

Silencing Chicken Little: Options for School Districts After *Parents Involved*

I. INTRODUCTION

On June 28, 2007, the United States Supreme Court invalidated the student assignment policies of two public school districts that used race classifications to maintain pre-determined percentages of racial groups within each school.¹ *Parents Involved in Community Schools v. Seattle School District No. 1* addressed consolidated equal protection challenges to elementary and high school student assignment plans in Seattle, Washington, and Louisville, Kentucky.² Writing for the majority, Chief Justice Roberts reaffirmed that the Fourteenth Amendment requires strict scrutiny review of all government race distinctions³ and found that neither district's plan was narrowly tailored to achieve a compelling governmental interest.⁴ A majority agreed that neither district demonstrated any of the compelling interests previously recognized by the Court, but Chief Justice Roberts wrote only for a plurality when Justice Kennedy acknowledged additional compelling interests asserted by the districts.⁵ Justice Breyer dissented⁶ and warned that the Court's holding set back school integration efforts and threatened the Court's landmark 1954 decision in *Brown v. Board of Education*.⁷

Indeed, the dissent was not alone in its dismay. "Within an hour of the U.S. Supreme Court's release of [its] . . . decision in June, pundits in the news media and talk show hosts of various political stripes were remarkably quick to bury racial integration plans in K-12 education as a dead animal."⁸ One commentator called the Court's decision "troubling" and predicted that it would hinder efforts to "maintain an integrated student body, prevent resegregation, improve academic performance, and build a more

Copyright 2008, by MICHELLE RENEE SHAMBLIN.

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

2. *Id.* at 2746.

3. *Id.* at 2751.

4. *Id.* at 2759.

5. *Id.* at 2752–54. Justices Roberts, Alito, Thomas, and Scalia comprised the plurality, while Justice Kennedy joined parts of the opinion for a majority.

6. Justices Souter, Ginsburg, and Stevens joined the dissent.

7. *Parents Involved*, 127 S. Ct. at 2800.

8. Maree Sneed, *Desegregation Dead? Not in This Court Decision*, THE SCHOOL ADMINISTRATOR, Oct. 2007, at 1, <http://www.aasa.org/publications/saarticledetail.cfm?ItemNumber=9426&snItemNumber=950&tnItemNumber=1995>.

equitable and competitive America.”⁹ Another observer remarked that the decision “will perpetuate—not alleviate—[the] current separate and unequal American educational system.”¹⁰ Other critics made similar statements, one going so far as to announce that “the recent court ruling marks the return to legally sanctioned segregation.”¹¹

Regardless of one’s opinion of the decision’s merits, all can agree that *Parents Involved* has the potential to significantly affect the strategies and policies of school systems across the nation, including the seventy school districts in Louisiana. Although *Parents Involved* only addresses the use of race classifications for non-remedial purposes,¹² the decision impacts all Louisiana public schools, whatever their desegregation status. After all, school districts currently subject to court-ordered desegregation are mandated to desegregate with an eye toward emerging from judicial supervision, and these schools must be prepared to transition smoothly to school assignment plans that pass constitutional muster once unitary status¹³ is declared. For those Louisiana districts never under court order or declared unitary, *Parents Involved* governs the constitutionality of their current assignment plans.

9. Gary Stager, *Separate But “Equal”*: Banning School Desegregation Policies, DISTRICT ADMINISTRATION, Sept. 2007, at 1, <http://www.districtadministration.com/viewarticle.aspx?articleid=1260>.

10. *Id.*

11. *Id.* See also *id.* at 2; Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 423, 428 (2007); Michael Doyle, *Supreme Court Curbs Use of Race in School Policies*, MCCLATCHY WASHINGTON BUREAU, Jun. 28, 2007, available at <http://www.mcclatchydc.com/201/v-print/story/17445.html>; Nicholas Lemann, *Reversals*, THE NEW YORKER, Jul. 30, 2007, http://www.newyorker.com/talk/comment/2007/07/30/070730taco_talk_lemann; Press Release, American Civil Liberties Union, ACLU Expresses Mixed Feelings about Supreme Court Decision in School Desegregation Cases, (Jun. 28, 2007), <http://www.aclu.org/scotus/2006term/parentsinvolvedincommunityschoolsv.seattleschooldistrictno.1meredith.v.jeffersoncountyboardofeducation/30302prs20070628.html>; Brennan Center for Justice, *Parents Involved in Community Schools v. Seattle School District No. 1*, http://www.brennancenter.org/content/resource/parents_involved_in_community_schools_v_seattle_schooldistrict_no_1/ (last visited July 5, 2008).

12. Using explicit racial factors to remedy the effects of legal segregation remains constitutionally acceptable. *Parents Involved*, 127 S. Ct. at 2752.

13. After *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 301 (1955) failed to produce desegregation with “all deliberate speed,” the Court in *Green v. County School Board of New Kent County* addressed specific areas in which school districts must desegregate. 391 U.S. 430 (1968). These six areas, identified as student assignments, faculty assignments, staff assignments, physical facilities, transportation, and extracurricular activities, are known as the “Green Factors” and are used by district courts to determine if a school district is “unitary” (i.e., court-ordered desegregation is no longer necessary).

Despite criticisms that *Parents Involved* marks the end of integration efforts, this Note will demonstrate that schools need not abandon such goals. After *Parents Involved*, public school districts may still employ race-neutral and even race-conscious strategies to maintain or achieve integration.¹⁴ Part II sets forth the legal background of racial classifications in the context of public education, surveying the development of the Court's race jurisprudence prior to *Parents Involved*. Next, Part III details the *Parents Involved* decision itself, including the facts of the consolidated cases, their procedural histories, and the reasoning and conclusions of the Justices' opinions.¹⁵ In Part IV, the Note identifies how *Parents Involved* leaves school districts room to employ voluntary integration policies and evaluates the viability of race-conscious and race-neutral plans. Using Louisiana data in particular, the Note will argue that race-neutral, disadvantage-based assignment plans are the best approach and will set forth some general considerations for implementation.

II. SUPREME COURT JURISPRUDENCE FROM *BROWN* TO *PARENTS INVOLVED*

A. Desegregation

In 1954, *Brown v. Board of Education* established the basic unconstitutionality of *de jure* segregation¹⁶ in public elementary and secondary education.¹⁷ Although *Brown* "lifted from the Court the burden of its history,"¹⁸ the short opinion provided scant legal

14. As a preliminary matter, it is fair and, indeed, intellectually honest to acknowledge that the issue of whether integration produces positive results for students is by no means a settled dispute. Analyzing the outcomes of school desegregation, various sources have explored integration's negative effects on black and white children alike. These effects do not result from innate problems with racial mixing, but rather are due to persistent societal inequalities that make desegregation's laudable goals difficult to achieve in practical reality. Justice Thomas' concurrence in *Parents Involved* expressed concern about this very issue, and a school district would do well to thoughtfully consider and address potential problems when crafting integration policies. See *Parents Involved*, 127 S.Ct. at 2768 (Thomas, J., concurring).

15. The Court issued five separate opinions: a majority opinion by Chief Justice Roberts, concurring opinions by Justices Thomas and Kennedy, and dissenting opinions by Justices Stevens and Breyer.

16. The Latin phrase "*de jure*" means "based on laws or actions of the state." MERRIAM-WEBSTER, available at <http://www.m-w.com/dictionary/de%20jure> (last visited July 5, 2008).

17. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

18. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 23 (1979). That history included decisions that explicitly and implicitly limited black freedom,

reasoning for the Court's conclusion and little guidance for desegregation's implementation; one year later, in *Brown II*, the Court could only require that desegregation proceed with "all deliberate speed."¹⁹ As one commentator remarked:

Brown thus gave little guidance to future racial debate. Its brevity was a mask for ambiguity. If segregated schools were not constitutional, what kinds of schools were? Was the evil segregation itself or merely the state's imposition of it? Was a color-blind society or the betterment of an oppressed race the Court's chief objective? On these and other questions, *Brown* (and later *Brown II*) gave no clear answers. It left future problems to the future, content to take one memorable step.²⁰

Over the next several decades, the Court endeavored to define the constitutional contours of desegregation that both *Brown* decisions left unanswered. Thirteen years after *Brown II*, the Court addressed school desegregation again in *Green v. County School Board*.²¹ *Green* removed the intimidating burden on blacks to integrate under "freedom of choice"²² plans and instead placed an affirmative duty upon school districts to desegregate—"to come forward with a plan that promises realistically to work, and promises realistically to work now."²³ Increasingly aggressive desegregation remedies throughout the late 1960s and early 1970s required school systems to achieve teacher racial ratios in each

including *Plessy v. Ferguson*, 163 U.S. 537 (1896) (sustaining "separate but equal" accommodations); *The Civil Rights Cases*, 109 U.S. 3 (1883) (declaring unconstitutional Civil Rights legislation designed to protect blacks from private as well as public intimidation and giving blacks equal access to inns, theaters, and transportation); *The Slaughter-House Cases*, 83 U.S. 36 (1873) (limiting the Fourteenth Amendment's Privileges and Immunities Clause to the benefits of federal, not state, citizenship); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that slaves are not United States citizens). See WILKINSON, *supra*, at 13–19.

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

20. WILKINSON, *supra* note 18, at 29. See also GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION* xvi (1996) ("[T]he Supreme Court in *Brown*, and in the subsequent *Brown II*, failed to spell out . . . what successful desegregation should look like.").

21. 391 U.S. 430 (1968).

22. *Id.* at 431. This type of plan "allows a pupil to choose his own public school." *Id.* at 431–32.

23. *Id.* at 439. See also ORFIELD, *supra* note 20, at xxii; WILKINSON, *supra* note 18, at 116–17.

school that reflected the entire district's ratio,²⁴ "terminate dual school systems at once . . . operat[ing] now and hereafter only unitary schools,"²⁵ and utilize involuntary busing to combat racially segregated housing that skewed assignment plans.²⁶ The Court further expanded its desegregation mandate from the South to schools in the Northern and Western United States that intentionally maintained policies creating segregation, also noting that Hispanics as well as African-Americans were entitled to a desegregated education.²⁷

Twenty years after *Brown I*, however, the Court began establishing outer boundaries for the desegregation mandate it had so emphatically pursued against often obstinate Southern school systems. In *Milliken v. Bradley*, the Court prohibited busing of suburban students to desegregate inner city schools, absent a finding of a constitutional violation by the suburban district.²⁸ Then, in the early 1990s, the Court held that a district declared unitary could return to local control and was no longer obligated to affirmatively maintain desegregation.²⁹ Moreover, districts that had achieved some of the requirements for unitary status could be partially released from court-ordered desegregation,³⁰ and the Court announced that the primary goal of school desegregation cases is a school system's quick return to local control.³¹

B. Affirmative Action

Despite these later limitations, cases such as *Green and Swann v. Charlotte-Mecklenberg Board of Education* declared and defined school boards' duty to take "affirmative" action to eradicate all "vestiges of state-imposed segregation."³² If school

24. *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969).

25. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

26. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971).

27. *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189 (1973).

28. 418 U.S. 717 (1974).

29. *Bd. of Educ. of Okla. v. Dowell*, 498 U.S. 237 (1991). *See also* *Riddick v. Sch. Bd. of Norfolk*, 784 F.2d 521 (4th Cir. 1986) (the first federal court case allowing unitary school districts to abandon desegregation plans).

30. *Freeman v. Pitts*, 503 U.S. 467 (1992).

31. *Missouri v. Jenkins*, 515 U.S. 70 (1995).

32. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971). *See also* *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) ("School boards . . . operating state-compelled dual systems [are] nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [will] be eliminated root and branch.").

districts failed to do so, the Court's desegregation cases established that intentional state discrimination on the basis of race justified some use of race-conscious, court-ordered remedies.³³ However, the Court's race jurisprudence shifted in the 1970s to address educational institutions' *voluntary* use of race classifications and preferences *absent* findings of past purposeful discrimination. The Court first addressed this form of "affirmative action" in *Regents of the University of California v. Bakke*.³⁴

1. Bakke

In *Bakke*, a white male applicant, denied admission to medical school in favor of less qualified applicants, challenged the university's admission program that separately evaluated minority applicants for a reserved number of seats.³⁵ The Court's judgment ultimately invalidated the medical school's admissions program and ordered Allen Bakke's admission, but this result did not invalidate affirmative action.

In essence, the affirmative action debate culminating in *Bakke* resulted from the questions unanswered by *Brown*. "To the university, *Brown* stood for minority educational opportunity . . . [t]o others, *Brown* stood for the ideal of color blindness . . . *Bakke* attempted, at least, to bridge the unbridgeable: the disparate legacies of *Brown*."³⁶ The "disparate legacies of *Brown*" are apparent in the conflicting views of the *Bakke* dissenters and Justice Powell, whose lone substantive opinion prevailed simply because four Justices concurred in the judgment.³⁷ For Powell, the

33. School systems' motivation to take such "affirmative action" was spurred by the Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 252 (1964) (codified in sections of 42 U.S.C.). This act prohibited racial discrimination and authorized the removal of federal funding from non-compliant school districts. See U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 6 (2007). See also WILKINSON, *supra* note 18, at 78.

34. 438 U.S. 265 (1978). In a case prior to *Bakke*, the Court did not reach the merits of a challenge to a law school admissions program. See *Defunis v. Odegaard*, 416 U.S. 312 (1974). However, one Justice writing separately expressed strong disfavor of racial factors in admissions, even for "benign" purposes designed to include minorities. See *id.* at 333. Justice Douglas argued that the Fourteenth Amendment required racially neutral consideration of applicants. *Id.* at 344.

35. *Bakke*, 438 U.S. at 272-74 (1978).

36. WILKINSON, *supra* note 18, at 299.

37. *Bakke* did not produce a majority opinion. Four Justices did not reach the constitutional issue, holding that Allen Bakke was excluded from medical school in violation of federal statutory law; these Justices concurred only in Powell's judgment insofar as it required Bakke's admittance. *Bakke*, 438 U.S. at 265.

Fourteenth Amendment enunciated a personal right to equality for all persons, despite its historical origin as a tool to prohibit discrimination against African-Americans. Thus, though the medical school's preference plan sought to include minorities and only burdened non-minority applicants, its race-based admissions program was still subject to the strictest judicial review and had to be narrowly tailored to achieve a compelling government interest.³⁸ By contrast, the dissent advocated more lenient scrutiny for "benign" race classifications: namely, those designed to include minorities.³⁹

Yet despite his strict view of race-conscious preference programs, Justice Powell preserved the future viability of affirmative action. First, he offered a "healing gesture"⁴⁰ by recognizing student body diversity as a compelling interest justifying affirmative action plans in the university setting.⁴¹ For Powell, "the atmosphere of 'speculation, experiment, and creation'—so essential to the quality of higher education—[was] widely believed to be promoted by a diverse student body,"⁴² and a university's academic freedom under the First Amendment encompassed student body selection.⁴³ Next, Powell explained that universities could indeed employ race in their admissions programs, as long as race was not used in a quota system but was

Another four Justices concurred in part and dissented in part, arguing that the Constitution permitted benign, non-stigmatizing race-conscious measures to overcome past societal discrimination, even when this compensatory act is performed by a state entity free from acts of past discrimination. *Id.* at 362–64.

38. *Id.* at 291–94. In support of this view, Justice Powell noted that the concepts of majority and minority are temporary and subject to demographic change, many ethnic groups other than African-Americans may claim historical discrimination in the United States, and preferences by nature sometimes unduly burden individuals and promote stereotypes that certain groups cannot achieve success without aid. *Id.* at 295–98.

39. *Id.* at 361–62. Justice Brennan suggested searching review that rejected stigmatizing classifications and demanded an "important and articulated purpose." *Id.*

40. WILKINSON, *supra* note 18, at 303.

41. *Bakke*, 438 U.S. at 311–12. The four dissenting Justices argued that remedying general societal discrimination is a sufficiently compelling interest. *Id.* at 362–64. Justice Powell rejected this argument; referring to the desegregation cases, he noted that the Court only allowed race-conscious remedies to correct discrimination upon specific judicial, legislative, or administrative findings of constitutional or statutory violations. *Id.* at 300–01.

42. *Id.* at 312 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9).

43. *Id.*

merely a “plus” factor in the consideration of an applicant.⁴⁴ Thus, through Powell’s opinion, the *Bakke* Court managed to “avoid a conclusive outcome”⁴⁵ regarding the blanket legitimacy or illegitimacy of affirmative action.

2. *Grutter and Gratz*

While the absence of a true Court majority produced uncertainty regarding *Bakke*’s value as precedent, at the very least affirmative action in higher education was not foreclosed.⁴⁶ However, the Court soon followed *Bakke* with invalidation of voluntary racial preferences in contracting, employment, and electoral districting cases,⁴⁷ causing concern that the Court’s purported strict scrutiny of race classifications might be “strict in theory, yet fatal in fact.”⁴⁸ What would be the fate of educational affirmative action?

Twenty-five years after *Bakke*, the contrasting companion cases *Grutter v. Bollinger*⁴⁹ and *Gratz v. Bollinger*⁵⁰ confirmed that limited use of racial preferences was permissible. Demonstrating that properly tailored affirmative action plans in higher education could survive strict review, the Court sustained the University of Michigan Law School’s race-conscious admissions program in *Grutter*. There, a white female was denied entry to law school and subsequently challenged the law school’s admissions policy that sought to enroll a “critical mass”—not a specified number or percentage—of minority students in an effort to achieve diversity’s educational benefits.⁵¹ To that end, the law school engaged in a

44. *Id.* at 315–18. By contrast, singular focus on race quotas would inhibit genuine diversity and insulate some candidates from competition with others. *Id.* Anticipating the argument that consideration of race as only one factor is merely a more sophisticated way of according racial preference, Justice Powell emphasized that the University’s good faith would be presumed in a facially non-discriminatory admissions policy. *Id.* at 318–19.

45. WILKINSON, *supra* note 18, at 298.

46. *See id.* at 306.

47. *See* *Bush v. Vera*, 517 U.S. 952 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

48. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

49. 539 U.S. 306 (2003).

50. 539 U.S. 234 (2003).

51. *Grutter*, 539 U.S. at 314–17.

full-file review of each applicant, where race was one consideration among several.⁵²

Justice O'Connor wrote for the five Justices in the majority, reiterating Justice Powell's view that the Court must strictly scrutinize all government use of race, whether benign or invidious in purpose.⁵³ Yet, she was careful to emphasize the importance of "context" in strict, not necessarily fatal, judicial review of affirmative action.⁵⁴ Moreover, Justice O'Connor affirmed Justice Powell's proposition, criticized by some lower courts after *Bakke*,⁵⁵ that a university's interest in student body diversity could justify affirmative action.⁵⁶ Justice O'Connor even expanded *Bakke's* rationale for a diversity interest, acknowledging the First Amendment concerns unique to higher education but pointing to broader benefits such as "cross-racial understanding,"⁵⁷ "prepar[ation] [of] students for [the] workforce and society,"⁵⁸ "effective participation . . . in the civic life of [the] Nation,"⁵⁹ and skill development through "exposure to widely diverse people, cultures, ideas, and viewpoints."⁶⁰

Though the Court broadened *Bakke's* bases justifying a diversity interest, Justice O'Connor tightened *Bakke's* "plus" factor requirement. Specifically, the Court would permit the voluntary use of race for diversity purposes only when the university conducts "individual, holistic review"⁶¹ of applicants that considers non-racial factors contributing to diversity,⁶² gives "serious good faith consideration to workable race-neutral alternative" plans,⁶³ places no undue burden on non-minorities,⁶⁴ and limits the time race classifications are employed.⁶⁵

52. *Id.* at 315.

53. *Id.* at 326.

54. *Id.* at 326–27.

55. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). See also Saverio Cereste, *Minority Inclusion Without Race-Based Affirmative Action: An Embodiment of Justice Powell's Vision*, 18 N.Y.L. SCH. J. HUM. RTS. 577 (2002).

56. *Grutter*, 539 U.S. at 328.

57. *Id.* at 330 (quoting Appendix to Petition for Writ of Cert. at 246a, *id.* (No. 02-241)).

58. *Id.* (quoting Brief for Am. Educ. Research Ass'n as Amici Curiae at 3, *id.* (No. 02-241)).

59. *Id.* at 332.

60. *Id.* at 330 (citing Brief for 3M as Amici Curiae at 5, *id.* (No. 02-241)).

61. *Id.* at 337.

62. *Id.* at 337–38.

63. *Id.* at 339–40.

64. *Id.* at 341.

65. *Id.* at 342 ("This [durational] requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that

In finding that the law school's admissions plan met these requirements, Justice O'Connor's opinion solidified a Court majority's tolerance of some race-based affirmative action in higher education. However, the dissenting Justices and other commentators viewed *Grutter* as a departure from *Bakke* principles, calling the University's critical mass policy a "sham" for racial quotas⁶⁶ and a "veil to cover up . . . racial balancing"⁶⁷ and also criticizing the deference given the university as uncharacteristic of strict judicial review.⁶⁸ Even so, the Court had not grown entirely permissive toward affirmative action, for it issued *Gratz v. Bollinger*⁶⁹ on the same day as *Grutter* and struck down the University of Michigan's race-based undergraduate admissions program. Unlike *Grutter*, the plan in *Gratz* was not narrowly drawn to achieve diversity; rather than using race as a "plus" factor in a full-file review of an applicant, the university automatically distributed to minorities one-fifth of the points needed to guarantee admission.⁷⁰ Thus, the differing results of *Grutter* and *Gratz* confirmed that affirmative action was not constitutionally prohibited but cautioned that even such "benign" race discrimination must satisfy the strictest standards under the Equal Protection Clause.

III. PARENTS INVOLVED

Bakke, *Grutter*, and *Gratz* delineated the bounds of voluntary racial preferences in higher education, but the Court had not determined if and how public *elementary* and *secondary* schools might constitutionally employ affirmative action. The Court had delved extensively into the area of court-ordered desegregation, where racial preferences were not only permissible but often

they may be employed no more broadly than the interest demands [This requirement] can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary.").

66. See *id.* at 347 (Scalia, J., concurring in part and dissenting in part). See also *id.* at 389 (Kennedy, J., dissenting).

67. Lauren Arms, *It's Not All Black and White: Race-Based Admissions Purport to Achieve a Critical Mass of Diversity, But in Reality Really Mask a Pre-Determined Quota for the Ideal Integrated Society*, 49 S. TEX. L. REV. 221 (2007). See also *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

68. See *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part); *id.* at 380 (Rehnquist, C.J., dissenting); *id.* at 388 (Kennedy, J., dissenting).

69. 539 U.S. 234 (2003).

70. *Id.* at 270.

required of school districts to end *de jure* segregation. Inevitably though—indeed, hopefully—school districts would one day emerge from judicial supervision, and courts would be confronted with racial preference programs in a non-remedial, K-12 setting. Such was the case in Seattle, Washington, and Jefferson County, Kentucky, the sites of the student assignment plans challenged in *Parents Involved*.

A. Seattle

In 1998, Seattle School District No. 1 implemented a policy allowing entering ninth grade students to rank their preferences among the district's ten high schools.⁷¹ If a school became oversubscribed (i.e., too many students ranked it as their first choice), the district employed four tiebreakers to determine which students would fill the school's open spots. Those tiebreakers, in order of use, included: 1) whether the student had a sibling attending the school; 2) whether the student's race would help balance an "integration positive" school; 3) the geographic proximity of the school to the student's residence; and 4) a lottery (to which the district seldom resorted).⁷² For purposes of the racial tiebreaker, a school was deemed "integration positive" if it deviated beyond ten percentage points from the district's overall white to non-white racial balance; accordingly, students were classified as "white" or "non-white" so the district could make assignments bringing the school closer to balance.⁷³ Notably, Seattle never operated under court-ordered desegregation as a result of *de jure* segregation,⁷⁴ but the district did experience *de facto*⁷⁵ segregation.

71. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2747 (2007).

72. *Id.*

73. *Id.* Seattle's student population was actually more diverse than its two-tiered classification, consisting of 41% Caucasian, 23.8% Asian-American, 23.1% African-American, 10.3% Latino, and 2.8% Native American students. *Id.* at 2747 n.2.

74. *Id.*

75. "*De facto*" in Latin literally means "from the fact," or "in reality." MERRIAM-WEBSTER, available at <http://www.m-w.com/dictionary/de%20facto> (last visited July 5, 2008). In legal and educational parlance it is used to describe school segregation resulting from segregated housing patterns rather than school district policy. Nevertheless, the National Association for the Advancement of Colored People (NAACP) named Seattle in two lawsuits in the late 1960s and 1970s on grounds that the district's policies created or perpetuated segregation. *Parents Involved*, 127 S. Ct. at 2804.

When Seattle's use of the race tiebreaker denied some white students their choice of schools, the students' parents challenged the program as violating the Fourteenth Amendment Equal Protection Clause.⁷⁶ The district court applied strict scrutiny and upheld Seattle's plan.⁷⁷ After two reversals and certification of a state law question to the Washington Supreme Court, an en banc panel of the Ninth Circuit affirmed the district court's ruling.⁷⁸

B. Jefferson County

Across the country in metropolitan Louisville, Jefferson County Public Schools (JCPS) was subject to court-ordered desegregation from 1973 to 2000, when the district was declared unitary.⁷⁹ In 2001, JCPS adopted a student assignment plan requiring all non-magnet schools to maintain black enrollment between 15% and 50%.⁸⁰ For this purpose, the district classified students as "black" or "other."⁸¹ Initially, JCPS designated a "resides" school for each student by geographic residence.⁸² Elementary resides schools were grouped into clusters,⁸³ and each student was then assigned to a school within his or her cluster on the basis of available space and the impact of his or her race on the school's racial balance.⁸⁴ Though high school freshmen could apply to any school under open enrollment and any student could

76. The Seattle challenge arose from the complaints of the non-profit group Parents Involved in Community Schools, typified by a mother who sought to enroll her learning-disabled son in one particular high school due to a special program it provided. Although her son was selected for the program, he was denied admission to the school because that school was oversubscribed, the school's white enrollment was greater than ten percent above the district's white population on the whole, and her son's race was white. The other parents comprising the group also had children who were denied school assignments on the basis of race or who faced that possibility. *Parents Involved*, 127 S. Ct. at 2748.

77. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

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

79. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2749 (2007).

80. *Id.*

81. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840 n.6 (W.D. Ky. 2004). Unlike Seattle, Jefferson County's student population largely consisted of only two racial groups: 34% of the students were African-American, and 66% were Caucasian. *Parents Involved*, 127 S. Ct. at 2749.

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

83. *Id.*

84. *Id.*

request a transfer to another non-magnet school,⁸⁵ applications and transfer requests could also be rejected due to space or racial concerns.⁸⁶

Several parents of white students who were denied their school choice or transfer requests challenged the district's assignment program in *McFarland v. Jefferson County Public Schools*.⁸⁷ Like the Seattle case, the district court applied strict scrutiny and upheld the JCPS plan.⁸⁸ On appeal, the Sixth Circuit affirmed without issuing a detailed written opinion and simply expressed its satisfaction with the district court's written reasoning.⁸⁹

C. The Supreme Court Opinion

The U.S. Supreme Court granted writs of certiorari in both the Seattle and Jefferson County cases and consolidated the cases for hearing.⁹⁰ Though the *Parents Involved* decision struck down both districts' student assignment plans on Equal Protection grounds, the Court was narrowly divided as to whether strict scrutiny review should apply and, if so, whether the school districts' plans were narrowly tailored to achieve a compelling governmental interest.

1. Strict Scrutiny Review

Adhering to *Bakke* and *Grutter*, the *Parents Involved* majority affirmed that strict scrutiny is the appropriate standard of judicial review "when the government distributes burdens or benefits on the basis of individual race classifications,"⁹¹ since "racial

85. *McFarland*, 330 F. Supp. 2d at 844.

86. *Parents Involved*, 127 S. Ct. at 2750.

87. 330 F. Supp. 2d 834 (W.D. Ky. 2004). Four parents filed suit, but the Supreme Court focused upon the complaint of Crystal Meredith, the only claim left unresolved. Though the "resides" school for Meredith's kindergartener was very close to his home, the district assigned him to another elementary within his cluster. This school was ten miles from home and the district refused the mother's request to allow the child to transfer to yet another, closer school within his cluster. Although space was available at the requested school, the child's race would have negatively affected the racial balance at that school. *Parents Involved*, 127 S. Ct. at 2750.

88. *McFarland*, 330 F. Supp. 2d at 837.

89. *McFarland ex. rel. McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005).

90. See *Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 126 S. Ct. 2351 (2006).

91. *Parents Involved*, 127 S. Ct. at 2751–52 (citing *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995)).

classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”⁹² Like the *Bakke* dissenters, however, Justice Breyer argued that inclusive race classifications⁹³ should be subject to a more lenient standard than measures designed to exclude—a “contextual”⁹⁴ and “careful”⁹⁵ review.⁹⁶

In response, Chief Justice Roberts cautioned that the Court should not presume to distinguish between good and bad uses of race discrimination, especially when such characterizations may easily fluctuate from one generation’s opinions to the next.⁹⁷ Moreover, since the Fourteenth Amendment protects persons and not groups, no goal of assimilating a particular racial group can validate infringement of individual rights under the Equal Protection Clause without a showing that passes strict scrutiny.⁹⁸ Justices Thomas and Kennedy separately concurred, with Justice Thomas noting that the Constitution draws no distinction between invidious and “benign” race classifications⁹⁹ and Justice Kennedy stressing the “presumptive invalidity” of all government race distinctions.¹⁰⁰

With five Justices in firm agreement as to the strict standard of review, Chief Justice Roberts proceeded to analyze whether Seattle and Jefferson County had asserted compelling interests justifying their affirmative action plans and whether those plans were narrowly tailored to achieve such compelling interests.¹⁰¹ Despite his reservations, Justice Breyer also agreed to apply strict scrutiny in his analysis,¹⁰² though Chief Justice Roberts and Justices

92. *Id.* at 2752 (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

93. In Justice Breyer’s view, the districts’ student assignment plans sought to bring the races together, not to allocate limited resources normally distributed on merit-based grounds, stigmatize, exclude, exacerbate racial tensions, or unfairly burden one race alone. *Id.* at 2817–18.

94. *Id.* at 2819.

95. *Id.*

96. *Id.* at 2815. In Justice Breyer’s opinion, the Fourteenth Amendment’s purpose was to prohibit the exclusion of the slave race; consequently, using race-conscious criteria to separate the races is distinct from using those classifications to bring the races together.

97. *Id.* at 2764–65.

98. *Id.* at 2765. The plurality emphasized that even *Brown* itself addressed the plaintiffs’ *individual* interest in school admission. *Id.*

99. *Id.* at 2774. Regardless, Justice Thomas argued that the districts’ programs were *not* benign; in fact, some schoolchildren *were* excluded from their school of choice and suffered injury solely on the basis of their race, no doubt fostering racial tensions and resentment. *Id.* at 2775.

100. *Id.* at 2794.

101. *Id.* at 2752.

102. *Id.* at 2820.

Thomas and Kennedy each criticized the dissent's version of strict scrutiny as uncharacteristically deferential to the school districts.¹⁰³

2. *Compelling Interests*

Analyzing the first prong of the strict scrutiny analysis, the majority found that neither Seattle nor Jefferson County had an interest in remedying past intentional segregation—the interest justifying race distinctions in court-ordered desegregation plans—since Seattle was never legally segregated and Jefferson County had achieved unitary status.¹⁰⁴ By contrast, the dissent would not require a finding of *de jure* segregation before the districts could have a compelling remedial interest.¹⁰⁵ Justice Breyer argued that a school district is permitted to use race classifications to remedy *de facto* segregation reflecting “generalized societal discrimination and residential housing patterns.”¹⁰⁶ But Chief Justice Roberts and Justices Thomas and Kennedy separately stressed the importance of the Court's traditional differentiation between *de jure* and *de facto* segregation, noting that the distinction served to limit the judiciary and state actors' power to fashion remedies using disfavored race classifications.¹⁰⁷ They also emphasized that *de jure* segregation is an identifiable problem capable of discrete remedy, but *de facto* segregation—also referred to as racial imbalance or general societal discrimination—naturally and continuously changes over an indefinite period of time.¹⁰⁸

103. *See id.* at 2766; *id.* at 2775 (Thomas, J., concurring); *id.* at 2793 (Kennedy, J., concurring).

104. *Id.* at 2752.

105. *Id.* at 2810.

106. *Id.* at 2802.

107. *Id.* at 2761 (citing *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992) (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.”)); *id.* at 2796 (Kennedy, J., concurring) (“Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake . . . the distinction serves as a limit on the exercise of a power that reaches to the very verge of constitutional authority.”); *id.* at 2771 (Thomas, J., concurring) (“[W]ithout a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures.”). In Justice Thomas' view, *de jure* segregation is a narrow exception to the disfavor of race classifications, which explains why a race-conscious student assignment plan is constitutional while a school is under court order for official segregation, yet unconstitutional upon a declaration of unitary status. *Id.* at 2772 n.8.

108. *Id.* at 2773 (Thomas, J., concurring) (“Unlike *de jure* segregation, there is no ultimate remedy for racial imbalance. . . . [R]acial balancing will have to take place on an indefinite basis—a continuous process with no identifiable

After finding no interest in remedying past intentional discrimination, the majority also deemed the *Bakke-Grutter* diversity interest inapplicable to Seattle and Jefferson County¹⁰⁹ and devoted its discussion in large part to demonstrating that the school districts' programs did not meet *Grutter's* requirements for a diversity-oriented plan.¹¹⁰ But the majority ultimately dismissed the *Grutter* diversity interest in the K–12 context altogether, noting that the *Grutter* opinion founded its broad student body diversity interest in the unique freedoms of expression characteristic of the university setting.¹¹¹ Justice Breyer disagreed again, arguing that the more general benefits of diversity articulated in *Grutter* are even more compelling in the elementary and secondary school context.¹¹² In response to the dissent's charge that the majority had implicitly overruled *Grutter*,¹¹³ the Court countered that the districts' plans violated *Grutter's* explicit rejection of racial balancing as a compelling interest and any singular focus on race as a narrowly tailored way to achieve diversity.¹¹⁴

Though the majority rejected the application of *Grutter's* interest in broad diversity, the districts also asserted an interest in a more specific type of diversity. Seattle and Jefferson County argued that their race-conscious assignment plans were justified by an interest in the educational and social benefits derived from a *racially diverse* learning environment,¹¹⁵ an interest which the

culpable party and no discernable end point."); *id.* at 2795 (Kennedy, J., concurring) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06 (1989) (“To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for remedial relief for every disadvantaged group. The dream of a Nation . . . where race is irrelevant . . . would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”)).

109. *Id.* at 2754.

110. For example, the *Bakke-Grutter* notion of diversity required considerations of non-racial factors in order to distinguish the diversity interest from pure racial balancing. *Id.* at 2753. The Court pointed out that, though the district's plans considered student choice and residence, when race was used it alone was determinative of a student's assignment in a “non-individualized, mechanical way.” *Id.* at 2753–54. Plus, the districts' two-tiered race classifications, white/non-white and black/other, actually undermined broad student body diversity. *Id.* at 2754.

111. *Id.* at 2754.

112. *Id.* at 2822.

113. *Id.* at 2835.

114. *Id.* at 2763.

115. *Id.* at 2755.

dissenting Justices wholeheartedly endorsed.¹¹⁶ Yet, Chief Justice Roberts chose *not* to decide whether the benefits of racial diversity are sufficiently compelling to justify a race-conscious assignment plan. He noted, “The parties . . . dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve”¹¹⁷ Instead, Chief Justice Roberts concluded that the student assignment plans failed on narrow tailoring grounds.¹¹⁸

Thus, the *Parents Involved* decision leaves open a question of key significance: Do school districts have a compelling interest in the benefits of racial diversity that, if supported by a narrowly tailored student assignment plan, would constitutionally justify a race-conscious assignment policy? The plurality’s answer is uncertain, but the disinclination to race-consciousness that pervades the plurality opinion may imply hesitancy to recognize a racial diversity interest as compelling. Moreover, Justice Scalia’s dissent in *Grutter* demonstrates that he is skeptical of the purported benefits of racial diversity and any unique relevance those benefits may have to the educational setting.¹¹⁹ For Justice Thomas, the answer is clearly no. His *Parents Involved* concurrence expressed doubt that positive educational benefits necessarily flow from a racially integrated education, but argued nonetheless that such a disputed social science issue could hardly be classified as a compelling interest.¹²⁰

On the other hand, Justice Kennedy’s answer is clearly yes. In his *Parents Involved* concurrence, he departed from the plurality’s refusal to “acknowledge that the school districts have identified a compelling interest . . . in increasing diversity, including for the purpose of avoiding racial isolation.”¹²¹ Seattle and Jefferson

116. *Id.* at 2820. The dissent’s view of a racial diversity interest was broad, encompassing an “interest in setting right the consequences of prior conditions of segregation . . . overcoming the adverse educational effects produced by and associated with highly segregated schools . . . [and an] interest in producing an educational environment that reflects the pluralistic society in which our children will live.” *Id.* at 2820–21.

117. *Id.* at 2755.

118. *Id.*

119. *Grutter v. Bollinger*, 539 U.S. 306, 347–48 (2003) (Scalia, J., concurring in part and dissenting in part).

120. *Parents Involved*, 127 S. Ct. at 2776–77. Justice Thomas cited various studies and amicus reports indicating that African-American children do not benefit academically or socially from racial mixing in an educational setting and then noted that reports showing positive integration benefits are unspecific and unable to precisely show what demographics create such effects. *Id.*

121. *Id.* at 2789 (Kennedy, J., concurring).

County lost Justice Kennedy's key swing vote, not as to whether the districts had a compelling interest justifying a race-conscious assignment plan, but instead on the second prong of strict scrutiny: narrow tailoring.

3. *Narrow Tailoring*

While the Roberts opinion did not resolve whether racial diversity constitutes a compelling interest, the majority did agree that the districts' assignment plans were not narrowly tailored to achieve any such interest. First, the majority found that the racial classifications used by both districts affected so few student assignments that the effects could not justify subjecting the entire student population to race discrimination.¹²² Also, the classifications were clearly unnecessary to achieve diversity.¹²³ Second, the Court stated that the districts violated *Grutter's* narrow tailoring requirements by failing to give good faith consideration to workable, race-neutral alternatives.¹²⁴

Even within the majority, though, the Justices provided varying explanations of the districts' failure to narrowly tailor their plans to achieve racial diversity. Speaking only for a plurality, Chief Justice Roberts pointed to a total lack of evidence that the alleged educational and social benefits of racial diversity necessitated the target minority percentages established by each district for its schools. Instead, the plans were simply designed to reflect each district's overall population demographics.¹²⁵ Moreover, the plurality maintained that diversity could be achieved without using racial classifications, calculating the breakdowns of racial composition within each Seattle school both with and without the use of racial preferences and concluding that significant

122. *Id.* at 2759–60.

123. *Id.* at 2760 (“[R]acial proportionality is not required [to achieve integration].”).

124. *Id.* at 2759–60. However, the dissent was satisfied that the districts' plans were narrowly tailored and questioned the majority's inability to point to a plan less race-conscious yet still capable of achieving the districts' goals. Justice Breyer also noted that the districts had already tried many alternatives. Further, the dissent emphasized that the districts' plans were not quotas but only broad outer ranges of minority populations, the focus of the plans was primarily student choice, the criteria often had no effect on student assignments, the plans were less burdensome than previous Court-approved plans, and the plans reflected a thoughtful process that diminished the use of race. Moreover, *Grutter's* individualized holistic review of each applicant should not be a narrow tailoring requirement in a non-merit based elementary/secondary school placement context. *Id.* at 2825–28.

125. *Id.* at 2755–56.

representation from each of Seattle's racial groups was achieved without the racial tiebreaker.¹²⁶

Writing separately, Justice Kennedy emphasized that Jefferson County had not explained how and when it employs race classifications with enough precision to survive strict scrutiny, and Seattle's major flaw was its inexplicable use of a white to non-white classification in a district comprised of a diversity of races.¹²⁷ Justice Kennedy asserted that school authorities can counter "the status quo of racial isolation in schools"¹²⁸ using race-conscious measures, so long as the use of race is not a "crude"¹²⁹ form of "systematic, individual typing"¹³⁰ and the school system demonstrates the necessity of its chosen method.¹³¹

IV. THE SKY IS NOT FALLING

Unlike the law school's policy in *Grutter*, the race-based assignment methods of Seattle and Jefferson County did not survive the Court's strict review of suspect race classifications under the Fourteenth Amendment. Decrying this result, Justice Breyer claimed that the *Parents Involved* decision "undermines *Brown*'s promise of integrated primary and secondary education"¹³² But while the Court rejected the plans at issue, *Parents Involved* is not the end of integration. Both race-conscious and race-neutral assignment plans are still viable options for a district seeking to foster racial diversity within its schools.

A. Parents Involved Does Not Foreclose Race-Conscious Assignment Plans: Racial Diversity as a Compelling Interest

Parents Involved does not prohibit all use of race in student assignment plans. Seattle and Jefferson County's particular race-conscious means failed narrow tailoring analysis, but the *Parents Involved* plurality sidestepped rather than rejected the districts' asserted interest in the benefits of racial diversity.¹³³ While two

126. *Id.* at 2756–57 n.13.

127. *Id.* at 2789–91 (Kennedy, J., concurring).

128. *Id.* at 2791.

129. *Id.* at 2792.

130. *Id.*

131. *Id.*

132. *Id.* at 2800 (Breyer, J., dissenting).

133. *Id.* at 2755. Arguably, *Brown* itself assumed that integration produced benefits. Chief Justice Warren noted that "segregation with the sanction of law . . . has a tendency to retard the educational and mental development of Negro children and deprive them of some of the benefits they would receive in a

members of the plurality—Justices Thomas and Scalia—are candidly skeptical that such benefits are compelling enough to justify race classifications.¹³⁴ Justice Kennedy and the four *Parents Involved* dissenters clearly support elementary and secondary schools' interest in racial diversity.¹³⁵ Thus, after *Parents Involved*, a majority of the Court acknowledges a compelling interest that will support race-conscious K–12 student assignment plans, so the plurality's answer to the question it omitted is immaterial.

Justice Kennedy's departure from the plurality not only ensured that school districts have a compelling interest justifying race-conscious plans, but his concurrence also provided helpful guidance for narrowly tailoring those plans. Justice Kennedy and the *Parents Involved* plurality agreed that Seattle and Jefferson County's plans were not narrowly tailored to achieve racial diversity, so a school district asserting that interest must still convince Justice Kennedy that its assignment plan is narrowly drawn. But unlike the plurality, which did not suggest any examples of properly drawn plans, Justice Kennedy specifically proposed race-conscious measures that would not involve "classify[ing] every student on the basis of race and . . . assign[ing] each of them to schools based on that classification."¹³⁶ These measures included race-conscious school site selection, zoning, resource allotment, recruitment of faculty and students,¹³⁷ or even "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."¹³⁸ This last approach "would be informed by *Grutter*, though . . . 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."¹³⁹ Marked by these suggestions for properly tailoring race-conscious policies and Justice Kennedy's vote in favor of

racially integrated system." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (quoting *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

134. See *Parents Involved*, 127 S. Ct. at 2776–77 (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 347–48 (2003) (Scalia, J., concurring in part and dissenting in part).

135. *Parents Involved*, 127 S. Ct. at 2820–23 (Breyer, J., dissenting); *id.* at 2789, 2797 (Kennedy, J., concurring).

136. *Id.* at 2792 (Kennedy, J., concurring) (noting "[w]hat the government is not permitted to do").

137. *Id.* According to Justice Kennedy, these methods would probably not be subject to strict scrutiny since they "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race . . ." *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996)).

138. *Id.* at 2793.

139. *Id.*

racial diversity as a compelling interest, *Parents Involved* reveals a Court willing to accept the use of race in K-12 affirmative action plans.

B. Parents Involved Encourages Race-Neutral Approaches: The Advantage of Disadvantage

Parents Involved does not prohibit school districts' narrowly tailored use of race to achieve racial diversity, but even if the opinion had stripped schools of all race-conscious student assignment plans, options to achieve integration would remain. Like race-conscious approaches, race-neutral student assignment plans can also accomplish racial integration but are preferable for several reasons. First, a race-neutral policy is the best way to secure the full support of the Court, for it would comport with the plurality's view that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁴⁰ Second, if a school district declines to use suspect classifications such as race, its student assignment plan will be subject to the Court's more lenient rational basis review rather than strict scrutiny.¹⁴¹ Third, race-neutral means also reduce the threat of litigation against school districts wary of further legal embroilment after years of court-ordered desegregation. Finally, race-neutral, *disadvantage-based* student assignment plans can ensure that truly disadvantaged individuals have access to the best educational resources available and naturally achieve racial integration as well. This last benefit is the primary topic for the remainder of this Note.

1. Disadvantage Better Measures the Need for Equal Protection

Anti-discrimination measures such as the Fourteenth Amendment, Civil Rights legislation, and desegregation orders were necessary to combat the negative effects of oppression resulting from a particular group's history, not to compensate for innate inferiorities associated with skin color.¹⁴² In his 1942 book,

140. *Id.* at 2768.

141. A district whose race-neutral plan is challenged need only demonstrate means rationally related to a legitimate governmental end.

142. See 1 GEORGE BROWN TINDALL & DAVID EMORY SHI, *AMERICA: A NARRATIVE HISTORY* 605–6 (W.W. Norton & Co., Inc. 5th ed. 2000) (1984) (explaining that the Fourteenth Amendment was recommended to support the Civil Rights Act of 1866, which in turn was designed to remedy the negative effects of the Black Codes on blacks' property, labor, parenting, and marital rights). See also *MAJOR PROBLEMS IN THE CIVIL WAR AND RECONSTRUCTION* 311

Man's Most Dangerous Myth: The Fallacy of Race, anthropologist Ashley Montagu demonstrated through sociological, genetic, and biological study that "race" is purely a social construct.¹⁴³ Writing the introduction to the Sixth Edition in 1997, Dr. Montagu emphasized that "there is no such thing in reality as 'race' . . . the idea of 'race,' implying the existence of significant biologically determined mental differences rendering some populations inferior to others is wholly false."¹⁴⁴ He went on to note that the "structure of the current conception of 'race' to which most people subscribe"—physical appearance, intelligence, and ability to "achieve a high civilization"—could not be more "unsound, for there is no genetic linkage whatever between these three variables."¹⁴⁵

Since it is not "race" itself but the *disadvantages* often connected with "race" that necessitate remedial measures, modern affirmative action plans should also target the true source of an individual's need for equal protection: disadvantaged circumstances, not skin color. Historically, affirmative action went beyond simply forbidding race discrimination and instead awarded race-based preferences to redress the lingering disadvantageous effects of discrimination. Fortunately, in today's society one's race is no longer wholly determinative of disadvantage, so race-based programs no longer accurately reflect a need for affirmative action.

Educational affirmative action is no exception. Due to positive correlations between race and disadvantage that still persist, disadvantage-based preferential student assignments will produce racial integration and thus the educational and socialization benefits of racial diversity. However, disadvantage-based plans enable school districts to avoid the over-inclusive and under-inclusive preferences that characterize race-based affirmative action.

(Michael Perman ed., Houghton Mifflin Co. 2d ed. 1998) (discussing Congress' Reconstruction terms, including the Fourteenth Amendment, which were drafted in part because "the freed slaves had to be protected and given the opportunity to enjoy and solidify their new status. This meant guaranteeing their legal rights and economic security, perhaps even giving them the vote or land.").

143. ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 31 (AltaMira 6th ed. 1997) (1942).

144. *Id.*

145. *Id.*

a. Correlations Between Race and Disadvantage Produce Integration

If student assignment plans tracked some combination of disadvantage indicators, a race-neutral plan would necessarily provide preferences to significant numbers of African-American students. U.S. Census data from 2006 indicates that the median income of white families is \$62,712, compared to \$38,385 for black families.¹⁴⁶ Moreover, 18.4% of black households with children under eighteen are single-parent homes headed by a female, while only 5.5% of white households are similarly situated.¹⁴⁷ As for education level, 18% of whites over twenty-five have a bachelor's degree and 10.5% have a graduate or professional degree, compared to 11.2% and 5.7% of blacks respectively.¹⁴⁸

This data supports the findings of recent studies. For example, the Southern Education Foundation recently reported that low-income students now constitute 54% of the South's public schoolchildren; the study attributed this in part to a "higher rate of population growth among Latino and African-American children, who are statistically more likely than white children to be born into a low income household."¹⁴⁹ Additionally, Carl Bankston and Stephen Caldas' 2002 report on Louisiana school desegregation noted that "[b]lack Americans as a group grow up in lower-income families and communities than white Americans do" and "[l]ow income . . . means that black American young people have parents with less educational experience."¹⁵⁰ Also, "[b]lack children are far more likely than whites to live in single-parent homes, most often headed by women."¹⁵¹ The authors emphasize that low income, poor family educational background, and single-parent families put minorities at risk for low academic achievement and are also related to increased occurrences of behavioral and emotional problems.¹⁵² Additionally, other authorities link race and

146. U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, <http://factfinder.census.gov> (follow "Data Sets" link; then follow "American Community Survey" link; then follow "Selected Population Profiles" link; then select "Add"; then select "Next"; then select "White Alone" or "Black Alone").

147. *Id.*

148. *Id.*

149. S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH'S PUBLIC SCHOOLS 8-10 (2007).

150. CARL L. BANKSTON III & STEPHEN J. CALDAS, A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA 7-8 (2002).

151. *Id.*

152. *Id.*

disadvantage through factors like rate of employment, longevity, crime victimization, and political representation,¹⁵³ while still others cite national data showing that African-Americans and Latino students are disproportionately poorer and that poverty leads to frequent housing changes and resultant educational instability, sickness, and higher incidence of violence, alcoholism, abuse, divorce, and desertion.¹⁵⁴ These correlations demonstrate that disproportionate numbers of African-American students and other minorities would receive preferences under disadvantage-based, race-neutral assignment plans. Consequently, such plans will necessarily produce integration without resort to race-conscious measures.

The diversity benefits of a race-neutral, disadvantage-based preference program have already been noted in the university context. Writing pre-*Grutter* and pre-*Parents Involved*, one author explained that a law school's race-neutral admissions policy enabled the school to enroll "minorities based on non-race factors, such as overcoming economic and educational disadvantages . . . [and] continue to provide a diverse educational environment without the possibility of encountering reverse discrimination lawsuits."¹⁵⁵ The preference program was available to disadvantaged applicants regardless of race, and disadvantage-based factors allowed the school to "target applicants with certain backgrounds that are usually associated with minorities."¹⁵⁶ Summing up the compatibility of race-neutral student admissions plans with the Constitution's Equal Protection Clause, the author stated that the program "places all applicants, regardless of race, who have excelled in disadvantageous environments on equal footing with all applicants, regardless of race, who have excelled in an advantageous environment. This . . . does nothing more than preserve the equality of all individuals, as guaranteed by the Fourteenth Amendment."¹⁵⁷

b. Race-Neutral Plans More Accurately Award Preferences

Despite correlations between minority groups and disadvantage, student assignment plans awarding preferences based purely on race

153. Clark D. Cunningham & N.R. Madhava Menon, Correspondence, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1301 (1999) (citing Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429, 2444-49 (1994)).

154. ORFIELD, *supra* note 20, at 54.

155. Cereste, *supra* note 55, at 594-95.

156. *Id.* at 598.

157. *Id.* at 600.

present the twin dangers of over-including or unjustly excluding students. While race can be an indicator of socioeconomic status (SES), it is not a perfect test; to be sure, some white students suffer from disadvantaged backgrounds, and some black students do not.¹⁵⁸ Interestingly, the problem of over-inclusion was addressed by the nation of India in repairing the effects of its historic caste system,¹⁵⁹ as discussed in a critique of one author's American affirmative action recommendations informed by comparison to India's experience. Professors Clark Cunningham and Madhava Menon pointed out that, while the author's approach "assume[d] that evidence of low socioeconomic status of a person's ascribed group . . . is sufficient to demonstrate that person's own disadvantage," the Indian Supreme Court recognized "that reservations [were] going to persons who do not in fact need them because they have been raised in privileged circumstances due to parental success in overcoming the disadvantaged status of a backward group."¹⁶⁰ As a solution, the Indian Supreme Court further differentiated within the beneficiary groups when assigning group-based preferences.¹⁶¹

While India's group-focused solution primarily addressed the problem of over-including non-disadvantaged individuals in preferential programs, a disadvantage-based plan that ignores a student's particular racial group can also alleviate *under*-inclusion. The Louisiana Department of Education's Public Student Counts and Percentages data helps demonstrate the dual advantages—accurate inclusion and integration—of a disadvantage-based student assignment plan.¹⁶² Of the 334,673 Caucasian students in Louisiana, 143,691, or approximately 43%, are students of low socioeconomic status (i.e., eligible for free and reduced price lunch).¹⁶³ Of the 289,109 African-American students, 245,109, or

158. BANKSTON & CALDAS, *supra* note 150, at 9.

159. Cunningham & Menon, *supra* note 153, at 5.

160. *Id.*

161. *Id.*

162. LA. DEP'T OF EDUC., MULTIPLE STATISTICS FOR TOTAL REPORTED PUBLIC SCHOOL STUDENTS (Feb. 2007), <http://www.doe.state.la.us/1de/uploads/10528.xls>.

163. Low-income students are determined by their eligibility for free and reduced price lunch. The National School Lunch Act, 42 U.S.C. § 1751 (2000), provides federal funding for free and reduced price lunches made available to eligible school children. Pursuant to §§ 1758(b)(1) and 1766(c)(4), the Department of Agriculture annually issues Income Eligibility Guidelines for these lunches, and eligibility is based upon federal income poverty guidelines. *See* Notices, 72 Fed. Reg. 8685 (Feb. 27, 2007). Accordingly, applications for free and reduced price lunch require parents or guardians to submit their total household gross income. *See* U.S. Dep't of Agric., Food and Nutrition Service, Free and Reduced Price

approximately 85%, are low SES. A preferential student assignment plan based on race would exclude the 43% of white students whose family income level places them at risk for poor academic achievement and other problems, while the 15% of black students who are not low income would remain eligible. However, a disadvantage-based plan would provide educational opportunities to both needy white and black children and would still result in significant integration, since low SES black students almost double the number of similarly situated whites.

2. The Legal and Practical Success of Race-Neutral Policies Requires Careful Planning

If disadvantage-based preferences are to achieve the aforementioned benefits, a student assignment plan must overcome two potential legal and practical hurdles. Though *Parents Involved* clearly supports race-neutral integration plans, an improperly drawn program could prompt the Court to find that a school district's disadvantage-based assignment policy is merely a "sham" for racial balancing. Moreover, race-neutral plans that survive constitutional challenge still face the practical impediment of high-SES student flight from the school district, an obstacle common to race-based student assignments as well. Awareness of these possible difficulties can help school districts craft effective race-neutral plans and capitalize upon the legal and educational benefits of a disadvantage-based approach.

a. Avoiding the "Smokescreen" Challenge

In *Grutter*, Justice Kennedy joined Justice Rehnquist's dissent, which argued that the law school's goal to enroll a "critical mass" of racial minorities was a "sham" to disguise racial balancing rather than an effort toward broad student body diversity.¹⁶⁴ Justice Kennedy's separate dissent called the school's plan "a delusion . . . to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."¹⁶⁵ Since Justice Kennedy's swing vote can determine the

Lunch Application and Verification Forms, http://www.fns.usda.gov/cnd/Application/2006_Application.doc. School districts that have gathered this data pursuant to federal law also use the information to calculate percentages of low-socioeconomic status students in the district.

164. *Grutter v. Bollinger*, 539 U.S. 306, 383 (2003).

165. *Id.* at 389.

constitutionality of a district's assignment plan and he has shown suspicion of schools' methodologies, a district cannot confuse the integration benefits of a disadvantage-based plan with a singular purpose of allotting preferences to a specified number of African-American students. Nevertheless, two considerations preserve race-neutral student assignment plans as the best option for school districts.

First, a disadvantage-based plan that recognizes significant racial integration as *one* benefit and utilizes a variety of disadvantage indicators instead of "crude"¹⁶⁶ race typing should satisfy Justice Kennedy. In *Parents Involved*, Justice Kennedy indicated that he approves facially race-neutral measures designed to encourage diverse student body compositions, even though some element of race-consciousness is present.¹⁶⁷ He went on to list strategic school site selection, attendance zones, resource allocation, and targeted recruitment as examples of race-conscious yet permissible actions to achieve diversity.¹⁶⁸ Justice Kennedy left schools "free to devise race-conscious measures" to foster integration;¹⁶⁹ such measures might include preferences for disadvantaged children using indicators like family income level, parents' educational background, family structure (single-parent households and number and age of siblings), contact with the criminal justice system (a parent has been lost to the penal system or the student has a personal criminal history), and past academic performance as indicated by test scores.

Second, because a race-neutral student assignment plan does not employ suspect race classifications on its face, a petitioner challenging the plan will bear the burden of demonstrating that the district's plan is really a "smokescreen" for racial balancing. Facially race-neutral plans are subject to deferential rational basis review. For strict scrutiny to apply, a plaintiff claiming that facially-neutral state action is impermissibly discriminatory must prove the government's discriminatory intent, not merely a "racially disproportionate impact."¹⁷⁰ Thus, as long as school districts utilize race-neutral plans to ensure that all disadvantaged students, regardless of race, have access to their school preferences, the fact that more African-American than white

166. *Id.*

167. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007).

168. *Id.*

169. *Id.*

170. *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977). *See* *Washington v. Davis*, 426 U.S. 229 (1976).

students qualify for those preferences should not invalidate the student assignment plan.

b. Combating "Flight"

Although court-ordered desegregation and voluntary affirmative action plans both attempt to achieve integration, increased segregation often occurs instead,¹⁷¹ and disadvantage-based plans are not exempt from this problem. As of 2003, the percentage of white students attending school with the average black student had dropped to at or near 1970 levels in many states. In Louisiana in 2003, the average black student attended school with *less* white students than he or she did in 1970.¹⁷² In Louisiana, this trend has been attributed to "white flight" into suburban school districts or private schools following court-ordered desegregation.¹⁷³ White flight in turn is largely a reaction to diminished overall academic performance of the student body caused by increased concentrations of at-risk black students in traditionally white schools. Bankston and Caldas documented this diminished academic performance, finding that both black and white tenth graders' percentage of correct answers on the 1990 Louisiana Graduate Exit Exam decreased correspondingly with increases in their school's concentration of African-American students, impoverished students, and students from single-parent families.¹⁷⁴

Though *Parents Involved* clearly supports the constitutionality of a race-neutral assignment plan, a preference plan creating increased concentrations of disadvantaged students per school must accommodate negative effects on academic performance and resulting white flight in order to achieve the benefits of integration

171. See ORFIELD, *supra* note 20.

172. *Parents Involved*, 127 S. Ct. at 2838 (citing G. ORFIELD & C. LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 18 tbl. 8 (2006)).

173. BANKSTON & CALDAS, *supra* note 150, at 65 tbls. 3.2, 3.3; *id.* at 89 fig. 4.2; *id.* at 112 fig. 5.1; *id.* at 113 tbl. 5.1; *id.* at 152 fig. 6.2; *id.* at 153 fig. 6.3; *id.* at 164 fig. 6.4; *id.* at 169 fig. 6.5; *id.* at 181 fig. 6.8.

174. *Id.* at 193 tbl. 7.1; *id.* at 195 tbl. 7.2; *id.* at 197 tbl. 7.4.

In theory, there is no reason that a majority-black school cannot be far superior to a majority-white school [F]or the most part, though, the association between the proportion of African American students and the proportion of at-risk students is so close that efforts to seek good schools and avoid bad schools mean efforts to avoid schools with concentrations of black students. Desegregation, then, bears its own self-contradiction. The very inequalities that lead policy makers to try to achieve racial balances in schools promote imbalances.

Id. at 11.

and access to enhanced educational opportunities. Bankston and Caldas summarize the issue:

[W]e now know that beyond a certain threshold percentage of African American (which statistics show translates to a high concentration of children from single-parent, poor families) both whites and blacks with the financial means are likely to pull their children from such schools . . . the challenge will be to [integrate] . . . in a manner that does not surpass a threshold that will trigger white flight—and higher-SES black flight.¹⁷⁵

Thus, while *Parents Involved* does not impose constitutional barriers to race-neutral assignment plans, schools utilizing disadvantage-based preferences must recognize and address practical barriers—such as high-SES white and black flight—that have long plagued race-based plans.¹⁷⁶

C. *Parents Involved's Current Impact in Louisiana is Limited*

The race-conscious and race-neutral student assignment options remaining after *Parents Involved* belie alarmists' calls that integration is no more. But even if Justice Breyer and some commentators' end-of-integration predictions following *Parents Involved* were accurate, the ruling's immediate effects, particularly in Louisiana, would be constrained by the racial demographics, overall population size, legal status, and current assignment plans of some school districts.

As of February 2007, nine school districts in Louisiana had minority student populations of over 80%,¹⁷⁷ rendering significant integration within the district largely impossible whether race-conscious or race-neutral student assignment plans are utilized. In their Louisiana study, Bankston and Caldas highlight three Louisiana parishes—Orleans, East Baton Rouge, and Lafayette—where court-ordered desegregation produced such high rates of white flight that the public school systems are either almost entirely made up of African-American students or steadily

175. *Id.* at 204.

176. The complexities of “white flight” are beyond the scope of this Note. Specific solutions to the problem are largely dependent upon the particular circumstances of individual school districts, but for an introduction to “white flight” in Louisiana, see BANKSTON & CALDAS, *supra* note 150.

177. LA. DEP'T OF EDUC., *supra* note 162. These districts include: East Baton Rouge, 83.93%; East Carroll, 94.15%; Madison, 92.25%; Orleans, 84.66%; St. Helena, 94.46%; St. John the Baptist, 82.34%; Tensas, 94.20%; Monroe City, 87.93%; City of Baker, 92.62%. *Id.*

approaching that result.¹⁷⁸ For these districts, significant integration can likely come only as a result of measures designed to re-attract white students lost to private schools, suburban districts, or home-schooling.¹⁷⁹

On the other hand, some districts' small student population can result in integration by default. For example, the City of Baker, Bogalusa City, Red River, and West Feliciana school districts operate only one school for each grade, while Madison Parish has only one high school and one middle school.¹⁸⁰ This set-up requires students of the same grade, regardless of race, to attend school together. Thus, in addition to the race-conscious and race-neutral assignment plans still viable after *Parents Involved*, consolidated schools may be a legitimate integration option for small school districts.¹⁸¹

In addition to district circumstances that might render integration moot, the present legal status of some Louisiana schools limits the immediate application of *Parents Involved*. Of the seventy school districts in Louisiana, forty-three are still subject to court-ordered desegregation.¹⁸² *Parents Involved* clearly reaffirms that race classifications are constitutionally permissible

178. BANKSTON & CALDAS, *supra* note 150, at 68.

179. *Id.* at 204. The authors' recommendations include educational, economic, and social policies. They suggest neighborhood school programs with increased spending and teacher salary incentives in minority schools, combined with magnet programs whose enhanced resources keep whites interested in the public schools and create a higher learning environment for talented blacks. The authors also encourage residential desegregation through the elimination of housing discrimination, as well as economic development of minority communities through public transportation, incentives for job-creating investments, and public works performed by a government-jobs agency similar to the Depression-era's Works Progress Administration or Tennessee Valley Authority. Finally, the authors emphasize public policies designed to aid single-parent families, incentives to encourage two-parent households, and religious promotion of fatherhood and strong family structures. *Id.* at 205-19.

180. See Appendix. The author gathered data from Louisiana school districts through email surveys and telephone calls. All seventy school districts responded to part or all of the data request. School district representatives were asked to provide the district's current desegregation status (i.e., never under court order, currently under court order, or unitary), the name of the court case and presiding judge if currently under court order or unitary, the date of court order if any, the date of unitary status if any, and a description of the district's current student assignment plan.

181. However, small districts with disproportionately large populations of one racial group would still face integration obstacles despite consolidated schools. For example, Madison Parish and City of Baker have over 90% minority populations. See LA. DEP'T OF EDUC., *supra* note 162.

182. See Appendix. See also U.S. COMM'N ON CIVIL RIGHTS, *supra* note 33, at 141-44.

for remedial purposes, namely correcting the effects of *de jure* segregation,¹⁸³ so these districts' student assignment plans are not currently affected by the Court's ruling. Of course, *Parents Involved* will guide these districts' future assignment policies when and if each achieves unitary status.

Of the remaining Louisiana districts, sixteen have achieved unitary status, while eleven were never found legally segregated and placed under judicial supervision.¹⁸⁴ *Parents Involved* governs these twenty-seven districts, and they report varying student assignment plans.¹⁸⁵ Most of these districts primarily operate neighborhood schools according to student residence and do not consider race in making assignments.¹⁸⁶ These districts thus have no level of legal risk under *Parents Involved*, though the opinion would certainly support both race-conscious and race-neutral measures designed to achieve integration should these districts identify such a need.¹⁸⁷

183. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752, 2771 (2007).

184. See Appendix. See also U.S. COMM'N ON CIVIL RIGHTS, *supra* note 33, at 139–40, 145. The Commission's report only reflects nine unitary districts, and the report does not include the recently-formed Central Community and Orleans Recovery school districts.

185. Many of these districts operate neighborhood schools, with some plans allow magnet program transfers, majority-to-minority transfers, hardship transfers, academic transfers, and transfers by persons providing their own transportation. Some unitary districts are still using court-approved attendance zones, many of which were no doubt "gerrymandered" based upon racial considerations. See Appendix. However, Justice Kennedy's concurrence explicitly noted that racially-conscious attendance zones are sufficiently narrowly tailored to achieve racial diversity, so a majority of the Court would not overturn such assignment plans. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

186. See Appendix.

187. Despite the limitations that might render racial diversity difficult to achieve in Louisiana, federal and state legislation is in place to counter educational inequality. For example, school systems nationwide must report disaggregated test scores (i.e., separately report test scores by race) to ensure that minority academic results do not get lost in the shuffle of a school district's overall academic performance. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111, 115 Stat. 1451 (2002). In keeping with federal requirements, Louisiana has also adopted state reporting requirements for "Adequate Yearly Progress" that ensure that each subgroup's performance (including minority groups) is evaluated separately. See LA. ADMIN. CODE tit. 28, § 4310 (2007).

V. CONCLUSION

When Chief Justice Roberts began the *Parents Involved* opinion, he asked “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.”¹⁸⁸ The short answer to that question is “No, but”

While the plurality and Justice Kennedy reject pure race typing through individual classifications, a majority of the Court has not outlawed a more narrowly tailored use of race to achieve the educational and social benefits of racial diversity in the nation’s public elementary and secondary schools. More importantly, race-neutral, disadvantage-based student assignment plans can accomplish racial diversity without the stricter constitutional review, reverse discrimination challenges, and over- and under-inclusive preferences that characterize race-based plans. Furthermore, school districts employing race-neutral plans will likely garner the approval of the *Parents Involved* plurality and thus the full support of the Court. If, as Justice Breyer indicates, the promise of *Brown* is a “democracy that must work for all Americans . . . one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live,”¹⁸⁹ *Parents Involved* may hold the key to a level of fulfillment of *Brown* that has never before occurred: schools that strive to meet the needs of all children regardless of their race.

Michelle Renee Shamblin*

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

189. *Id.* at 2836 (Breyer, J., dissenting).

* Recipient of the 2007–2008 Vinson & Elkins Best Casenote or Comment Award for Excellence in Legal Writing.

The author would like to thank Professor Kenneth M. Murchison, James E. and Betty M. Phillips Professor of Law at Louisiana State University’s Paul M. Hebert Law Center, for his insightful guidance throughout the drafting of this paper. The author is also grateful to Dr. Michael P. Shamblin, Ed.D., for his assistance in gathering Louisiana Public School District data, as well as the “real-world” perspective he contributed from his thirty-plus years as a teacher and administrator in Louisiana’s public school system.

VI. APPENDIX

*A. Desegregation Status of Louisiana Public School Districts**1. Districts Currently Under Court Order (43)*

Avoyelles	East Carroll	Monroe City	St. John
Bienville	East Feliciana	Morehouse	St. Landry
Bogalusa City	Evangeline	Natchitoches	St. Tammany
Bossier	Franklin	Orleans	Tangipahoa
Caddo	Jackson	Ouachita	Terrebonne
Calcasieu	Jefferson	Plaquemines	Union
Caldwell	Jefferson Davis	Pointe Coupee	Washington
Catahoula	Lafourche	Richland	Webster
Claiborne	Lasalle	Sabine	West Baton Rouge
Concordia	Lincoln	St. Helena	West Carroll
Desoto	Madison	St. James	

2. Districts Declared Unitary (16)

Acadia	Iberia	Rapides	St. Mary
Ascension	Iberville	Red River	Tensas
E. Baton Rouge	Lafayette	St. Bernard	Vermillion
Grant	Livingston	St. Martin	West Feliciana

3. Districts Never Under Court Order (11)

Allen	Beauregard	Orleans Recovery	Winn
Assumption	Cameron	St. Charles	Zachary
Baker City	Central Comm.	Vernon	

*B. Student Assignment Plans of Louisiana Public School Districts
(52 districts responding)*

District	Status	Plan
Acadia	Unitary	Neighborhood Schools, One School Per Grade Level Grouping*
Allen	No Court Order	No Response
Ascension	Unitary	Neighborhood Schools
Assumption	No Court Order	No Response
Avoyelles	Court Order	Court-Approved Attendance Zones
Baker City	No Court Order	One School Per Grade Level Grouping

Beauregard	No Court Order	Neighborhood Schools, Majority-Minority Transfers
Bienville	Court Order	Neighborhood Schools
Bogalusa City	Court Order	One School Per Grade Level Grouping
Bossier	Court Order	Neighborhood Schools, Majority-Minority Transfers
Caddo	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Magnet Programs
Calcasieu	Court Order	Neighborhood Schools, Majority-Minority Transfers
Caldwell	Court Order	Court-Approved Attendance Zones
Cameron	No Court Order	Neighborhood Schools, Open Enrollment with Student-Provided Transportation
Catahoula	Court Order	Court-Approved Attendance Zones
Central Community	No Court Order	No Response
Claiborne	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers
Concordia	Court Order	No Response
Desoto	Court Order	Court-Approved Attendance Zones
East Baton Rouge	Unitary	Neighborhood Schools, Magnet Programs
East Carroll	Court Order	Court-Approved Attendance Zones
East Feliciana	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers
Evangeline	Court Order	Voluntary/Involuntary Student and Personnel Transfers to Reflect District-Wide Race Percentages in Each School
Franklin	Court Order	Court-Approved Attendance Zones
Grant	Unitary	Court-Approved Attendance Zones
Iberia	Unitary	Neighborhood Schools, Other Transfers**
Iberville	Unitary	No Response
Jackson	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
Jefferson	Court Order	Court-Approved Attendance Zones
Jefferson Davis	Court Order	Court-Approved Attendance Zones
Lafayette	Unitary	Neighborhood Schools, Majority-Minority Transfers, Other Transfers

Lafourche	Court Order	Neighborhood Schools
Lasalle	Court Order	Neighborhood Schools
Lincoln	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
Livingston	Unitary	Court-Approved Attendance Zones, Other Transfers
Madison	Court Order	One School Per Grade Level Grouping
Monroe City	Court Order	Court-Approved Attendance Zones, Magnet Programs
Morehouse	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
Natchitoches	Court Order	No Response
Orleans	Court Order	No Response
Orleans Recovery	No Court Order	No Response
Ouachita	Court Order	No Response
Plaquemines	Court Order	No Response
Pointe Coupee	Court Order	No Response
Rapides	Unitary	Neighborhood Schools, Magnet Programs
Red River	Unitary	One School Per Grade Level Grouping
Richland	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers
Sabine	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
St. Bernard	Unitary	Neighborhood Schools
St. Charles	No Court Order	Neighborhood Schools, Other Transfers
St. Helena	Court Order	No Response
St. James	Court Order	No Response
St. John	Court Order	Court-Approved Attendance Zones, Magnet Programs
St. Landry	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
St. Martin	Unitary	No Response
St. Mary	Unitary	Neighborhood Schools
St. Tammany	Court Order	No Response

Tangipahoa	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers
Tensas	Unitary	Court-Approved Attendance Zones, Other Transfers
Terrebonne	Court Order	No Response
Union	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
Vermillion	Unitary	Court-Approved Attendance Zones, Other Transfers
Vernon	No Court Order	Court-Approved Attendance Zones, Open Enrollment with Student-Provided Transportation
Washington	Court Order	Court-Approved Attendance Zones
Webster	Court Order	Court-Approved Attendance Zones
West Baton Rouge	Court Order	No Response
West Carroll	Court Order	Court-Approved Attendance Zones, Majority-Minority Transfers, Other Transfers
West Feliciana	Unitary	One School Per Grade Level Grouping
Winn	No Court Order	No Response
Zachary	No Court Order	No Response

* District uses neighborhood schools in outlying areas and one school per grade grouping in city schools.

** Other transfers include any combination of academic, medical, athletic, parent-employee, other hardship, or lottery transfers.