Louisville's Response to the Decision*

In the wake of *Parents Involved*, Louisville was charged with bringing its public school assignment program into compliance with the Court's interpretation of the standards of the Fourteenth Amendment. Ironically, a policy that was once the source of community-wide riots had become a definitive characteristic of the community. The busing policy was even lauded as the source of Kentucky's 2001 status as the most integrated state for blacks.<sup>262</sup> Many Jefferson County parents and students demonstrated their disappointment after the ruling, imploring the school district to continue its efforts to instill its students with an appreciation for diversity.<sup>263</sup>

Months after *Parents Involved*, the community was still experiencing its after-effects.<sup>264</sup> School Board administrators worked at a steady and determined pace to implement an assignment system that fell within the constitutional guidelines of the *Parents Involved* ruling. The Board attempted this with the aid and direction of District Judge John Heyburn, who stated that the Supreme Court decision "allows the district to adopt any plan it wants by any date—as long as it doesn't use race to assign individual students to schools."<sup>265</sup> The Board itself

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262 See GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 2 (2004), available at <http://www.civilrightsproject.ucla.edu/research/resseg04/brown50.pdf>.

263 Commentaries printed in the Reader's Forum of the *Courier-Journal* included numerous remarks on the subject. See, e.g., Allison Koch, Letter to the Editor, *COURIER-J.* (Louisville, Ky.), Aug. 19, 2007, at H2 ("I experienced Louisville public schools first-hand and appreciate the number of lessons I learned outside the classroom about acceptance and diversity. . . . [My high school] taught me how to be careful and conscious without judging others. Interacting with students and teachers of different backgrounds than I had gave me knowledge that I could not have learned otherwise. Public schooling helped me realize I don't need to fear what is different, but rather embrace it."); Jodie Zoeller, Letter to the Editor, *COURIER-J.* (Louisville, Ky.), Aug. 19, 2007, at H2 ("I implore Jefferson County's new superintendent and school board to continue their efforts to integrate our school system. . . . The cultural and real-world relevance of an integrated education will stick with our children much longer than Shakespeare and Euclid.").

264 Interestingly, in July 2007, the attorney who litigated the case against the School Board filed a motion imploring Judge John Heyburn of the Western District of Kentucky to hold the officers of the Jefferson County School Board in contempt, claiming that the Board's 2007–2008 assignment plan violated the Supreme Court's summer ruling. The motion was immediately denied by Heyburn, who stated that the School Board "need not respond to such an outrageous motion, couched in such unprofessional language." Chris Kenning, *Motion Against JCPS Rejected*, *COURIER-J.* (Louisville, Ky.), July 28, 2007, at A1.

265 Chris Kenning, *Schools' Course Since Race Ruling OK'd*, *COURIER-J.* (Louisville, Ky.), Aug. 1, 2007, at A1.

interpreted the Supreme Court's decision not as a requirement that the assignment plan be "color blind," but that it avoid using racial classifications unless all other means have been exhausted.<sup>266</sup>

The Louisville School Board extracted what it believed to be a "moral imperative" from *Parents Involved*, citing both Justice Breyer's dissent<sup>267</sup> and Justice Kennedy's concurrence<sup>268</sup> to conclude that the county must maintain its commitment to integrated education.<sup>269</sup> Superintendent Berman's message to the community before the start of the 2007–2008 school year echoed the hope of the Board and the citizens of Jefferson County for the future of public education:

As we start a new school year . . . , I am personally inviting, encouraging and even challenging this community to become more involved in your public schools.

When schools are able to engage parents and the community in support of their children's learning beyond bake sales and school fundraisers to being full partners in the education of their children, the children are winners. That is the kind of commitment I am asking for—to support our children and youth.<sup>270</sup>

That commitment is one that the Board tried to honor in its response to *Parents Involved*. The city has always been proud of its integration efforts and while no such moral imperative has been cast upon the city by the Supreme Court as such, officials feel that integration is a defining feature of the city's schools.<sup>271</sup> The board has created a new permanent plan for the 2009–2010 school year, as well as

266 See Quicktime Video: U.S. Supreme Court Ruling: What Does It Mean for JCPS? (Jefferson County Public Schools 2007) [hereinafter What Does It Mean for JCPS?] (on file with author).

267 See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2822 (2007) (Breyer, J., dissenting) ("Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, 'unless our children begin to learn together, there is little hope that our people will ever learn to live together.'" (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting))).

268 See *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment) ("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.").

269 See What Does It Mean for JCPS?, *supra* note 266.

270 Sheldon H. Berman, *JCPS Needs Your Help This Year*, COURIER-J. (Louisville, Ky.), Aug. 13, 2007, at A8.

271 Louisville Mayor Jerry Abramson believed that "diversity has helped make Jefferson County one of the top public school systems in the country." *Local Reactions to*

an interim plan to take effect during the 2008–2009 school year only. The permanent plan, which uses a combination of race, family income, and education to assign students, will be voted on in May 2008.<sup>272</sup> The plan separates the county into two areas: one below the district's average income and education levels with a higher-than-average minority population, and one in which either the income or education level is above the district's average, or the student minority population is below the average.<sup>273</sup> The plan requires schools to enroll at least fifteen percent and no more than fifty percent of students from the low-income, low-education, and high-minority group.<sup>274</sup> Superintendent Berman believes the new plan is constitutional in light of *Parents Involved*, stating, "Our objective is to maintain schools that are racially, ethnically and economically diverse," and "[i]t's a model based on geography, not race."<sup>275</sup> Additionally, "[a]lthough the proposal still uses race as one factor in student assignments, it is not applied directly to individual students."<sup>276</sup>

In order to ensure the effectiveness and legality of its new plan, the board consulted with national desegregation experts,<sup>277</sup> officials

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*Desegregation*, COURIER-JOURNAL.COM, Jan. 29, 2008, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20080129/NEWS0105/80129001/0/NEWS01>.

272 See Antoinette Konz & Chris Kenning, *Income, Race, Education Criteria for Assignments*, COURIER-J. (Louisville, Ky.), Jan. 29, 2008, at A1.

273 See *id.* "According to the district, the average household income among school families is about \$41,000; the average education level is a high-school diploma with some college; and the district's minority enrollment is 48 percent." *Id.*

274 See *id.* The proposal offers two alternatives for grouping elementary schools in student assignments. The first would be based on current elementary clusters, which are noncontiguous. In the "Non-Contiguous Boundary Scenario," the elementary clusters would be similar to how they are now, with minor changes. There would be nine clusters, with five to 13 schools each. About 1,700 students would have to change schools." *Id.* The second would be based on geographic areas, with clustered schools bordering each other. "In the 'Contiguous Boundary Scenario,' current clusters of elementary schools would be rearranged so that schools in the same cluster would all touch each other. There would be seven clusters of 10 to 14 schools each. About 3,500 students would have to change schools." *Id.*

275 *Id.*

276 *Id.* Nevertheless, the lawyer who prosecuted the case against the board disagrees, stating, "On the surface, without seeing a detailed review of the JCPS proposed plan, this new student assignment seems to be unconstitutional," and "I urge JCPS to immediately submit this to Judge Heyburn for his review to avoid costly litigation." *Id.*

277 Louisville Superintendent Berman sought the help of Gary Orfield (director of the University of California at Los Angeles's Civil Rights Project), as well as Ohio State University law professor John Powell (executive director of the Kirwan Institute for the Study of Race and Ethnicity), lawyer Anurima Bhargava (from the NAACP's Legal Defense Fund), and demographer Ron Crouch (from the Kentucky State Data

from other school systems that have ceased using race in school assignments,<sup>278</sup> and its numerous legal counsel. Louisville administrators and lawyers weighed plans by their “impact on diversity, school choice and the number of students who would have to switch schools, among other factors.”<sup>279</sup> After announcing the plan to the community, district officials now seek public input. Between January and the May vote on the plan, the school board will assess public opinion—including the views of parents, teachers, and other community leaders—through community forums, polls, and focus groups.<sup>280</sup>

In light of the principles established in *Parents Involved*, the new Louisville plan is arguably constitutional. As a primary matter, race is not the only issue involved in the constitutional analysis of the new plan. The school board is also using economic factors in its assignments, which the Supreme Court has stated are not subject to a strict scrutiny analysis.<sup>281</sup> The addition of a wealth classification in Louisville’s new plan makes its constitutionality much more probable. Furthermore, the limited use of race in the new plan is highly likely to pass a strict scrutiny analysis. First, the school district has identified a compelling interest in diversity, which a majority of the Supreme Court found to be a legitimate interest.<sup>282</sup> The district has also broadened its definition of diversity so that minority status includes not only African Americans, but all nonwhite students.<sup>283</sup> Now, 47.9% of the district’s 98,000 students are considered minorities.<sup>284</sup>

The school district has also fixed many problems which caused its plan to fail the majority’s narrow tailoring analysis. The majority faulted the old plan for its dispositive, mechanical, nonindividualized

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Center). See Chris Kenning, *District Consulted National Experts*, COURIER-J. (Louisville, Ky.), Jan. 29, 2008, at A8.

278 The School Board and its experts interviewed officials from school districts including Cambridge, Charlotte, Berkeley, and Wake County. See *id.*

279 See *id.* The group considered plans including neighborhood assignment, open enrollment, lotteries, and geographical assignments. See *id.* Superintendent Berman rejected the ideas of a neighborhood assignment plan and a free-choice plan, stating that such assignments would lead not only to racial segregation, but also segregation by income and other socioeconomic factors. See Antoinette Konz, *Berman: Simple Plans Would Segregate*, COURIER-J. (Louisville, Ky.), Jan. 29, 2008, at A8. The former option would also lead to the reassignment of more than 20,000 students. See *id.*

280 See Kenning, *supra* note 277.

281 See, e.g., *James v. Valtierra*, 402 U.S. 137, 141 (1971).

282 See *supra* notes 187–97.

283 See Konz & Kenning, *supra* note 272.

284 See *id.*

use of race,<sup>285</sup> its limited notion of diversity,<sup>286</sup> the “minimal impact” of its use of race,<sup>287</sup> and the board’s failure to show good-faith consideration of workable race-neutral alternatives.<sup>288</sup> The plurality also voiced concern at the plan’s mirroring of racial demographic percentages of the county, which the Court found to be essentially a form of racial balancing.<sup>289</sup>

In the new plan, race is not dispositive like it was in the old plan, and a student’s race cannot be used to systematically deny him or her an assignment or transfer request. Race is considered along with income and education in making such decisions. Diversity has been broadened to encompass more than the two categories of “black” and “other.” The plan itself takes into account race-neutral factors, and is more akin to *Grutter’s* individualized admissions policy in which race is one of many factors to be considered in diversity, and which was found to pass a strict scrutiny analysis. Furthermore, the use of race has been limited in the new plan and does not resemble the “extreme measure” of race reliance of the previous plan.<sup>290</sup> This more restricted use is presumably necessary to achieve diversity, although there is not yet any data showing the actual impact that race will have on future student assignments.

The old plan employed a ratio requiring between fifteen percent and fifty percent black enrollment, while the new plan employs a ratio requiring between fifteen percent and fifty percent low-income, low-education, high-minority group enrollment. When does a plan that was patently unconstitutional—essentially a form of racial balancing rejected by the plurality<sup>291</sup>—become constitutional by the mere substitution of three variables for one? An answer can be found in one of two explanations. Either the new plan will pass a strict scrutiny analysis of its more narrow use of race, or, alternatively, the plan will be judged by—and pass—a less demanding level of scrutiny.

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285 See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753–54 (2007).

286 See *id.* at 2754 (“It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse.’”).

287 *Id.* at 2760.

288 See *id.*

289 See *id.* at 2755 (plurality opinion).

290 See *id.* at 2756.

291 See *id.* at 2757 (“[W]orking backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that ‘[r]acial balance is not to be achieved for its own sake.’” (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992))).

While race is subject to strict scrutiny, education level and income are not. For example, plans that are based solely on income, such as that of Wake County, North Carolina, avoid being subjected to strict scrutiny, and can be justified by a showing that income-level integration has a significant impact on student achievement. However, the plan here mixes one classification subject to strict scrutiny (race) with two other elements that are not reviewed under such scrutiny, to create the final factor of admission: residence in one of two areas. How would the Court analyze a plan consisting of these elements if challenged under the Equal Protection Clause? Potentially, the use of race itself would still be analyzed separately under a strict scrutiny analysis. It is arguable that the limited use of race in such a situation will be found constitutional. The school board no longer uses race alone to assign students on individual bases. The impact of the use of race is reduced so that race alone cannot be used to decide admissions or transfers. Instead, geographic area—based on a combination of race, education, and income—will. The plan has remedied many of the plurality's concerns with the original plan's lack of narrow tailoring, and the new plan may very well find support by that same plurality.

Even if the plan would not pass a plurality analysis, however, it would most likely meet Justice Kennedy's approval. The plan incorporates Justice Kennedy's recommendations for formulating a narrowly tailored plan by using such suggestions as drawing attendance zones based on demographic factors, and using a more nuanced, individualized consideration of students.<sup>292</sup> Therefore, a majority of Justices—Justice Kennedy and the *Parents Involved* dissenters—would likely find this new plan to pass strict scrutiny.

Alternatively, the plan may be looked upon with a lesser level of scrutiny. The plan uses a calculation that is ultimately based on geographic location within the district to assign students. Geography alone is not analyzed under a strict scrutiny standard.<sup>293</sup> If the plan were viewed under a lesser level of scrutiny, the Court would much more easily find the plan's use of its classification to be justified. So long as Louisville will be able to explain the necessity of the factors used in its new plan, such a plan should be able to withstand constitutional scrutiny. Regardless of the potential level of scrutiny to be applied, the new plan seems to propose a very interesting test case for

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292 See *id.* at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment).

293 But see *infra* notes 300–04 and accompanying text (describing redistricting cases invoking scrutiny questions).

the Supreme Court. The Louisville School Board has taken Justice Kennedy at his word that race may still be used to achieve diversity, and has used his suggestions for guidance in formulating a new plan.

Finally, the Louisville School Board has also taken guidance from a very similar plan used in Berkeley, California, which assigns neighborhoods diversity ratings based on racial composition, family income, and education levels.<sup>294</sup> The Berkeley plan has withstood legal challenges at the state superior court level and would likely withstand strict scrutiny at the constitutional federal level for the same reasons as Louisville's new plan.<sup>295</sup>

The board's interim proposal is slightly more problematic.<sup>296</sup> The plan uses geography instead of race in assigning students, requiring that elementary schools have between fifteen percent and fifty percent of enrolled students from residential areas with minority populations of forty-five percent or more.<sup>297</sup> The school board became concerned about its district's level of integration after a dozen or so schools fell outside of the desired racial enrollment of fifteen percent to fifty percent black students following *Parents Involved*.<sup>298</sup> The geographic solution to this problem raises some constitutional issues. It has been suggested that geographical classifications are not suspect and therefore not subject to strict scrutiny.<sup>299</sup> However, the Supreme Court has issued several decisions addressing voter redistricting in which geographical distinctions were challenged as proxies for racial classifications. These decisions are informative in the present

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294 See Konz & Kenning, *supra* note 272. For a more detailed description of the Berkeley plan, see Berkeley Unified Sch. Dist., BUSD Student Assignment Plan/Policy, <http://www.berkeley.net/index.php?page=student-assignment-plan> (last visited Mar. 13, 2008).

295 See *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, No. RG06292139, slip op. at 16–18 (Cal. Super. Ct. Apr. 6, 2007), available at [http://www.nsba.org/cosa2/clips/docs/ACRF\\_v\\_BUSD.pdf](http://www.nsba.org/cosa2/clips/docs/ACRF_v_BUSD.pdf).

296 In fact, the attorney who challenged the original plan in *Parents Involved* has challenged this plan as being unconstitutional, as well. See Antoinette Konz, *Schools' Interim Policy Opposed*, COURIER-J. (Louisville, Ky.), Feb. 6, 2008, at B1.

297 See Antoinette Konz, *Temporary Desegregation Plan Approved*, COURIER-J. (Louisville, Ky.), Feb. 1, 2008, at A1. "The plan would apply to children entering first grade, students new to the district or who have moved, and those requesting transfers." *Id.*

298 See *id.*

299 See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2283 (2002) ("Doctrinally, the contrast between race-based classifications (strict scrutiny) and sex-based ones (intermediate scrutiny) operates to prefer remedial preferences for women over remedial preferences for racial minorities; easiest to defend would be preferences based upon income, geography, or another factor that would produce diversity along several dimensions without deploying a suspect identity trait.").

situation, although it is unclear just how these principles would be applied to a case of the geographical assignment of students under the Equal Protection Clause.

In *Shaw v. Reno*,<sup>300</sup> the Supreme Court recognized that while laws that are express in their racial discrimination easily violate the Equal Protection Clause, laws that appear racially neutral but operate in practice as racial classifications may also violate the Clause: “These principles apply not only to legislation that contains explicit racial distinctions, but also to those ‘rare’ statutes that, although race neutral, are, on their face, ‘unexplainable on grounds other than race.’”<sup>301</sup> The Court concluded that “redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting” may create a cause of action under the Equal Protection Clause.<sup>302</sup> This proposition was later confirmed by the Court in *Miller v. Johnson*<sup>303</sup> and *Bush v. Vera*.<sup>304</sup>

While these cases apply to voter redistricting laws and not student assignment policies, they still raise pertinent issues. If the Louisville school district’s assignments made by geographical area are inexplicable by anything other than on the basis of race, and race is found to be *the* predominant factor in the geographical assignments, the school board might find itself in dangerous, uncharted territory. The board must be careful not to allow its geographical assignments to operate as *de facto* racial classifications. Nevertheless, because the school board is no longer systematically denying individual students assignments based on race alone, this interim option is a safer alternative to the old plan. Fortunately, this temporary plan will be replaced with the presumably constitutionally permissible race-education-income plan the following year.

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300 509 U.S. 630 (1993).

301 *Id.* at 643 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

302 *Id.* at 642.

303 515 U.S. 900, 905 (1995) (“Applying this basic equal protection analysis in the voting rights context, we held that ‘redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race, . . . demands the same close scrutiny that we give other state laws that classify citizens by race.’” (alterations in original) (quoting *Shaw*, 509 U.S. at 644)).

304 517 U.S. 952, 959 (1996) (“For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ‘subordinated’ to race. By that, we mean that race must be ‘*the predominant* factor motivating the legislature’s [redistricting] decision.’” (alterations in original) (quoting *Miller*, 515 U.S. at 916)).

## CONCLUSION

Although the Supreme Court's ruling in *Parents Involved* has been in effect for a short time, it is already clear that its impact will be felt for some time to come.<sup>305</sup> The issue of race in education has long been a live topic of judicial discussion, and *Parents Involved* has by no means laid the issue to rest. If anything, the plurality decision has only clouded the issue for school boards in its failure to explain lucidly how to effectively implement constitutional assignment plans that assert compelling interests and are narrowly tailored to achieve those interests. By examining Justice Kennedy's concurrence and the Supreme Court precedents in place before *Parents Involved*, this Note has aimed to eliminate much of that confusion.

Ironically, *Parents Involved* marked *Brown's* coming full circle—only in a way that no one could have anticipated. In 1955, the Supreme Court issued an order to school districts “to achieve a system of determining admission to the public schools on a nonracial basis.”<sup>306</sup> That mandate was reissued in *Parents Involved* by Chief Justice Roberts who, invoking *Brown II*, concluded that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>307</sup> Today, Louisville is again trying to live up to that mandate, while setting an example for similarly situated school districts to follow.

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305 In fact, shortly after—and as a result of—the decision, one school district found itself having to defend against a motion to reopen a First Circuit case, decided before *Parents Involved*, in which its race-based assignment plan was upheld as constitutional. The case was *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005). For an in-depth discussion of the motion to reopen the case, which was ultimately denied, see Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/massachusetts-parents-school-plea-denied> (July 31, 2007, 10:16 EST).

306 *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955).

307 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (plurality opinion).