

Parents Involved in Community Schools v. Seattle School District No. 1:
The Search for Quality in Public Secondary Education

I. INTRODUCTION

In the more than fifty years since the Supreme Court decided *Brown v. Board of Education*¹, affirmative action jurisprudence has had a profoundly divisive effect on the members of the Court and American society, at large.² The academic institutions charged with implementing the Court's decrees have struggled to strike a balance between multi-ethnic integration in student bodies and individualized assessment, or "colorblindness."³ Further complicating these policy directives is the overarching goal of providing students with the highest quality education possible. Unsurprisingly, the Court's most recent decision in this area of law reflects this multi-faceted tension.

In *Parents Involved in Community Schools v. Seattle School District No. 1*⁴, a four-Justice plurality reversed the decisions of the Sixth and Ninth Circuits and determined that local school boards may not allocate students to different public schools on the basis of racial classifications.⁵ Historically, government-led initiatives that use race as a selection criterion have been subject to strict scrutiny review.⁶ In this context strict scrutiny requires the academic institution to "demonstrate that the use of individual racial classifications is 'narrowly tailored' to achieve a

‘compelling’ government interest.”⁷ The Court has held that the objective of racial diversity in student populations may only serve as a compelling interest in two limited contexts: 1) when measures are enacted to remedy the effects of previous *de jure* segregation⁸, and 2) when diversity is sought in institutions of higher education.⁹

Parents Involved concerned race-based assignment plans in Seattle, Washington and Jefferson County, Kentucky. Despite the school boards’ contention that “educational and broader socialization benefits flow from a racially diverse learning environment,”¹⁰ the Plurality found that neither of the board’s assignment plans was narrowly tailored to any recognizable compelling interest.¹¹ In a somewhat ambiguous concurrence, Justice Kennedy agreed with the Plurality’s judgment but refused to accept that racial diversity could *never* be considered a compelling interest. In his view, “the plurality opinion [wa]s too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of race.”¹² Alternatively, Justice Kennedy would have found it “permissible” for school boards “to consider the racial makeup of schools and to adopt general policies to encourage a diverse composition . . . without treating each student in different fashion solely on the basis of . . . race.”¹³

This note submits that *Parents Involved*, though divisive in both ideology and practice, is a faithful application of the legal standards that *Brown* and its progeny have established. The note argues, however, that *Parents Involved* further isolates under-funded and under-achieving American secondary public schools from the aid those institutions so desperately need. Moreover, as a guidepost for future litigants, Justice Kennedy's concurrence offers little in the way of a systematic alternative to the race-based assignment programs in question.

Empirical evidence has established a negative correlative relationship between a school's minority concentration and the quality of education provided.¹⁴ Historically, school boards have sought to redistribute racially isolated minorities in order to alleviate this imbalance.¹⁵ If the Court is both unwilling to recognize a Constitutionally afforded right to education (and, for that matter, high-quality education)¹⁶ and unwilling to condone race-based school assignments, then poorly performing minority-dominated public schools may be without redress.

II. FACTUAL BACKGROUND

The Seattle and Jefferson County school assignment programs differed in implementation but were virtually identical in effect. The Seattle plan allowed rising ninth-graders to choose their school of preference from among the district's ten high schools.¹⁷ Because some schools

were more popular than others, the district used a system of “tiebreakers” to allocate children who indicated as their preference an oversubscribed school. Among the four “tiebreakers” was a factor based solely on the applicant’s race. The school board grouped races according to two categories: “white” and “nonwhite.”

The board required that the composition of each of the Seattle high schools’ student bodies reflect the larger “white” / “non-white” ratio in the high school’s district.¹⁸ If the racial composition of an oversubscribed school to which an applicant applied was not within ten percentage points of the district’s overall racial balance, then those applicants whose race was over-represented were denied admission.¹⁹ Importantly, the Seattle schools were never subject to *de jure* segregation, though “white” and “nonwhite” students continue to reside in geographically separate areas of the city.²⁰

On the other hand, schools in Jefferson County, Kentucky were previously subject to *de jure* segregation. Until 2000, the school district operated pursuant to a 1973 federal court decree that required the board to implement remedial desegregation measures. In 2000, the District Court dissolved the decree, finding that the school district had achieved unitary status. Shortly thereafter, the school board implemented the voluntary student assignment plan in question.²¹

Similar to the Seattle plan, the Jefferson county initiative classified students under the headings “black” and “other”²² and required a minimum black enrollment of 15 percent and a maximum black enrollment of 50 percent at each non-magnet district school.²³ Students in Kindergarten, first-grade, and those new to the district had the option of applying to a school of their choice, provided the school was within the student’s geographical “cluster.”²⁴ As in the Seattle plan, applicants whose race was over-represented at a school to which they had applied were denied admission. While students at any grade-level could apply to transfer between schools within their district, transfer applicants were also subject to the racial constraints detailed above.²⁵

Parents of students in Jefferson County and Seattle brought suit against their school boards, alleging that the race-assignment plans violated the 14th Amendment’s Equal Protection guarantee.²⁶ The Seattle case was jostled among the District Court for the Western District of Washington, the Supreme Court of Washington and the Ninth Circuit.²⁷ Ultimately, the Ninth Circuit upheld the racial assignment plan, as did the Sixth Circuit in the case of Jefferson County.

III. AFFIRMATIVE ACTION JURISPRUDENCE THROUGH THE YEARS

Following the Court's 1955 directive in *Brown II*²⁸, school boards who were previously subject to *de jure* segregation embarked on a variety of tactics aimed at reversing the ills of racial isolation. This objective was deemed a "compelling interest" for the purposes of equal protection.²⁹ The Court has since upheld a number of remedial measures as "narrowly tailored," including student-busing,³⁰ specialized educational programs for previously segregated children,³¹ and the intentional dismantling of segregated school faculties.³² Nevertheless, the Court has refused to support the continuation of these programs once a lower court determines that a school district has reached "unitary status."³³

A "unitary status" determination is commensurate with a finding that the school district is operating in compliance with the Constitutional requirements set out in *Brown*.³⁴ Thus, the Court has closely scrutinized any integrative measures undertaken by a board after such a finding has been made.³⁵ In practice, a school board determined to have met the requirements of "unitary status" is judged on the same grounds as a school board that was never subject to *de jure* segregation in the first place.³⁶

Because “unitary” school districts and those districts that never implemented *de jure* segregation are all constrained by the Court’s strict scrutiny when employing race-based classifications, efforts undertaken by these institutions to fashion racially diverse student bodies have been litigated in district courts around the country. Accordingly, these institutions are limited in their ability to rectify any of the negative educational characteristics commonly associated with racially isolated schools.³⁷ These characteristics are further discussed below.

In addition to curing the ills of *de jure* segregation, the Court has held that student-body diversity in higher education may also be deemed a compelling interest for equal protection purposes.³⁸ This Court initiated this line of analysis in *Regents of Univ. of Cal. v. Bakke*.³⁹ In a controlling concurrence, Justice Powell first noted that race-based assignment programs must trigger a strict scrutiny analysis--even at the higher education level.⁴⁰ Powell went on to hold, however, that universities have a first amendment right to select “those students who will contribute the most to the ‘robust exchange of ideas.’”⁴¹ Powell thus endorsed a narrowly tailored admissions process that used race as a “plus” factor without “insulat[ing] the individual from comparison with all other candidates for the available seats.”⁴² This “individualized

consideration” approach has been a hallmark of the Court’s contemporary affirmative action jurisprudence.

Two decisions, *Gratz v. Bollinger*⁴³ and *Grutter v. Bollinger*⁴⁴ have framed the Court’s most recent approach to “individualized consideration.” Although the Plurality in *Parents Involved* reaffirmed the limited application of these cases,⁴⁵ the premises outlined in *Gratz* and *Grutter* help to explain why the *Parents Involved* Plurality declined to find a compelling interest in the Seattle and Jefferson County plans. Both *Gratz* and *Grutter* involved plaintiffs who sought admission to the University of Michigan. In *Gratz*, the litigation concerned the admissions process at the undergraduate College; in *Grutter*, the Law School.

The University of Michigan undergraduate admissions committee employed a racial point system, whereby each underrepresented minority applicant was “awarded 20 points, or one-fifth of the points needed to guarantee admission . . . solely because of race.”⁴⁶ Writing for the majority and using *Bakke* as a basis, Chief Justice Rehnquist found that the admissions process did not afford sufficient individualized consideration of each applicant.⁴⁷ In his view, the 20-point allocation system was tailored to achieving a racially diverse student body without regard to the educational and social benefits reaped therefrom.⁴⁸

The Court applied a similar analysis in *Grutter* but arrived at an opposite conclusion. There, the Law School's admission's policy likewise sought a diverse student body. The school ordinarily accepted students with high LSAT scores and undergraduate GPA's, but "professed a special 'commitment'" for "students from groups which have been historically discriminated against."⁴⁹

In upholding the policy, the Court first established that the School had a compelling interest in attaining a diverse student body. The Court noted the special academic characteristics of a Law School classroom, and found that a "critical mass of minority students"⁵⁰ is necessary to bolster "livelier classroom discussion," and "cross-racial understanding" in the legal context.⁵¹ The Court went on to find that the admissions policy the Law School employed was narrowly tailored to the ends it sought. According to Justice O'Connor, the Law School used a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."⁵² The policy thus satisfied the considerations Justice Powell set forth in *Bakke*.⁵³

IV. ANALYSIS OF THE OPINIONS IN *Parents Involved*: STRICT CONSTRUCTION AT ITS FINEST HOUR OR MOST TRAGIC?

A. THE PLURALITY

Writing for the *Parents Involved* Plurality, Chief Justice Roberts reversed the decisions of the Sixth and Ninth Circuits and found that both the Seattle and Jefferson County plans were inconsistent with the 14th Amendment's Equal Protection guarantee.⁵⁴ Roberts implemented the two-tiered analysis that is common to strict scrutiny review. First, he examined the Seattle and Jefferson County plans to determine whether the school boards had proffered a compelling interest in seeking racial diversity in their student bodies. Next, he embarked on a counterfactual analysis to determine whether, assuming the boards had proffered a "compelling interest," the race-assignment plans were narrowly tailored to achieving diversity.

Roberts strictly construed the Court's precedent concerning "compelling interests." As noted above, the Court has found only two contexts in which "racial diversity" can serve as a compelling interest: 1) in cases of prior state-administered segregation, and 2) in cases involving institutions of higher education. Seattle had never been subject to *de jure* segregation and the District's plan involved only secondary-education students. Thus, Roberts found, the District's plan did not fall within any of the established contexts.

Roberts similarly declined to find a compelling interest in the case of Jefferson County. As with Seattle, the County's plan involved children in secondary schools and was therefore not governed by the Court's holding in *Grutter*.⁵⁵ Furthermore, while the county was subject to *de jure* segregation before *Brown*, the district court for the Western District of Kentucky dissolved its desegregation decree in 2000 after finding that the school board had "eliminat[ed] . . . the vestiges of prior segregation."⁵⁶ Thus, Roberts asserted, "Jefferson County was on the same footing as any other school district, and its use of race must be justified on some other grounds."⁵⁷ Accordingly, the Plurality refused to find that that the County had a compelling interest in correcting the ills of its previously segregated system.

Both of the school boards asserted additional compelling interests besides those covered by the Court's higher education and *de jure*-remedial cases. Seattle argued that its race-based assignment plan "help[ed] to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools."⁵⁸ Jefferson County argued that its school board had an interest in "educating its students 'in a racially integrated environment.'"⁵⁹ Rejecting both of these claims, Chief

Justice Roberts noted that neither party had fully illustrated a solid empirical relationship between school diversity and test scores or “other intangible socialization benefits.”⁶⁰

The Chief Justice also considered whether the race-based assignment plans were narrowly tailored to achieving the type of diversity the schools boards sought. He concluded that they were not.⁶¹ Neither plan involved a clearly articulated pedagogical goal.⁶² Roberts and the Plurality were quick to point out that both plans sought diversity for diversity’s sake and nothing more. While Jefferson County employed a target race ratio and Seattle attempted to mimic the racial proportions in the community, neither school board proffered evidence demonstrating that the “level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the . . . school districts . . . or . . . the white/nonwhite or black/”other” balance.”⁶³ Indeed, “in design and operation, the plans [were] directed only to racial balance, pure and simple.”⁶⁴ Pursuant to *Bakke* and *Grutter*, such an objective is “patently unconstitutional,” and the Court so held.⁶⁵

Though he does not specifically mention such, the latter analysis required the Chief Justice to momentarily assume *arguendo* that racial diversity *could* be considered a compelling

interest. Ironically, this seems to provide the launching ground for Justice Kennedy's concurrence and may serve as the basis for future litigation.

B. JUSTICE KENNEDY'S CONCURRENCE

Kennedy's concurrence is perhaps the most confounding opinion in *Parents Involved*.⁶⁶

While he condoned the Plurality's ultimate judgment, Justice Kennedy explicitly held that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."⁶⁷ It would seem, then, that Kennedy's contention with the race-assignment plans centered on the specific way in which they were implemented—or tailored—and not the ends the plans were designed to meet. By intimating that the school boards had proffered a "compelling interest," Kennedy dared to circumscribe the Plurality's strict constructionist approach in which raced-based compelling interests are limited to the two contexts described above.

Interestingly, Justice Kennedy offered no clear indication as to what specific type of plan future school boards might validly "pursue." Particularly confusing was Kennedy's suggestion that school boards employ "race-conscious measures" to address racial isolation "without treating each student in different fashion solely on the basis of a systematic, individual typing by

race.”⁶⁸ This counterintuitive approach is reminiscent of Justice Powell’s concurrence in *Bakke*, wherein he suggested that “[t]he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive”.⁶⁹ As Professor Neil Siegel has noted, “it may seem curious that [this] rationale would” only approve of “a system of ‘individualized consideration,’ even though such a system would produce almost the same ‘net operative results’ as explicit [race-assignment] plans.”⁷⁰ Ostensibly, Justice Kennedy’s approval of racial diversity as a compelling interest is in accord with the Dissent.⁷¹ This is both demonstrative of the fractious nature of the *Parents Involved* Court and indicative of the means by which future litigants may return the issue to the Justices.

V. COMMENTARY AND CONCLUSIONS: JUDICIAL AMBIVALENCE TOWARDS HIGH QUALITY EDUCATION

The *Parents Involved* decision reflects the Roberts Court’s divided stance on voluntary integration in schools. While the legacy of *Brown* may live on, the various opinions in *Parents Involved* echo the difficulty the court has faced in correcting the ills of *de jure* and *de facto*

segregation. Most importantly, however, *Parents Involved* underscores a certain judicial ambivalence toward the overarching societal goal of providing youth with the highest quality education possible. The successful undertaking of this objective is as critical to our existence as co-racial socialization; indeed, it is upon this objective that such socialization is contingent.

Sadly, the empirics demonstrate that racially isolated schools provide a lower quality education than do integrated schools.⁷² While the remedy for equalizing this imbalance may not be race-based assignment plans, the ease with which the Plurality brushes aside the idea of extending its “compelling interest” jurisprudence to the secondary school context trivializes the importance of quality education. And though the *Parents Involved* Court is faithful to its precedent,⁷³ Chief Justice Roberts is consummately disloyal to this core American value.

Chief Justice Roberts is not the first jurist to espouse such ambivalence. Through the years, the Court has consistently declined to find a constitutionally vested right to education⁷⁴ despite its conviction that “[p]ublic schools . . . are ‘the most powerful agency for promoting cohesion among a heterogeneous democratic people.’”⁷⁵ Because Justice Kennedy’s concurrence⁷⁶ offers no clear route to pass the Court’s strict scrutiny muster, future litigants who

cannot follow Kennedy’s guide may be inclined to resurrect the argument that education—and a quality one at that—is a 1st amendment guarantee.⁷⁷

Supporters of quality education and supporters of affirmative action are not members of mutually exclusive groups. Indeed, an educated populace is one that shuns bigotry and racial isolation. If the Court is unwilling to extend its affirmative action jurisprudence to voluntary integration at the secondary-school level, then perhaps it is time for the Court to sincerely consider the *quality* of education that its decisions endorse. If this happens, the rest may take care of itself.

¹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (citing *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954)).

² See, e.g., Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 2, 34 (2002).

³ Compare *Brown II*, 349 U.S. 294 (1955) (reaffirming that racial discrimination in matters of public education is fundamentally unconstitutional), with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., concurring) (declaring that higher education institutions have a first amendment right to use race as a “plus” factor in implementing diversity in their student

bodies); *see also* Jeffrey Rosen, *Can a Law Change a Society?*, N.Y. TIMES, July 1, 2007, § 4, at 1; George F. Will, *The Court Returns to Brown*, WASH. POST, July 5, 2007, at A17.

⁴ 127 S. Ct 2738 (2007).

⁵ *Id.* at 2768.

⁶ *Id.* at 2751-52.

⁷ *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *see also* *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Bakke*, 438 U.S. at 291 (Powell, J., concurring) (admonishing that “racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination”).

⁸ *See generally* *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 402 U.S. 1 (1971) (approving various remedial policies to correct the effect of prior government-mandated school segregation).

De jure segregation is “the deliberate operation of a school system ‘to carry out a governmental policy to separate pupils in schools solely on the basis of race.’” *Parents Involved*, 127 S. Ct. at 2769 (Thomas, J., concurring) (quoting *Swann*, 402 U.S. at 6).

⁹ *Grutter*, 539 U.S. at 328.

¹⁰ *Parents Involved*, 127 S. Ct. at 2755.

¹¹ *Id.* at 2767.

¹² *Id.* at 2791 (Kennedy, J., concurring).

¹³ *Id.* at 2792.

¹⁴ *See, e.g.,* Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L. J. 781, 827 (2006).

¹⁵ *Id.*

¹⁶Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L. J. 111, 122 (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”)).

¹⁷ *Parents Involved*, 127 S. Ct. at 2746.

¹⁸ *Id.* at 2747.

¹⁹ *Id.*

²⁰ *Id.* In his dissent, Justice Breyer spends considerable time debating the difference between *de jure* and *de facto* segregation. He concludes that Seattle’s history of minority isolation and housing discrimination renders inane any distinction made by the plurality between *de jure* and

de facto segregation in the context of a “compelling interest.” Accordingly, Justice Breyer would find that the Seattle plan’s objective of racial integration is a compelling interest. *Parents Involved*, 127 S. Ct. at 2802 (Breyer, J., dissenting). Justice Breyer’s attempt to dissolve this distinction confounds the simplicity of the Court’s precedent, as Justice Thomas so indicates in his concurrence. *See id.* at 2769 (Thomas, J., concurring) (“The dissent makes much of the supposed difficulty of determining whether prior segregation was *de jure* or *de facto*. That determination typically will not be nearly as difficult as the dissent makes it seem . . . [T]here either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races.”).

²¹ *Parents Involved*, 127 S. Ct. at 2749.

²² *Id.* at 2746.

²³ *Id.* at 2749.

²⁴ *Id.* These geographic “clusters” are themselves arranged to facilitate racial integration among students who may reside in racially isolated, yet geographically proximate communities. *See generally id.* at 2808 (Breyer, J., dissenting).

²⁵*Parents Involved*, 127 S. Ct. at 2750. Both transfer applicants and the younger first-time applicants were also subject to available space at the schools of their choice. Thus, even applicants whose race would not have otherwise contributed to a school’s racial imbalance were denied admission to schools that were over-populated in terms of sheer number of pupils. This feature of the Jefferson County plan was not the subject of the instant litigation. *Id.*

²⁶ *Id.* at 2748 n.4 (quoting U.S. CONST. amend. XIV, § 1) (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²⁷ *Parents Involved*, 127 S. Ct. at 2748-49.

²⁸ 349 U.S. 294 (1955). *Brown II* gave the “primary responsibility for elucidating, assessing, and solving the[] problems” associated with prior segregation to local school boards. *Id.* at 299. The decision further required the federal courts to determine whether the measures the boards enacted were in accord with “the governing constitutional principles” set forth in *Brown I*. *Id.*

²⁹ *See supra*, note 7.

³⁰ *Swann*, 402 U.S. 1 (1971).

³¹ *Milliken v. Bradley*, 433 U.S. 267 (1977).

³² *Id.* at 282 (citing *U.S. v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969)).

³³ Chemerinsky, *supra* note 16, at 116 (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991)).

In *Dowell*, the Court determined that “once a ‘unitary’ system had been achieved, an earlier desegregation order should end.” *Id.* at 115 n.28. The term “unitary status” is an ambiguous means of characterization. The Court has held that a “unitary” system is simply one in which the ““ vestiges of past discrimination have been eliminated to the extent practicable.”” *Id.* at 116 (quoting *Dowell*, 498 U.S. at 249-50). As discussed below, this definition poses problems for the *Parents Involved* plurality, and seemingly bolsters the position espoused by Justice Breyer in his dissent.

³⁴ Chemerinsky, *supra* note 16, at 115 n.29 (citing *Missouri v. Jenkins*, 515 U.S. 70, 100 (1995)).

³⁵ *See* Chemerinsky, *supra* note 16, at 116 (citing *Freeman v. Pitts*, 503 U.S. 467, 485 (1992) (finding that a federal court could not review discriminatory effects of remedial measures after a court had already deemed the school board to have met the requirements of a federal desegregation decree)).

³⁶ *Id.*; *see also Parents Involved*, 127 S. Ct. at 2755 n.12. As the Court has also noted, “the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation . . .

[T]he Constitution is not violated by racial imbalance in the schools, without more.” *Parents Involved*, 127 S. Ct. at 2752 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280, n.14 (1977)).

³⁷ Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 710-11 (2007).

³⁸ *Bakke*, 438 U.S. 265.

³⁹ *Id.*

⁴⁰ *Id.* at 291.

⁴¹ *Id.* at 312 (Powell, J., concurring) (quoting *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (E.D.N.Y. 1943)).

⁴² *Bakke*, 438 U.S. at 317 (Powell, J., concurring). Some commentators have challenged this approach as being unfaithful to the tenets of the Equal Protection Clause, which considers persons on a strict individual basis. As Professor Neil S. Siegel has noted, the “‘freedom to regard race as an especially salient dimension of diversity’ . . . ‘seems inconsistent with the constitutional requirement that [universities] treat applicants as unique persons rather than as members of racial groups.’” Siegel, *supra* note 14, at 798 (quoting Robert C. Post, *The Supreme*

Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4, 72 (2003)).

⁴³ 539 U.S. 244 (2003).

⁴⁴ 539 U.S. 306 (2003).

⁴⁵ See *Parents Involved*, 127 S. Ct. at 2754. As one commentator argues, “there is no basis in the text of the various *Grutter* opinions for employing the holding outside the realm of public higher education.” Paul J. Beard II, *The Legacy of Grutter: How the Meredith and PICS Courts Wrongly Extended the “Educational Benefits” Exception to the Equal Protection Clause in Public Higher Education*, 11 TEX. REV. L. & POL. 1, 21 (2006). The Court reiterated this position in *Parents Involved*. 127 S. Ct. at 2754.

⁴⁶ *Gratz*, 539 U.S. at 270.

⁴⁷ *Id.* at 271.

⁴⁸ *Id.* at 275. Specifically, Rehnquist noted that the “only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.” *Id.* at 271. As Justice Powell indicated in *Bakke*,

“[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” *Bakke*, 428 U.S. at 307 (Powell, J., concurring).

⁴⁹ Beard, *supra* note 45, at 5 (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 827-28 (E.D. Mich. 2001), rev’d, 288 F.3d 732 (6th Cir. 2002), aff’d, 539 U.S. 306.).

⁵⁰ *Grutter*, 539 U.S. at 329 (quoting Res’t’s Br. 13).

⁵¹ *Grutter*, 539 U.S. at 330 (quoting App. to Pet. for Cert. 246a).

⁵² *Grutter*, 539 U.S. at 337. Justice O’Connor employed a four-prong analysis to determine whether the admissions policy was narrowly tailored. The test required the Court to verify that 1) the school had not implemented a quota system, 2) the school had considered and rejected race-neutral alternatives, 3) the policy did not unduly injure minorities, and 4) the race-based classifications were limited in time. *See* Beard, *supra* note 45, at 9-10 (citing *Grutter*, 438 U.S. at 334-42). This test, though not employed directly in *Parents Involved*, is nonetheless indicative of the approach implemented by the plurality there.

⁵³ *See Bakke*, 438 U.S. at 314 (Powell, J., concurring) (“Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”).

⁵⁴ *Parents Involved*, 127 S. Ct. at 2767-68.

⁵⁵ *Id.* at 2754 (“The Court in *Grutter* expressly articulated key limitations on its holding-defining a specific type of broad-based diversity and noting the unique context of higher education . . . The present cases are not governed by *Grutter*.”).

⁵⁶ *Id.* at 2755 n.12

⁵⁷ *Id.*; see also Chemerinsky, *supra* note 16.

⁵⁸ *Parents Involved*, 127 S. Ct. at 2755.

⁵⁹ *Id.* (quoting App. in No. 05-915 22).

⁶⁰ *Parents Involved*, 127 S. Ct. at 2755. Importantly, Justice Thomas spends considerable time deconstructing the alleged empirical relationship between diversity and achievement. While he takes no affirmative position on either side of the debate, his presentation of conflicting social science evidence demonstrates that Justice Breyer’s dissent may rely too strongly on theory as opposed to fact. *Id.* at 2776 (Thomas, J., concurring) (“[I]t is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.”).

⁶¹ *Parents Involved*, 127 S. Ct. at 2755.

⁶² *Id.*

⁶³ *Parents Involved*, 127 S. Ct. at 2756.

⁶⁴ *Id.* at 2755.

⁶⁵ *Grutter*, 539 U.S. at 308 (quoting *Bakke*, 438 U.S. at 307 (Powell, J., concurring)).

⁶⁶ *Parents Involved* 127 S. Ct. at 2788 (Kennedy, J., concurring). For a colorful commentary on Justice Kennedy's opinion, see Benjamin Wittes, *Anthony Kennedy Punts on the question of School Diversity*, THE NEW REPUBLIC, Jan. 2, 2007, ¶ 4, <http://www.tnr.com/docprint.mhtml?i=w070702&s=wittes070207> (finding that “[Kennedy’s concurrence] announces no coherent rule that any school system could apply with confidence that it will garner Kennedy’s vote in the future by doing so”).

⁶⁷ *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring).

⁶⁸ *Id.* at 2792

⁶⁹ *Bakke*, 438 U.S. at 317 (Powell, J., concurring).

⁷⁰ Siegel, *supra* note 14, at 792-93 (quoting Paul J. Mishkin, *the Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 927-28).

⁷¹ *Compare Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring) (finding that “[a] compelling interest exists in avoiding racial isolation.”), *with id.* at 2835 (Breyer, J., dissenting) (explaining that “diversity in public primary and secondary schools [] must be . . . a compelling state interest”).

⁷² Siegel, *supra* note 14, at 827 (“Research shows that recognition of a compelling interest in reducing racial isolation in public schools is not premised on unconstitutional stereotypes and assertions of inherent racial inferiority. Rather, the interest is based on the empirically demonstrated reality that racially isolated schools afford inferior educational opportunities[.]”).

This is not the same social science evidence that Justice Thomas cites as contradictory in his concurrence. While Thomas focuses on the correlation between voluntary integration and levels of educational achievement, the quality imbalance to which this note refers is primarily a function of wealth distribution. *See, e.g.*, Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 281-82 (2006) (quoting Erica Frankenberg, et al., The Civil Rights Project at Harvard University, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at 11 (2003), <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (“with respect to majority black schools, we find that the students who attend them are poorer

than many, if not most, of the students attending majority white school . . . Children in these schools tend to be less healthy, to have weaker preschool experiences, to have only one parent, to move frequently and have unstable educational experiences, to attend classes taught by less experienced or unqualified teachers, to have friends and classmates with lower levels of achievement, to be in schools with fewer demanding pre-collegiate courses and more remedial courses, and to have higher teacher turnover. Thus, with few exceptions, ‘separate schools are still unequal schools.’)). Congress has concurred in this judgment as the magnet school statutes so suggest. *See* Siegel, *supra* note 14, at 826 (citing the Magnet Schools Assistance Act, codified at 20 U.S.C. § 7231(a)(4)(Supp. III 2003)).

⁷³ *See* Wittes, *supra* note 66, at ¶ 13 (“Even those who disagree with the position Roberts and Thomas articulated in this case . . . should be able to respect it. It represents a coherent vision of what equal protection means.”).

⁷⁴ Chemerinsky, *supra* note 16.

⁷⁵ Siegel, *supra* note 14, at 820 (quoting *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948)).

⁷⁶ *See Parents Involved*, 127 S. Ct. at 2788.

⁷⁷ See Chemerinsky, *supra* note 16, at 131-33 (advocating an increased judicial role in enforcing the constitutional rights of students “who lack the political power to do anything about ensuring educational opportunity”).