NEW LIMITS ON THE USE OF RACE IN PUBLIC SCHOOL STUDENT ASSIGNMENT PLANS: IMPLICATIONS OF THE SUPREME COURT'S DECISION IN *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1*, 127 S. CT. 2738 (2007)

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I. INTRODUCTION

The use of racial classifications in schools is not a new legal issue. Following the Supreme Court's landmark decision in *Brown v. Board of Education*,[1] school districts across the nation faced mandatory desegregation orders, and many districts began to classify and assign students based on race in an effort to comply with the requirements of the orders. Formerly segregated school districts made significant and often successful attempts to integrate.

Despite the efforts of school districts, however, a new problem arose: the resegregation of our nation's schools as a result of societal factors. In many school districts throughout the nation, "white flight" caused urban centers to have disproportionately high percentages of minority residents. One way school districts attempted to combat this growing problem was through the use of race-conscious student assignment plans. Should school districts be permitted to use race to remedy segregation imposed not by the government, but by societal factors beyond the government's control? The Supreme Court of the United States faced this issue in *Parents Involved in Community Schools v. Seattle School District No. 1* and its companion case, *Meredith v. Jefferson County Board of Education* (collectively *Parents Involved*), when the race conscious assignment plans of two school districts were challenged.[2]

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1. Brown v. Bd. of Educ., 346 U.S. 483 (1954).
2. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751 (2007).

The Court invalidated the plans, but parts of the opinion were unable to command a majority vote.[3] School districts across the nation now have to reevaluate any race-conscious student assignment plans that they have in place. Because of the Supreme Court's decision in *Parents Involved*, public school districts would be well advised to use socioeconomic classifications or to incorporate both race and socioeconomic status into a broader definition of diversity, rather than using race classifications alone. These approaches would allow school districts to combat resegregation and have their student assignment plans upheld when faced with equal protection challenges from unhappy parents.

This Casenote aims to offer some guidance on the practical implications this decision has for public schools and offer some suggestions as to how public school districts can still effectively combat resegregation. Section II outlines the background and development of equal protection law in the educational context. Section III summarizes the facts and procedure of the case, and discusses the opinion of the Court, the concurring opinions, and the dissent. Justice Kennedy's opinion is of special importance because he did not join the Plurality's view that race could never be used to achieve a diverse student body in public schools.[4] Finally, section IV analyzes the impact of the Court's decision on the prior law, the practical implications of the opinion for public school districts, and some suggested permissible solutions for school districts that want to continue combating resegregation.

II. BACKGROUND

In order to fully appreciate the implications of *Parents Involved in Community Schools v. Seattle School District No. 1* (*Parents Involved*) for public school districts, an overview of the development of Equal Protection law in the context of education is necessary. In 1868, following the end of the Civil War, the Fourteenth Amendment to the U.S. Constitution was ratified which, in pertinent part, provides:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

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3. *Id*. at 2788.
4. *Id*. at 2791.
5. U.S. CONST. amend. XIV, § 1.

A. Cases Prior to *Grutter v. Bollinger*

The Supreme Court initially interpreted the Equal Protection Clause to permit states to pass laws that authorize or even mandate separation based on race in public places, a doctrine that became known as "separate but equal."[6] This doctrine remained good law for over fifty years, until the Supreme Court's seminal *Brown v. Board of Education* decision, in which the Court held separation of public school students based on race to be a violation of the Fourteenth Amendment.[7] The decision in *Brown* put an end to government mandated or *de jure* segregation in public schools,[8] but the decision did not address what school districts were required or permitted to do in order to remedy segregation imposed by outside societal factors, or *de facto* segregation.

After the decision in *Brown,* some school officials and politicians argued that the government was "required, or at least permitted, not only to remedy de jure segregation, but de facto segregation as well."[9] It was clear that race classifications could be used to correct *de jure* segregation, but the question was left open as to whether school districts could use race-based assignment plans in an effort to alleviate *de facto* segregation. It eventually became accepted that any time the government uses racial classifications to distribute benefits or burdens, a court reviews the action under the demanding "strict scrutiny" standard.[10] To pass muster under the strict scrutiny standard, any use of racial classifications in student assignment plans must be "narrowly tailored to achieve a compelling government interest."[11] Thus, when evaluating a school district's use of racial classifications in student assignment plans, the inquiry is whether the district articulated a "compelling" government interest and whether the plan is "narrowly tailored" to achieve that interest.

The Supreme Court addressed the question of whether diversity of a student body is a compelling government interest in *Regents of University of*

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6. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).
7. Brown v. Bd. of Educ., 346 U.S. 483, 493 (1954).
8. *Id*.
9. J. Kevin Jenkins, *An Update on Race-Based Student Assignments in Public K-12 Schools,* 210 West's Education Law Reporter 1, 3 (2006).
10. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751 (2007) (citing Johnson v. California, 543 U.S. 499, 505–06 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)).
11. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

California v. Bakke.[12] The admissions policy of the University of California's medical school was at issue in *Bakke*.[13] That policy reserved a certain number of places in the entering class for minority students that applied through a "special admissions program."[14] The Court held the program unconstitutional, but also recognized that "the 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."[15]

The Court could not agree, however, as to what the "substantial interest" was.[16] Four of the Justices thought that "remedy[ing] past disadvantages cast on minorities by past racial prejudice" was a compelling state interest and would have upheld the program as constitutional.[17] Four Justices did not reach the constitutional issue and invalidated the program on statutory grounds.[18] Justice Powell concurred and voted to invalidate the admissions program,[19] but recognized the "attainment of a diverse student body" as a compelling state interest, at least in the context of higher education.[20] Consequently, the decision did not resolve the issue of whether diversity in student bodies is a "compelling state interest" and conflicts developed between the courts of appeals.[21]

In addition to the confusion as to whether the state has a "compelling interest" in achieving a diverse student body, it was unclear whether student body diversity could be a compelling interest outside of the higher education context. When presented with cases in which public school districts employed race classifications to achieve student body diversity to remedy *de facto* segregation, the First and Fourth Circuits held that the assignment plans were not "narrowly tailored" and thus unconstitutional.[22] The courts did not, however, directly address the issue of whether racial diversity is a "compelling" government interest in the context of public schools not subject to mandatory desegregation, and this remained an open question.[23]

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12. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978).
13. *Id*. at 275.
14. *Id*.
15. *Id*. at 320.
16. *See id.* at 325.
17. *Id*.
18. *Id*.
19. *Id*. at 271.
20. *Id*. at 311–12.
21. *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (no compelling state interest in achieving a diverse student body), *with* Smith v. University of Washington Law School, 233 F.3d 1188, 1197 (9th Cir. 2000) (achieving a diverse student body is a compelling state interest).
22. Jenkins, *supra* note 9, at 4 (citing Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998); Tuttle v. Arlington, 195 F.3d 698 (4th Cir. 1999); Eisenberg v. Montgomery 197 F.3d 123 (4th Cir. 1999)).
23. *Id*.

B. *Grutter v. Bollinger*

The Supreme Court resolved the circuit split over whether achieving a diverse student body in the context of higher education was a compelling interest when it decided *Grutter v. Bollinger*.[24] In *Grutter,* the admissions policy of the University of Michigan Law School was at issue. That policy employed race as a "plus factor" for minority applicants in order to attain a diverse student body.[25] The Court held that the law school had a compelling interest in attaining a diverse student body.[26] The Court's opinion stated that "context matters when reviewing race-based governmental action under the Equal Protection Clause"[27] and noted the unique nature of universities.[28]

After recognizing student body diversity as a compelling interest, the Court held that in order for a race-conscious admissions program to be "narrowly tailored" to that interest, it "must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"[29] Universities could safely use race as a "plus-factor" when evaluating an applicant's file.[30] Universities could not, however, establish racial quotas or exempt members of specific racial or ethnic origins from competition with other applicants.[31] The requirements of the *Grutter* holding became known as "individualized consideration."[32]

Grutter did not resolve whether public K-12 schools not subject to mandatory desegregation orders could use race classifications to achieve diversity in student bodies, or if the requirement of "individualized consideration" would apply in that context. Some scholars have argued that *Grutter* should apply in the public school context, since diversity may be an

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24. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).
25. *Id*. at 328.
26. *Id*.
27. *Id*. at 327 (citing Gomillion v. Lightfoot, 364 U.S. 339, 343–44 (1960)).
28. *Id*. at 329 (the Court stated: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.") (citing Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).
29. *Id*. at 334 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).
30. *Id*.
31. *Id*.
32. *See, e.g.,* Neil S. Siegel, *Race Conscious Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 794 (2006).

even more compelling interest at the K-12 level.[33] Others have argued against extending *Grutter* to the K-12 context, fearing such extension would spread to other areas outside the realm of education.[34] The Supreme Court faced this unresolved issue when it decided *Parents Involved in Community Schools v. Seattle School Dist. No. 1*.[35]

III. EXPOSITION OF *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1*

In *Parents Involved* , the Supreme Court held the student assignment plans of two public school districts were not narrowly tailored to a compelling state interest as required under the "strict scrutiny" analysis applied when the government uses race based classifications to distribute benefits or burdens.[36] Since *Parents Involved* consolidated two individual cases, the facts and procedure of each case will be considered separately.

A. The Seattle Case

Seattle School District No. 1 instituted a plan in 1999 that allowed incoming high school freshmen to choose which school within the district they wished to attend.[37] The plan allowed each student to rank any number of schools within the district in preferential order.[38] When too many students requested a particular school as their first choice, the school district's plan used a series of "tiebreakers" to determine which students to assign to which schools.[39] The first tiebreaker looked at whether the student had a sibling enrolled in the oversubscribed school and would give those students that did the first available slots.[40] The second tiebreaker examined the race of the student and the racial composition of the school.[41] The plan classified each student as either "white" or "nonwhite".[42] If a school was not within ten

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33. *See, e.g.,* Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 217 (2005).
34. *See, e.g.,* 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, 28 (2006).
35. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007).
36. *Id*. at 2760.
37. *Id*. at 2747.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*. at 2746.

percent of the overall racial composition of the school district (41% white, 59% "nonwhite"), students who "[would] serve to bring the school into balance" would be admitted before students that would not.[43]

Seattle School District No. 1 was never legally segregated and was never subject to a judicial desegregation order.[44] The district employed the racial tiebreaker in an attempt to combat the racially imbalanced housing patterns within the district, in which most white students lived in the northern portion of Seattle and most minority students lived in the southern portion.[45] Five high schools were located in the south, four in the north, and one in the middle.[46] Of the ten high schools, the district considered three schools "integration positive" because more than 51% of students were white.[47] The district deemed one school "integration positive" because more than 69% of students were "nonwhite".[48]

Parents Involved in Community Schools (Parents Involved), a nonprofit organization formed to represent the interest of parents within the district whose children might not get assigned to their first-choice high school because of their race, sued the Seattle school district.[49] The organization brought suit after the district denied a student assignment to his chosen school because he was white and the school was "integration positive" for having a student body that was more than 51% white.[50] Parents Involved challenged the school district's assignment plan on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment.[51]

The District Court for the Western District of Washington granted summary judgment in favor of the school district, finding its plan "narrowly tailored to serve a compelling government interest."[52] Initially, the Ninth Circuit reversed the judgment of the District Court on statutory grounds, but, realizing that it could not fully adjudicate the case prior to the time in which student assignments were to occur the next year, withdrew its opinion and certified the case to the Washington Supreme Court to resolve the statutory question.[53] The Washington Supreme Court ruled that state law did not prohibit the school district's assignment plan and returned the case to the

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43. *Id*. at 2747.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*. at 2747.
48. *Id*. at 2747–48.
49. *Id*. at 2748.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.

Ninth Circuit.[54] A panel of the Ninth Circuit reconsidered the case, and again reversed the District Court, determining that the assignment plan was not narrowly tailored to "achieving racial diversity and avoiding racial isolation."[55] The Ninth Circuit then granted rehearing en banc and determined that the plan was in fact narrowly tailored to achieving the school district's compelling interest, overruling the panel decision and affirming the judgment of the District Court.[56] The United States Supreme Court granted certiorari.[57]

B. The Jefferson County, Kentucky Case

A federal court in 1973 held that Jefferson County's school system was operated in an illegally segregated fashion, and a district court subsequently ordered the district to desegregate.[58] In 2000, the district court lifted the desegregation order because it found that unitary status had been achieved in the school district.[59] Following the dissolution of the order, the school district adopted a voluntary student assignment plan that required a minimum enrollment of 15% black students and a maximum enrollment of 50% black students for all non-magnet schools.[60] A magnet school is a satellite public school established by a school district that emphasizes "a particular subject area, teaching method, or service".[61] All other public schools are non-magnet schools.

Under the plan, the school district designated every student at the elementary level to a "resides" school based on geographic proximity to their residence, and all the "resides" schools were "grouped into clusters in order to facilitate integration."[62] The plan permitted parents of kindergartners, first graders, and new students to rank a first and second choice school within their "cluster" and submit their choices to the district.[63] When a school was deemed to have "reached the extremes of the racial guidelines," a student would not be assigned there if his or her race would further imbalance the school's racial composition.[64] After being assigned to a school, students in any grade could request a transfer, which the district could deny due to lack

54. *Id*.
55. *Id*. at 2749.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*.
61. Zelman v. Simmons-Harris, 536 U.S. 639, 639 (2002).
62. *Parents Involved in Cmty. Sch.,* 127 S.Ct. at 2749.
63. *Id*.
64. *Id*. at 2749–50.

of space or because of the district's racial guidelines.[65] The district instituted a similar plan at the middle and high school level.[66]

Crystal Meredith, whose son was denied a transfer based on his race, sued the school district in the District Court for the Western District of Kentucky.[67] Meredith claimed that the use of race in the school district's assignment plan violated the Equal Protection Clause of the Fourteenth Amendment.[68] The District Court held that the school district articulated a "compelling interest" in the form of maintaining racially diverse schools, and that the plan was narrowly tailored toward achieving that interest (and thus valid).[69] The Sixth Circuit affirmed and the Supreme Court of the United States granted certiorari.[70]

C. The Opinion of the Court

Five Justices voted to invalidate the student assignment plans in Seattle and Jefferson County under the Equal Protection Clause of the Fourteenth Amendment, on the ground that the plans were not narrowly tailored to achieve a compelling state interest.[71] The Court stated that it had previously recognized only two "compelling state interests" that could justify the use of race when assigning students to schools: "Remedying the effects of past intentional discrimination" and "diversity in higher education," as articulated in *Grutter v. Bollinger*.[72] The Court held that the first interest could not justify the use of race in the student assignment plans, since Seattle never operated *de jure* segregated schools and Jefferson County's desegregation order had already been lifted.[73]

With respect to the second interest recognized as "compelling," the Court held *Grutter* inapplicable in the context of these cases, since the assignment plans "employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' in Jefferson County."[74] The admissions plan at issue in *Grutter* defined diversity in terms of "a far broader array of qualifications and characteristics of which racial or ethnic origin is

65. *Id*. at 2750.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*. at 2760.
72. *Id*. at 2752–53.
73. *Id*. at 2752.
74. *Id*. at 2754.

but a single though important element."[75] The Court also differentiated the plan at issue in *Grutter* since that plan considered race as "part of a broader assessment of diversity," whereas under the assignment plans of the Seattle and Jefferson County school districts, race is decisive when it comes into play.[76] The Court reasoned that because race could itself be determinative, the school districts' plans do not afford students the kind of "individualized consideration" that was an integral part of the admissions plan at issue in *Grutter*.[77] The Court also noted the unique nature of universities and pointed out that the *Grutter* Court was also cognizant of the special considerations inherent in the university context.[78]

D. The Plurality Opinion

In a portion of the opinion not joined by Justice Kennedy (and therefore lacking the five votes necessary to become part of the court's holding), the plurality would have ruled that race classifications cannot be used to achieve racial diversity in any circumstances.[79] The plurality also would have held that the compelling interest that the school districts identified was really just "racial balancing" re-labeled, and that "racial balancing" could never be a compelling state interest.[80] Since Justice Kennedy did not join this part of the opinion, these assertions cannot be construed as holdings of the court. Justice Kennedy's concurring opinion is considered separately because his opinion will likely guide lower courts in similar cases.

E. Justice Kennedy's Concurring Opinion

As noted *supra*, Justice Kennedy did not join part of the opinion.[81] Although Kennedy agreed that the plans at issue were not "narrowly tailored" toward achieving their stated purpose,[82] he wrote separately because he believed that race could be taken into account in certain circumstances.[83] Kennedy also thought that the plurality opinion could be interpreted as stating that "the Constitution requires school districts to ignore the problem of *de*

75. *Id*. at 2753 (quoting Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).
76. *Id*.
77. *Id*. at 2753–54.
78. *Id*. at 2754.
79. *Id*. at 2759.
80. *Id*.
81. *Id*. at 2788 (Kennedy, J., concurring).
82. *Id*. at 2790.
83. *Id*. at 2791.

facto resegregation in schooling."[84] This suggestion, in his view, was "profoundly mistaken."[85] Finally, Kennedy believed that schools had a compelling interest in achieving a diverse student body, but he thought race should only constitute part of the definition of "diversity."[86]

In Justice Kennedy's view, school districts can use race-conscious assignment plans, provided that the plans do not treat individual students differently based solely on their racial classification.[87] He listed a number of ways that school districts could take race into account when attempting to achieve a diverse student body, including establishing new schools, redrawing attendance zones, targeted recruiting of faculty and students, and funding special programs.[88] In Kennedy's view, however, school districts cannot use race to classify individual students and assign them to schools solely on the basis of that classification.[89]

F. Justice Thomas' Concurring Opinion

Justice Thomas agreed that the plans were unconstitutional, but wrote separately because he thought the Court should interpret the Constitution in a "color-blind" fashion.[90] In Thomas's view, *any* race-based decisionmaking is unconstitutional.[91]

G. The Dissent

Four Justices dissented because they believed the plurality overlooked the fact that the plans use racial classifications "not to keep the races apart, but to bring them together."[92] The dissenters suggested that a "less strict" version of strict scrutiny be applied in this context.[93] In analyzing the case, however, the dissent still applied the traditional "strict scrutiny" analysis, noting that any plan that meets the requirements of the traditional test would survive under the "less strict" version of the test.[94] The dissent believed "racial

84. *Id*.
85. *Id*.
86. *Id*. at 2797.
87. *Id*. at 2792.
88. *Id*.
89. *Id*. at 2797.
90. *Id*. at 2787–88 (Thomas, J., concurring).
91. *Id*. at 2788.
92. *Id*. at 2818 (Breyer, J., dissenting).
93. *Id*. at 2819.
94. *Id*. at 2820.

diversity" was a compelling interest,[95] and thought the plurality relied too heavily on the distinction between *de jure* and *de facto* segregation.[96] They believed the distinction was only important when evaluating what a school district is *constitutionally required* to do, rather than what a school district *may* do.[97] Additionally, the dissent thought the assignment plans were "narrowly tailored."[98] Finally, the dissent asserted that invalidating the plans threatened the goals of *Brown v. Board of Education,* and deprived school districts of "the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty."[99]

IV. ANALYSIS

The *Parents Involved* decision resulted in only two holdings, since Justice Kennedy did not join part III-B and part IV. One holding was that *Grutter v. Bollinger* did not apply in the context of public schools.[100] Justice Kennedy, in his concurring opinion, hinted that if race was used as only part of a broader definition of "diversity," then *Grutter* might have some application in the public school context.[101] The only other holding was that the student assignment plans were unconstitutional because they were not "narrowly tailored."[102]

Justice Kennedy believed that diversity can be a "compelling interest," depending on how it is defined.[103] His opinion does not, however, provide public school districts with a concrete framework for judging when and how race classifications can be used to achieve that compelling interest. Because of the Supreme Court's decision in *Parents Involved*, public school districts would be well advised to use socioeconomic classifications or to incorporate both race and socioeconomic status into a broader definition of diversity, rather than using race classifications alone, if they wish to combat

95. *Id*. at 2823.
96. *Id*.
97. *Id*. at 2823–24 ("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.").
98. *Id*. at 2830.
99. *Id*. at 2837.
100. *Id*. at 2755 (majority opinion).
101. *Id*. at 2794 (Kennedy, J., concurring).
102. *Id*. at 2760 (majority opinion).
103. *Id*. at 2797. (Kennedy, J., concurring) (Kennedy stated: "[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

resegregation, yet have their plans upheld when faced with equal protection challenges from unhappy parents.

A. Ways School Districts Can Still Use Race When Trying to Achieve a Diverse Student Body

Justice Kennedy's concurring opinion is probably the best guide as to the extent school districts are still permitted to use race when trying to achieve a diverse student body. Justice Kennedy is known as a "swing vote" because he sometimes rules with the more "liberal" Justices in close cases.[104] The four dissenting Justices in *Parents Involved* believe "racial diversity" is always a compelling interest.[105] The four Justices who made up the plurality thought "racial diversity" was never a compelling interest in the context of de facto segregation.[106] Justice Kennedy's vote would likely determine the outcome of future equal protection challenges, since he took a "middle ground" between the plurality and the dissent.

Kennedy outlined a number of race-conscious measures that he would permit school districts to employ.[107] One way school districts may still employ race is in the drawing of attendance zones.[108] Thus, a school district may redraw attendance zones taking into account the racial makeup of the area. An obvious problem with this approach, however, is that it could require making elaborate changes in the district lines that may necessitate the busing of children. An advantage to this approach is that a court would be less likely to invalidate a redrawing of attendance zones, since it is a facially neutral means of achieving diversity.

Facially neutral classifications are subject only to deferential "rational basis review", unless they are merely a pretext for discrimination based on a suspect class such as race.[109] The Supreme Court has, in the context of voting rights, found that the redrawing of a city's boundaries that allegedly eliminated most of the black voters would amount to a pretext for discrimination if the allegations were true.[110] Despite Justice Kennedy's belief that redrawing attendance zones is a permissible way to accomplish racial diversity, a school district might still have to demonstrate that it was motivated by a purpose other than assigning students based on race. Despite

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104. Michael J. Gerhardt, *Essay: The New Religion,* 40 CREIGHTON L. REV. 399, 412 (2007).
105. *Parents Involved in Cmty. Sch.,* 127 S.Ct at 2823 (Breyer, J., dissenting).
106. *Id*. at 2759 (plurality opinion).
107. *Id*. at 2792 (Kennedy, J., concurring).
108. *Id*.
109. Personnel Adm'r of Mass. v. Feeny, 442 U.S. 256, 272 (1979).
110. Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

this possibility, however, it has been suggested that "[s]chool officials can be confident that they can take race-neutral steps to try to achieve racial integration . . . ."[111]

Another related way that public school districts may still employ race is in the establishment and strategic placement of new schools or "magnet" schools. This approach has the same advantages as altering district lines, but has the obvious drawback of expense.

B. Achieving Racial Diversity Indirectly Through the Use of Socioeconomic Classifications

Legal scholars have suggested that assigning students based on socioeconomic status would indirectly result in racial diversity in school districts.[112] An advantage of this approach is that it would likely avoid the "strict scrutiny" analysis altogether. Normally, economic classifications are subjected to the less stringent "rational basis review," requiring only a showing that the plan has a rational relation to a legitimate state interest.[113] Strict scrutiny can apply to facially neutral classifications, such as socioeconomic classifications, if the challenger can show that the neutral classification was really just a pretext for racial discrimination.[114] Even if the neutral classification results in a disproportionate impact on one racial group, it is unconstitutional only if the true purpose was discriminatory.[115] The use of socioeconomic classifications would not likely be found a "pretext" for racial discrimination. Socioeconomic diversity has been shown to produce improvement in academic achievement for lower income students,[116] which is probably a sufficient race-neutral purpose of using socioeconomic classifications.

It is also suggested that the same benefits that flow from racial diversity are actually the product of *socioeconomic* diversity.[117] Some school districts already employ socioeconomic classifications in student assignment plans, and

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111. James E. Ryan, *The Supreme Court and Voluntary Integration,* 121 HARV. L. REV. 131, 137 (2007).
112. *See, e.g.,* Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Segregation,* 12 GEO. J. ON POVERTY LAW & POL'Y 95, 97 (2005).
113. *See, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).
114. *Personnel Adm'r of Mass*. 442 U.S. at 272.
115. *Id*.
116. *See* Richard D. Kahlenberg, *High Poverty Schooling in America: Lessons in Second-Class Citizenship,* 85 N.C. L. REV. 1545, 1553–54 (2007) (Discussing the academic improvement of students under the socioeconomic integration plan of Wake County, North Carolina).
117. Lewin, *supra* note 112 at 97 (all students, of all races, and at all socioeconomic levels, reach higher levels of academic achievement and are better socially adjusted in middle-class schools than in poor schools.").

have witnessed promising results.[118] One reason school districts have chosen to use socioeconomic status in student assignment plans is that "they value racial diversity and know that using socioeconomic status will produce a racial dividend in a race-neutral way."[119] One school district that switched to socioeconomic classifications lost almost none of the racial integration it had achieved through the use of race classifications.[120] Since socioeconomic diversity would likely produce racial diversity, yet would avoid review under the harsh "strict scrutiny" standard, assigning students based on socioeconomic status is an attractive solution for public school districts.

The problem with socioeconomic classification is that it is based on an assumption that socioeconomic status and race correlate. Even if this assumption is currently correct, one primary goal of requiring that "equal protection" of the law be given to citizens of all races is to reduce or eliminate economic inequality between the races. Thus, if racial diversity in schools helps even the playing field for minority students, economic inequalities between races should subside over time. The idea is that providing a high quality education to all students will eventually allow minorities to obtain employment of the same caliber as non-minorities. The hope is that sooner or later there will no longer be a disproportionate number of minorities subject to poverty.

While assigning students based on socioeconomic status may accomplish racial diversity in the short-term, it may not be a workable long-term solution. The economic disparity between races is not a constant, unchangeable reality, and one of the goals of providing equal protection of the laws to all citizens is to reduce or eliminate such inequalities. Should this goal be realized, classifying students on the basis of socioeconomic status alone may no longer produce a racially diverse student body.

C. Defining "Diversity" in Terms of *Both* Race and Socioeconomic Status: A Novel Approach to the Problem.

Justice Kennedy believes that in addition to the above "racially neutral" measures, school districts could use direct racial classification if racially neutral means failed, and race was only part of a broader definition of "diversity."[121] His concurring opinion did not, however, offer much guidance as to what exactly needs to be included in the definition of diversity. The

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118. *See* Kahlenberg, *supra* note 116 at 1553–54.
119. *Id*. at 1554.
120. *Id*. at 1557.
121. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct 2738, 2792–93 (2007).

factors that went into the definition of diversity in *Grutter*[122] are not useful in the K-12 public school context, as there are differences in "the age of the students, the needs of the parents, and the role of the schools."[123]

One approach that Justice Kennedy might find acceptable is to define "diversity" in *both* economic and racial terms. Despite efforts to equalize the economic disparities between races, minority status still correlates with low socioeconomic status. This approach, like using socioeconomic status alone, is capable of producing racial diversity. This method, however, allows for the plan to remain at least somewhat effective if the present inequalities between races do not last. If economic differences diminished, a school district could still use race as a factor in assignment plans. Race alone, however, cannot be the decisive factor when assigning a student. That much is clear from Justice Kennedy's concurring opinion.[124]

If race and socioeconomic status were considered jointly as part of a broader definition of "diversity," race would be employed only as factor in deciding assigning students. Race alone would not be determinative, since a student could contribute to "diversity" because of race, socioeconomic status, or both. The incorporation of socioeconomic status into a school district's definition of "diversity" might be sufficient to sway Justice Kennedy's vote in a future case. As noted *supra*, however, Justice Kennedy offers little guidance as to exactly what factors in addition to race must be a part of the definition of "diversity." One commentator suggested that Kennedy's opinion establishes a "continuum" in which "the use of [racial] criteria presumably changes from impermissibly 'rigid' to more permissibly 'flexible.'"[125] Under this "continuum," a school district is unable to discern exactly when the use of race becomes impermissible. Thus, a policy that incorporates race into a broader definition of diversity could subject school districts to an increased risk of litigation, since there is no clear line as to when and to what extent race may be used.[126]

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122. Grutter v. Bollinger, 539 U.S. 306, 338 (2003) (The law school admissions board considered the extent students had lived or traveled widely abroad, fluency in foreign languages, overcoming personal adversity and family hardship, records of community service, unusual intellectual achievements, and employment experience).

123. Parents Involved in Cmty. Sch., *supra* note 111, at 2793.

124. *See id*. at 2792.

125. J. Harvie Wilkinson III, *The Seattle and Louisville Cases: There is No Other Way*, 121 HARV. L. REV. 158, 171–72 (2007).

126. *Id*. at 172.

Lower courts will likely view Kennedy's opinion as controlling,[127] and due to the lack of precision in Kennedy's "continuum" a school district can only guess as to whether defining diversity in this way will justify the use of race. A court might find that the goals of such a plan could be accomplished equally well by relying on socioeconomic classifications alone and leaving race out of the picture, or that the inclusion of socioeconomic status alone does not make the plan "flexible" enough to justify the consideration of race.

V. CONCLUSION

Parents Involved places new limits on the use of race in public school assignment plans. School districts can no longer look to *Grutter v. Bollinger* for guidance, since that case was held inapplicable in the context of public K-12 schools. Justice Kennedy's concurring opinion rescued "racial diversity" from being categorically excluded from the short list of recognized "compelling interests" that may justify the use of race classifications. His opinion does not, however, provide an intelligible standard that school districts can use when creating race-conscious student assignment plans. He explicitly outlines some race-conscious ways that school districts can achieve racial diversity, and suggests that race classifications may be permissible when race forms only part of a broader definition of diversity and good faith consideration has been given to race-neutral methods.

Because of the Supreme Court's decision in *Parents Involved*, public school districts would be well advised to use socioeconomic classifications or to incorporate both race and socioeconomic status into a broader definition of diversity, rather than using race classifications alone. These approaches would allow school districts to combat resegregation and have their student assignment plans upheld when faced with equal protection challenges from unhappy parents. Incorporating socioeconomic status into the definition of diversity may not broaden the definition of "diversity" enough to justify the use of race, so school districts adopting this method cannot be absolutely sure that such a plan would survive an equal protection challenge. The use of socioeconomic classifications to indirectly achieve racial diversity has some

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127. Marks v. U.S. 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case, and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153 (1976)). *See also* James E. Ryan, *The Supreme Court and Voluntary Integration,* 121 HARV. L. REV. 131, 137 (2007) ("Kennedy's opinion appears controlling. This is because the four dissenters would uphold the Seattle and Jefferson County plans and would apply looser criteria to assess voluntary integration plans than would Justice Kennedy. A fortiori, they would uphold any plan that Justice Kennedy would approve.").

potential long term problems, but is likely the best way for school districts to achieve racial diversity and remain confident that their assignment plans would be upheld if faced with an equal protection challenge.