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## Revisiting Parents Involved v. Seattle School District: Race Consciousness and the Government-Speech Doctrine

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## ARTICLE

# REVISITING *PARENTS INVOLVED V. SEATTLE SCHOOL DISTRICT*: RACE CONSCIOUSNESS AND THE GOVERNMENT-SPEECH DOCTRINE

JOSEPH O. OLUWOLE\*

### INTRODUCTION

School districts have voluntarily adopted plans to address persistent racial *de facto* segregation/re-segregation in education and to ensure that students are exposed to a diverse student population reflective of the American society. Despite the benefits these race-conscious plans seek, there has been some legal and social opposition to the plans. It was such opposition that led to the *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>1</sup> case and several earlier cases.<sup>2</sup> The plans have been challenged under the Equal Protection Clause and failed under the strict-scrutiny standard of review. This is because, as constitutional

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<sup>1</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1 (Parents Involved IV)*, 551 U.S. 701 (2007).

<sup>2</sup> *See, e.g.*, *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (per curiam); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999); *Ho by Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57 (D. Mass. 2000).

law scholar Gerald Gunther has aptly noted, strict scrutiny is “strict in theory and fatal in fact.”<sup>3</sup>

This social and legal opposition has intimidated school districts into pulling back efforts to implement race-conscious plans.<sup>4</sup> If this trend continues, fewer and fewer students will have the opportunity to interact with students of other races before they proceed to college and the larger society. We need to provide our schools with the tools and discretion necessary to ensure that students get educated in racially diverse settings. The government-speech doctrine—a “recently minted” judicial doctrine<sup>5</sup>—is empowering for schools seeking to promote such inclusive education.

Professor William M. Carter, Jr.’s trailblazing work, *Affirmative Action As Government Speech*,<sup>6</sup> first examined the relationship between government speech and race-conscious measures.<sup>7</sup> According to Professor Carter, the United States Supreme Court “has come to view race-conscious government action as a form of *prohibited* government speech.”<sup>8</sup> This Article takes a different approach from that of Professor Carter; specifically, the Article reviews the majority, dissenting, and concurring opinions in the *Parents Involved* case for language indicating the Justices’ parameters for viewing voluntary race-conscious measures as government speech. This is important, given that *Parents Involved* is the landmark Supreme Court decision on race-conscious measures at the K-12 school level.

The government-speech doctrine is particularly apropos when schools desire to “achieve or maintain racial integration through the use of race-conscious student assignment plans, under which the race of all students is equally considered and all students receive a spot in the public schools.”<sup>9</sup> In such cases, opposition has been mostly to the *message* the

<sup>3</sup> 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).

<sup>4</sup> See, e.g., *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1018 (D. Mass. 1996).

<sup>5</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring); see Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904 (2010) (“The U.S. Supreme Court did not recognize government speech as a constitutional law doctrine, however, until quite recently.” (internal quotation marks omitted)); see also *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001) (“The Supreme Court has provided very little guidance as to what constitutes government speech.”).

<sup>6</sup> William M. Carter, Jr., *Affirmative Action As Government Speech*, 59 UCLA L. REV. 2 (2011).

<sup>7</sup> See generally *id.* (discussing how the United States Supreme Court has come to view affirmative action as government speech in its opinions).

<sup>8</sup> *Id.* at 2 (emphasis added).

<sup>9</sup> *Id.* at 7.

voluntary race-conscious measure sends rather than the measure itself.<sup>10</sup> Indeed, the very concept of race-consciousness is expressive, conveying a message that race matters. Opposition is often based on the “colorblind” view that tries to convey the opposite message: race does not matter. As Professor Carter observed:

The strict colorblindness doctrine treats any remedial or diversifying government race consciousness as constitutionally suspect because of its message alone. The message of such government action is condemned because it is counter to what the Court has found to be a more important message. That message can be characterized in a variety of ways: liberal individualism, postracialism, antipaternalism, or antibalkanization.<sup>11</sup>

The government-speech doctrine would effectively ensure that the government is not in violation of “private parties’ First Amendment rights when it prevents them from joining or altering what is really the government’s own speech.”<sup>12</sup> In other words, the government-speech doctrine would protect the government from liability when it promotes a diverse elementary and secondary education. Under that premise, this Article analyzes the individual opinions in *Parents Involved* to determine whether the Justices would support race-conscious programs under the government-speech doctrine.

Part I of this Article describes the government-speech doctrine. Part II describes the Equal Protection Clause jurisprudence (the traditional weapon of choice for those challenging race-conscious measures, due to the potency of the strict-scrutiny test). Part III presents the facts of the *Parents Involved* case. Part IV examines the opinions of the United States Supreme Court Justices in *Parents Involved* in light of the government-speech doctrine.<sup>13</sup> The Article concludes that the government-speech doctrine would provide schools needed leeway to pursue race-conscious measures.

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<sup>10</sup> See *id.*

<sup>11</sup> *Id.* at 30 (footnotes omitted).

<sup>12</sup> Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 600 (2008).

<sup>13</sup> Chief Justice Roberts wrote the plurality opinion, and Justices Alito, Thomas, and Scalia joined that opinion. *Parents Involved IV*, 551 U.S. 701, 708 (2007). Justice Kennedy—the swing vote in *Parents Involved IV*—concurred in the judgment and wrote a separate opinion. *Id.* at 782. Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Ginsburg, and Souter, and Justice Stevens wrote a brief dissent. *Id.* at 798, 803.

## I. WHAT IS THE GOVERNMENT-SPEECH DOCTRINE?

## A. DEFINITION

Government speech simply means speech by a government entity.<sup>14</sup> Thus, government speech would encompass speech by school districts. Professor Carter points out that race-conscious measures constitute symbolic speech under the United States Supreme Court's two-prong test:<sup>15</sup> first, race-conscious measures are intended to "convey a particularized message"<sup>16</sup> of diversity and inclusion;<sup>17</sup> and second, "in the surrounding circumstances the likelihood [is] great that the message would be understood."<sup>18</sup> Legal scholar Charlotte Taylor describes government speech as follows:

Government speech is a broad category that includes any government action that communicates or subsidizes the communication of a particular message. It encompasses activities from appropriating taxpayer money to campaign for or against specific legislative measures to deciding who gets access to public fora such as theatres and broadcasting frequencies to offering a program of subsidies for expression—for example, funding for the arts—that makes content-based decisions among qualified applicants. The government can be said to 'speak' when it pays for speech directly, when it provides

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<sup>14</sup> See Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368 (2009) ("Government then becomes one of a host of speakers competing in the marketplace of ideas. Our notion of freedom of speech has not demanded that the government abstain from such a role, nor have we required government to endorse all viewpoints equally as it sends its messages.")

<sup>15</sup> See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." (internal quotation marks and brackets omitted) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

<sup>16</sup> *Spence*, 418 U.S. at 410-11.

<sup>17</sup> See Carter, *supra* note 6, at 36-39.

<sup>18</sup> *Spence*, 418 U.S. at 411; see Carter, *supra* note 6, at 39-41; Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 754 (2011) ("[B]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression . . . . Attempts to determine which element 'predominates' will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected. As it is with speech activities, so it is with speech regulations—they are '100%' expressive. If the government's expressive interests are to be recognized, then those interests are undoubtedly implicated fully in every speech regulation the government passes." (internal quotation marks and footnote omitted) (quoting John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975)).

access to public property for the communication of a given message, or when an elected official voices her opinion on a given issue.<sup>19</sup>

Government speech serves several functions. According to Professor Gia B. Lee, government speech

may, for example, seek to inform the public of matters the government deems relevant, to rally support for governmental policies and practices, to encourage or deter certain behavior, or to communicate shared values and perspectives. In doing so, a government seeks to shape public awareness, influence public opinion, or secure popular support.<sup>20</sup>

Racial diversity, equity, and inclusion are values a school district could seek to rally support for or communicate through government speech in the form of race-conscious measures. Through such measures, a school district performs the government-speech function of cultivating social consciousness of the importance of racial unity and diversity to the sustenance of our democratic republic.

The government-speech doctrine started with the “rather benign idea that of course the government can speak to its public, its democratic rulers. Indeed, the government must speak, and propose, and defend, and inform in order for democracy to work.”<sup>21</sup> The government must speak in order to fulfill democracy’s ideals of individual liberty and self-government.<sup>22</sup> Moreover, without government speech, “the polity cannot engage in the business of government, evaluate government policy, or disagree and dissent.”<sup>23</sup>

As recently as August 2010, retired United States Supreme Court Justice Souter stated that the government-speech doctrine is currently at

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<sup>19</sup> Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1142-43 (2010).

<sup>20</sup> Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 992 (2005). For further discussions of some benefits of government speech, see Blocher, *supra* note 18, at 750-51.

<sup>21</sup> Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 810 (2010); see also *The Supreme Court 2008 Term, Government Speech*, 123 HARV. L. REV. 232, 238 (2008) (“Government speech doctrine is justified at its core by the idea that, in order to function, government must have the ability to express certain points of view, and it would be unable to do so effectively if, for example, the Constitution required a government pro-democracy campaign to be accompanied by a pro-fascism campaign.” (footnote omitted)).

<sup>22</sup> Bezanson, *supra* note 21, at 812.

<sup>23</sup> *Id.*

an “adolescent stage of imprecision.”<sup>24</sup> Despite its novelty and imprecision, the government-speech doctrine is here to stay.<sup>25</sup>

When the government speaks, the government-speech doctrine creates a strong defense to a plaintiff’s claim that the government has engaged in viewpoint discrimination.<sup>26</sup> This disempowers plaintiffs who claim a deterioration of First Amendment rights. After all, as Professors Helen Norton and Danielle Keats Citron note, “Political accountability mechanisms such as voting and lobbying then provide the sole recourse for those displeased by their government’s expressive choices.”<sup>27</sup> Yet if used prudently, as in the case of race-conscious measures designed to enhance diversity of public education, the government-speech doctrine might be a powerful force for democratic values like tolerance, equality, and acceptance.

## B. JUDICIAL EVOLUTION OF THE GOVERNMENT-SPEECH DOCTRINE

The origins of the government-speech doctrine can be traced to *Rust v. Sullivan*.<sup>28</sup> The doctrine was obscure in *Rust*, as the term “government speech” was never used in the case;<sup>29</sup> however, the United States Supreme Court has since noted *Rust* as the origin of the doctrine.<sup>30</sup>

*Rust* involved a First Amendment challenge to federal regulations precluding Title X fund recipients from performing abortion-related activities.<sup>31</sup> The petitioners argued that the regulations violated the Free Speech Clause because they barred “all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while

<sup>24</sup> *Griswold v. Driscoll*, 616 F.3d 53, 54, 59 n.6 (1st Cir. 2010); see also *Page v. Lexington Cnty. Sch. Dist. One*, C.A. No. 3:06-249-CMC, 2007 WL 2123784, at \*6 (D.S.C. 2007) (stating that the government-speech doctrine is “relatively new and its limits remain imprecisely defined and subject to some debate”).

<sup>25</sup> *Bezanson*, *supra* note 21, at 809 (stating that the government-speech doctrine is “now a largely uncontroversial rule that when the government is speaking, its expressive actions are immune from First Amendment freedom of speech limits”).

<sup>26</sup> *Norton & Citron*, *supra* note 5, at 901; see also *id.* at 901-02 (stating that the government is not mandated to publicly disclose itself “as the source of a contested message to satisfy the government speech defense to a First Amendment claim”).

<sup>27</sup> *Id.* at 904.

<sup>28</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>29</sup> See *Norton & Citron*, *supra* note 5, at 905 (“Nowhere in *Rust* does the term ‘government speech’ appear.”).

<sup>30</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”); see also *Norton & Citron*, *supra* note 5, at 904 & n.25.

<sup>31</sup> *Rust*, 500 U.S. at 177-78.

compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.”<sup>32</sup> The Supreme Court disagreed, noting that there was “no question” about the constitutionality of the regulations.<sup>33</sup> The Court reasoned that the government can promote or favor certain values; and therefore the “government may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.”<sup>34</sup>

In an early articulation of the government-speech doctrine, the Supreme Court declared:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. A legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.<sup>35</sup>

To illustrate this point, the Court pointed out that, if Congress chooses to fund a program like the National Endowment for Democracy to promote democracy in other countries, the Constitution does not require Congress to also fund programs supporting competing political philosophies such as fascism and communism.<sup>36</sup> Accordingly, if a school district supports race-conscious measures designed to promote diversity, it is not required to support measures to oppose diversity.

The Supreme Court found that the government’s mere refusal to fund or support a particular activity is not equivalent to the government penalizing that activity.<sup>37</sup> The Court distinguished between the government choosing to support an activity and government interfering with a protected activity.<sup>38</sup> When government chooses to support one activity over another, it is merely working within its operational authority.<sup>39</sup> Further, the *Rust* Court ruled that the government has the

<sup>32</sup> *Id.* at 192.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 192-93 (internal quotation marks omitted) (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

<sup>35</sup> *Id.* at 193 (internal quotation marks and brackets omitted).

<sup>36</sup> *Id.* at 194 (“Petitioners’ assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has *soundly* rejected that proposition.” (emphasis added)).

<sup>37</sup> *Id.* at 193.

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 179, 193-94.



authority to “define the limits” of programs it decides to support with public funds.<sup>40</sup>

In *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>41</sup> the Supreme Court expounded on the government-speech doctrine by giving the government power to make content-based decisions. In that case, the Court found that denial of university funding for a student organization’s newspaper costs is not synonymous with government speech.<sup>42</sup> The Court declared:

[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.<sup>43</sup>

The Supreme Court in *Board of Regents of the University of Wisconsin System v. Southworth* upheld the university’s student activity fee but found the government-speech doctrine inapplicable because the case did not involve speech by the University. In so holding, the Court described the government-speech doctrine as effectively empowering the government when it speaks.<sup>44</sup> Specifically, the Court stated that in the course of its constitutional obligations, the government will have to implement policies and programs that its citizens will passionately disagree with.<sup>45</sup> Further, the Court declared that, despite protests from the citizenry, the government could choose to promote those policies and programs “by taxes or other exactions.”<sup>46</sup> The Court emphasized the inevitability that public funds will be expended on speech and other advocacy in the course of the government’s duties.<sup>47</sup> The Court indicated that even though the government-speech doctrine immunizes

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<sup>40</sup> *Id.* at 194.

<sup>41</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

<sup>42</sup> *Id.* at 841 (“In this case, ‘the government has not fostered or encouraged’ any mistaken impression that the student newspapers speak for the University.”).

<sup>43</sup> *Id.* at 833.

<sup>44</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221, 229-35 (2000).

<sup>45</sup> *Id.* at 229.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

government action from First Amendment scrutiny, citizens are not without recourse.<sup>48</sup> This recourse includes the election of government officials who will support programs and policies with which the citizenry agree.<sup>49</sup>

*Legal Services Corp. v. Velazquez*<sup>50</sup> presented the Supreme Court with another opportunity to speak about the government-speech doctrine. The Court was faced with a First Amendment challenge to the congressionally created Legal Services Corporation (LSC) fund.<sup>51</sup> This program barred fund recipients from legal representation in any case entailing a challenge to current welfare law.<sup>52</sup> Finding the restriction unconstitutional,<sup>53</sup> the Court distinguished the legal representation—private speech—from government speech:

[A]n LSC-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client.<sup>54</sup>

The Court reaffirmed its support for the breadth of the government-speech doctrine by reiterating that when the government is the speaker, it is authorized to make funding decisions that discriminate based on viewpoint.<sup>55</sup>

In *Johanns v. Livestock Marketing Ass'n*,<sup>56</sup> the Court provided the greatest insight since *Rust* on the government-speech doctrine.<sup>57</sup> *Johanns* involved a First Amendment challenge to a government campaign designed to encourage consumption and marketing of beef.<sup>58</sup> In that case, various beef producers challenged the use of a mandatory

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<sup>48</sup> *Id.* at 235.

<sup>49</sup> *Id.*

<sup>50</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

<sup>51</sup> *Id.* at 536.

<sup>52</sup> *Id.* at 536-37; *see id.* at 537 (“As interpreted by the LSC and by the Government, the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.”).

<sup>53</sup> *Id.* at 548-49.

<sup>54</sup> *Id.* at 542.

<sup>55</sup> *Id.* at 541.

<sup>56</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

<sup>57</sup> *See id.* at 557 (“We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.”).

<sup>58</sup> *Id.* at 553.

assessment to fund the campaign.<sup>59</sup> The Court was presented with the question of whether the campaign constituted government speech, thus immunizing the speech from First Amendment challenge.<sup>60</sup> The Court found that the campaign constituted government speech and that the government can compel financial support of its own speech.<sup>61</sup> In other words, the Constitution does not bar the government from compelling support of programs with which citizens disagree.<sup>62</sup> The Court declared that it had “*generally assumed*, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.”<sup>63</sup> The Court pointed out that some government programs, partially or entirely, constitute speech,<sup>64</sup> as is the case with race-conscious measures.

The *Johanns* Court ruled that in order to constitute government speech, the speech must be shown to be “effectively controlled” by the government.<sup>65</sup> The Court revealed six factors critical to an assessment of whether speech is indeed “effectively controlled” by the government:<sup>66</sup> whether the government established the speech “from beginning to end”; whether the government “set out the overarching message” of the speech; if the government left the development of some details of the message to a non-government entity, whether members of that entity are answerable to the government; whether the government had “final approval authority over every word used”; whether the government reviewed the message “both for substance and for wording”; and whether the government was in attendance and participated in open meetings for the proposal’s or program’s development.<sup>67</sup>

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<sup>59</sup> *Id.* at 555.

<sup>60</sup> *Id.* at 553.

<sup>61</sup> *Id.* at 559-62.

<sup>62</sup> *Id.* at 559.

<sup>63</sup> *Id.* (emphasis added).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 560.

<sup>66</sup> *Id.* at 560-61.

<sup>67</sup> *Id.* This Article will refer to these factors as the *Johanns* index of control. Prior to *Johanns*, several federal courts of appeals have applied a non-exclusive list of four factors to determine if speech was private or government speech: the central purpose of the program in which the speech in question occurs, the degree of editorial control exercised by the government or private entities over the content of the speech, the identity of the literal speaker, and whether the government or the private entity bears the ultimate responsibility for the content of the speech. See, e.g., *Arizona Life Coal. Inc., v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002); *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000). Given the Supreme Court’s introduction of the *Johanns* index of control, it is uncertain whether the pre-*Johanns* factors will have as critical a weight as they did before *Johanns*.

The Court ruled that if the government entity “sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”<sup>68</sup> Additionally, the Court stated that “[c]itizens may challenge compelled support of private speech, but have *no* First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.”<sup>69</sup>

*Pleasant Grove City, Utah v. Summum*,<sup>70</sup> was the “first case in which the Court was unanimous in characterizing contested speech as the government’s.”<sup>71</sup> In *Summum*, the issue before the Court was whether a private group could compel a government entity to place a permanent monument in a public park.<sup>72</sup> The group sought to erect a monument featuring the Seven Aphorisms of Summum<sup>73</sup> alongside other donated monuments, such as the Ten Commandments, that were already in the park.<sup>74</sup> The Court held that permanent monuments in public parks were government speech.<sup>75</sup>

The Court stated that the Free Speech Clause governs private speech, not government speech.<sup>76</sup> Consequently, the government is free to control what it says and to “say what it wishes.”<sup>77</sup> The Court noted that the government “has the right to speak for itself”<sup>78</sup> and is free to “select the views that it wants to express.”<sup>79</sup> Citing Justice Scalia’s opinion in a prior case,<sup>80</sup> the Court iterated that “[i]t is the very business

<sup>68</sup> *Johanns*, 544 U.S. at 562.

<sup>69</sup> *Id.*

<sup>70</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

<sup>71</sup> Norton & Citron, *supra* note 5, at 913.

<sup>72</sup> *Summum*, 555 U.S. at 464.

<sup>73</sup> The Summum church believes that, while on Mount Sinai, Moses received the Seven Aphorisms (the Seven Principles of Creation) before receiving the Ten Commandments. *Id.* at 465 n.1. However, Moses showed the Seven Aphorisms only to a few people, because of his belief that the Israelites were not prepared for the Aphorisms. *Id.*

<sup>74</sup> *Id.* at 464-65.

<sup>75</sup> *Id.* at 464.

<sup>76</sup> *Id.* at 467.

<sup>77</sup> *Id.* (internal quotation marks omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

<sup>78</sup> *Id.* (internal quotation marks omitted) (quoting *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

<sup>79</sup> *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).

<sup>80</sup> *Finley*, 524 U.S. at 598 (Scalia, J., concurring). Specifically, Justice Scalia stated:

of government to favor and disfavor points of view.”<sup>81</sup> Otherwise, as the Court explained, public debate and the government’s functioning would be compromised:

If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. . . . A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.<sup>82</sup>

The Court made plain that “[t]o govern, government has to say something, and a First Amendment heckler’s veto of any forced contribution to raising the government’s voice in the ‘marketplace of ideas’ would be out of the question.”<sup>83</sup> As in *Southworth*, the Court emphasized that when the government speaks, this immunity from a First Amendment challenge does not protect government officials from electoral accountability.<sup>84</sup> Citizens who do not like the government’s position may vote for different government representatives.<sup>85</sup> As the Seventh Circuit later explicated, the “constraints on the government’s choice of message are primarily electoral, not judicial.”<sup>86</sup>

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It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and, in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating it officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood). None of this has anything to do with abridging anyone’s speech.

*Id.* (footnote omitted).

<sup>81</sup> *Sumnum*, 555 U.S. at 468 (internal quotation marks omitted).

<sup>82</sup> *Id.* (internal quotation marks and citations omitted) (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990)).

<sup>83</sup> *Id.* at 468 (some internal quotation marks omitted) (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)).

<sup>84</sup> *Id.* at 468–69.

<sup>85</sup> *Id.*

<sup>86</sup> *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 859 (7th Cir. 2008).

Various lower courts have applied the government-speech doctrine.<sup>87</sup> Professor Andy Olree notes that “in freedom of speech cases, lower courts have accepted the Rust-inspired government-speech doctrine and seem to be aware that when the government has a message to send, such a message need not be viewpoint-neutral, and other messages need not receive governmental support.”<sup>88</sup> For example, in *Downs v. Los Angeles Unified School District*, a public school teacher challenged the school district’s use of school bulletin boards to commemorate Gay and Lesbian Awareness month.<sup>89</sup> The teacher disagreed with such commemoration and sought to post his responses to the commemorative postings.<sup>90</sup> The issue before the Ninth Circuit was “whether the First Amendment compels a public high school to share the podium with a teacher with antagonistic and contrary views when the school speaks to its own constituents on the subject of how students should behave towards each other while in school.”<sup>91</sup> The court characterized the bulletin boards as government speech, noting that this is “an example of the government opening up its own mouth.”<sup>92</sup> The court emphasized that the school exercised final authority over the content of the bulletin boards.<sup>93</sup> Furthermore, the court declared that “[s]imply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.”<sup>94</sup>

The *Downs* court held that

when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual’s choice of how to convey oneself: among other things, content, timing, and purpose.<sup>95</sup>

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<sup>87</sup> See, e.g., *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 330 (1st Cir. 2009) (“*Sumnum* makes it clear that when the government uses its discretion to select between the speech of third parties for presentation through communication channels owned by the government and used for government speech, this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech.”); *Chiras v. Miller*, 432 F.3d 606, 616-19 (5th Cir. 2005) (finding state selection and use of textbooks is government speech).

<sup>88</sup> Olree, *supra* note 14, at 379.

<sup>89</sup> *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1005-08 (9th Cir. 2000).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1005.

<sup>92</sup> *Id.* at 1012-13.

<sup>93</sup> *Id.* at 1011-13.

<sup>94</sup> *Id.* at 1013.

<sup>95</sup> *Id.*

The court ruled that a school district is free to “decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives.”<sup>96</sup> The court reasoned that citizens seeking to convey a viewpoint contrary to the school district’s can speak at the ballot box by electing new school board members.<sup>97</sup>

The Eighth Circuit had the opportunity to apply the government-speech doctrine in *Knights of the Ku Klux Klan v. Curators of the University of Missouri*.<sup>98</sup> The Curators of the University of Missouri implemented an underwriting program designed to fund the university’s public radio station.<sup>99</sup> Federal law required that public radio stations acknowledge on air any source of funding for their broadcasts.<sup>100</sup> Under the funding program, a donor could get an enhanced acknowledgment in a fifteen-second message drafted by the radio station’s staff or the donor.<sup>101</sup> The Ku Klux Klan asked the radio station if it could underwrite four segments of one of the station’s broadcasts, National Public Radio’s “All Things Considered.”<sup>102</sup> The Ku Klux Klan proposed that the following acknowledgement be read on air:

The Knights of the Ku Klux Klan, a White Christian organization, standing up for rights and values of White Christian America since 1865. For more information[,] please contact the Knights of the Ku Klux Klan, at . . . . Let your voice be heard!<sup>103</sup>

The radio station rejected the Ku Klux Klan’s request to underwrite its program, prompting the Klan to file suit challenging the decision as a violation of the First Amendment.<sup>104</sup>

The court ruled that acknowledgments read on air constituted government speech as the radio station had final authority and editorial control over the contents.<sup>105</sup> The court held that when the government

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<sup>96</sup> *Id.* at 1014; *see also id.* at 1015 (“Were we to invoke the Constitution to protect Downs’s ability to make his voice a part of the voice of the government entity he served, Downs would be able to do to the government what the government could not do to Downs: compel it to embrace a viewpoint.”).

<sup>97</sup> *Id.* at 1016.

<sup>98</sup> *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000).

<sup>99</sup> *Id.* at 1088.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1089.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1090.

<sup>105</sup> *Id.* at 1093–94. Additionally, the court pointed out that the underwriting program’s central purpose was not to support the views of the donors, but to “acknowledge any money, service, or

conveys a message over which it has editorial control and final authority, the message is government speech, even if private individuals or entities are involved in the speech.<sup>106</sup>

The Sixth Circuit has described the government-speech doctrine as follows:

Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement. For instance, government can distribute pins that say “Register and Vote,” issue postage stamps during World War II that say “Win the War,” and sell license plates that say “Spay or Neuter your Pets.” Citizens clearly have the First Amendment right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute “Don’t Vote” pins, to issue postage stamps in 1942 that say “Stop the War,” or to sell license plates that say “Spaying or Neutering your Pet is Cruel.”<sup>107</sup>

The Fifth Circuit has specifically extended the government-speech doctrine to public schools, noting that “the government, including its *educational institutions*, has the discretion to promote policies and values of its own choosing free from forum analysis or the viewpoint-neutrality requirement.”<sup>108</sup> The court maintained that the government’s discretion encompasses cases in which private messengers are used to convey the

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other valuable consideration directly or indirectly paid, or promised to or charged or accepted by the station with respect to the broadcast of any matter.” *Id.* at 1093 (internal quotation marks and ellipsis omitted).

<sup>106</sup> *Id.* at 1094. This is very similar to the Tenth Circuit’s determination in *Wells v. City and County of Denver* that “[w]hen the government speaks, either directly or through private intermediaries, it is constitutionally entitled to make content-based choices, and to engage in viewpoint-based funding decisions.” *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1139 (10th Cir. 2001) (internal quotation marks and citation omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)); see also *Page v. Lexington Cnty. Sch. Dist. One*, C.A. No. 3:06-249-CMC, 2007 WL 2123784, at \*6 (D. S.C. 2007) (“It is, however, clear that the government may speak through third parties and that such speech will be deemed government speech even though drafted and presented by a third-party at least when: (1) the government determines an overarching message; and (2) approves every word disseminated at its behest.” (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561 (2005)). The Tenth Circuit ruled that “[t]he First Amendment does prohibit the suppression of unpopular speech because of its content, but it does not require the government to serve as a speaker’s proxy or bodyguard in order to enhance the strength of the speaker’s message in the marketplace of ideas.” *Wells*, 257 F.3d at 1149; see also *Newton v. LePage*, 789 F. Supp. 2d 172, 192 (D. Me. 2011) (“[T]he overwhelming weight of authority indicates that government speech may say what it wishes regardless of viewpoint . . .”).

<sup>107</sup> *ACLU v. Bredeesen*, 441 F.3d 370, 379 (6th Cir. 2006) (footnotes omitted).

<sup>108</sup> *Chiras v. Miller*, 432 F.3d 606, 613 (5th Cir. 2005) (emphasis added).



government speech.<sup>109</sup> The United States District Court for the District of South Carolina expanded on the Fifth Circuit's government-speech approach, stating that "[t]he underlying justification is that the government has 'exercise[d] editorial judgment in choosing among private speakers to facilitate the government's own message.'"<sup>110</sup>

The above cases make clear that when the government speaks, it has "rights that are in many ways coextensive with the rights that private speakers enjoy under the First Amendment."<sup>111</sup> Those rights include the "government's exclusion of unwelcomed speech in the time, place, and space of government speech activity."<sup>112</sup> Given that the government already speaks on various "contested social and political issues,"<sup>113</sup> the government should not shy away from speech that relies on race-conscious measures to encourage diversity in the public schools. After all, "[e]ducation is widely understood to be a primary way in which government inculcates values in its citizens."<sup>114</sup> As Professor Carter admonishes, "[t]he Court should not lightly disregard the judgment of democratically accountable actors that race consciousness sometimes remains necessary to overcome persistent racial inequality."<sup>115</sup>

When the government-speech doctrine is invoked, "private speakers lose their First Amendment claim not because the Court views the private speakers' expressive claims as weak, but rather because the Court views the government's competing expressive interests as stronger."<sup>116</sup> With the Court viewing the government's interests as relatively stronger than that of private speakers, the government has a unique and "valuable opportunity to influence social meanings and affect norms of conduct"<sup>117</sup> through mechanisms such as public-school admissions policies. In fact, since schools have a tutelary relation with students and a responsibility to instill values in students, it is particularly critical that they be able to express "viewpoints designed to affect the social milieu or to persuade people to think and act differently."<sup>118</sup>

The government-speech doctrine is very potent because "[o]nce a court determines that the government has adopted the speech as its own,

<sup>109</sup> *Id.*

<sup>110</sup> *Page*, 2007 WL 2123784, at \*6 (quoting *Chiras*, 432 F.3d at 613).

<sup>111</sup> Steven G. Gey, *Why Should the First Amendment Protect Government Speech when the Government Has Nothing To Say?*, 95 IOWA L. REV. 1259, 1268 (2010).

<sup>112</sup> *Bezanson*, *supra* note 21, at 809.

<sup>113</sup> *Taylor*, *supra* note 19, at 1121.

<sup>114</sup> *Id.* at 1156.

<sup>115</sup> *Carter*, *supra* note 6, at 8-9.

<sup>116</sup> *Gey*, *supra* note 111, at 1262.

<sup>117</sup> *Taylor*, *supra* note 19, at 1121.

<sup>118</sup> *Olree*, *supra* note 14, at 367-68.

then only one conclusion could follow from everything the Court has said about the new doctrine of government speech: the government will win, and the private speaker will lose.”<sup>119</sup> The government-speech doctrine permits “what had previously been thought forbidden: the burdening, even if not silencing, of private viewpoints *because* the government disagrees with them.”<sup>120</sup> This potency of the government-speech doctrine will prove particularly helpful to schools seeking to instill values and develop our children into responsible, tolerant citizens so that schools do not become breeding grounds for viewpoint litigation.<sup>121</sup>

The government-speech doctrine is a powerful weapon for defending race-conscious measures designed to further diversity in schools. This is particularly so because the doctrine gives immunity and thus judicial deference to the government when it speaks. Accordingly, the doctrine may give schools an opening to establish race-conscious measures that will withstand legal challenges. With this opportunity to promote benign race-conscious positions, resegregation of public schools may be reversed, and children might have ample opportunities for education in diverse schools and classrooms. Further, the post-racial society of which many have dreamed and advocated may yet be realized.

The Equal Protection Clause strict-scrutiny test has served as an impediment to the realization of those dreams. The next Part describes the framework courts have traditionally used to review challenges to school districts’ race-conscious measures under the Equal Protection Clause.

## II. THE EQUAL PROTECTION CLAUSE REVIEW FRAMEWORK

The Equal Protection Clause of the Fourteenth Amendment provides that “No State shall . . . deny to any person within its

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<sup>119</sup> Gey, *supra* note 111, at 1303. *See generally* Nelda H. Cambron-McCabe, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine*, 274 EDUC. L. REP. 753 (2012).

<sup>120</sup> Blocher, *supra* note 18, at 697; *see also id.* at 696 (“[P]ursuant to government speech doctrine, the government may be able to restrict private expression because of its message, its ideas, its subject matter, or its content, so long as in so doing it is expressing its own viewpoint.” (internal quotation marks omitted)).

<sup>121</sup> Blocher gives a very incisive perspective on the potency of the government speech doctrine: “[O]nce the government is speaking, speakers cannot assert *any* First Amendment claim to stop it from doing so, nor do they have a First Amendment right to oppose the government’s speech by whatever method they choose. Of course, private speakers remain free to agree or disagree with the content of the government’s message. But they cannot express that disagreement in their preferred way . . .” *Id.* at 711.

jurisdiction the equal protection of the laws.”<sup>122</sup> Courts have traditionally used a three-tier framework for reviewing Equal Protection claims. The tiers are strict scrutiny, intermediate scrutiny, and rational basis.<sup>123</sup> Government classifications of a group of people can trigger strict scrutiny in either of two ways: if the classification infringes upon a fundamental right,<sup>124</sup> or if the government discriminates against a member of a suspect class.<sup>125</sup>

Courts determine whether a right is “fundamental” by examining whether it is implicitly or explicitly guaranteed by the United States Constitution.<sup>126</sup> Rights the Supreme Court has accorded fundamental-rights status include the rights to interstate travel,<sup>127</sup> procreation and marriage,<sup>128</sup> vote in federal and state elections,<sup>129</sup> privacy,<sup>130</sup> and free association.<sup>131</sup>

To determine if a classification is suspect, a court examines the facts of the case for the “traditional indicia of suspectness.”<sup>132</sup> The indicia

<sup>122</sup> U.S. Const. amend. XIV, § 1.

<sup>123</sup> See JOSEPH OLUWOLE, *THE SUPREME COURT AND WHISTLEBLOWERS: TEACHERS AND OTHER PUBLIC EMPLOYEES* 135-50 (2008) (discussing the history of the Equal Protection Clause jurisprudence).

<sup>124</sup> *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988); see also *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

<sup>125</sup> *Kadrmas*, 487 U.S. at 457; see also *Shapiro*, 394 U.S. at 658 (suspect classifications involve “racial classifications, which have . . . been regarded as inherently ‘suspect’”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”).

<sup>126</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”).

<sup>127</sup> See, e.g., *id.* at 32 (“The right to interstate travel had long been recognized as a right of constitutional significance.”); *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 n.4 (1986) (“[R]egardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.”).

<sup>128</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978).

<sup>129</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Note that *Sailors v. Bd. of Educ.*, 387 U.S. 105 (1967), ruled that there is no fundamental right to vote in local elections. *Id.* at 108-11.

<sup>130</sup> *Griswold v. Conn.*, 381 U.S. 479, 484 (1965).

<sup>131</sup> *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).

<sup>132</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

include whether the class is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>133</sup> To date, the United States Supreme Court has recognized only three classes as suspect: race,<sup>134</sup> alienage,<sup>135</sup> and national origin.<sup>136</sup>

Under the strict-scrutiny test, the government bears the burden of proof.<sup>137</sup> The test requires the government to prove that it has a compelling reason for the classification<sup>138</sup> and that the classification is narrowly tailored to achieve the compelling reason.<sup>139</sup>

Persons challenging government classifications seek strict scrutiny because the “compelling” reason and “narrow tailoring” requirements are very difficult to meet.<sup>140</sup> Even when the government shows that it has a compelling reason for the classification, it might not be able to show that the classification is narrowly tailored to achieve the compelling reason.<sup>141</sup> Narrow-tailoring jurisprudence often concludes that there are less restrictive means for achieving the compelling reasons than the government’s chosen classification.<sup>142</sup> Moreover, when strict scrutiny applies, courts presume the classification is unconstitutional, and the government must overcome that presumption in order to prevail.<sup>143</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214-16 (1995); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>135</sup> *Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984) (“As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.”); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

<sup>136</sup> *Graham*, 403 U.S. at 371-72; *Oyama v. California*, 332 U.S. 633, 644-46 (1948).

<sup>137</sup> *Parents Involved IV*, 551 U.S. 701, 720 (2007); *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005) (“We put the burden on state actors to demonstrate that their race-based policies are justified.”).

<sup>138</sup> *Parents Involved IV*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505.

<sup>139</sup> *Parents Involved IV*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505.

<sup>140</sup> Brant K. Brown, Note, *Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents*, 53 VAND. L. REV. 653, 667 (2000) (“[W]hile rational basis is, in practice, almost a standard of per se legality, strict scrutiny is difficult to overcome.”).

<sup>141</sup> See, e.g., *Parents Involved IV*, 551 U.S. at 726 (2007); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 705-07 (4th Cir. 1999) (per curiam).

<sup>142</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989); *Eisenberg v. Montgomery Cnty. Pub. Sch.*, 197 F.3d 123, 131-32 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 807 (1st Cir. 1998).

<sup>143</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“[R]acial classification, regardless of purported motivation, is presumptively invalid and can be upheld only on extraordinary justification.”); *Eisenberg*, 197 F.3d at 128-29.

Government classifications that discriminate against quasi-suspect classes attract the intermediate-scrutiny standard of review.<sup>144</sup> The name of the standard comes from the fact that it is the intermediate level of review between strict scrutiny and rational basis.<sup>145</sup> Government classifications subject to intermediate scrutiny confront a presumption of unconstitutionality, similar to that with strict scrutiny.<sup>146</sup> To overcome this presumption, the intermediate-scrutiny test requires the government to show that it has an important reason for the classification and that the classification is substantially related to the important government interest.<sup>147</sup> The Court has recognized only gender<sup>148</sup> and illegitimacy<sup>149</sup> as quasi-suspect classes.<sup>150</sup>

The most lenient of the three standards of review for government classifications is rational-basis review.<sup>151</sup> Rational-basis review is “minimal scrutiny in theory and virtually none in fact.”<sup>152</sup> Classifications that qualify for rational basis are presumed constitutional, with the burden on the plaintiff to prove otherwise.<sup>153</sup> The rational-basis test requires the plaintiff to prove that the classification is not rationally related to a legitimate government interest.<sup>154</sup>

<sup>144</sup> Clark v. Jeter, 486 U.S. 456, 461 (1988).

<sup>145</sup> *Id.*

<sup>146</sup> See Gomez v. Perez, 409 U.S. 535, 538 (1973) (“We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”); J.E.B. v. Alabama, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (“And though the intermediate scrutiny test we have applied may not provide a very clear standard in all instances . . . our case law does reveal a strong presumption that gender classifications are invalid.”); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61 (1973) (Stewart, J., concurring).

<sup>147</sup> Craig v. Boren, 429 U.S. 190, 197 (1976). The Supreme Court has sometimes referred to the intermediate-scrutiny test as a requirement that the government provide an “exceedingly persuasive justification.” See, e.g., Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

<sup>148</sup> Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982); Boren, 429 U.S. at 197.

<sup>149</sup> Clark v. Jeter, 486 U.S. 456, 461 (1988); see also Gomez v. Perez, 409 U.S. 535, 537-538 (1973); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968).

<sup>150</sup> Harvey v. Mich. Dep’t of Mgmt. & Budget, Bureau of Ret. Servs., 664 N.W.2d 767, 772-73 (Mich. 2003) (“[T]he United States Supreme Court has applied the intermediate scrutiny test only to challenges involving quasi-suspect classes such as gender and illegitimacy.”); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court To Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 495 (2012) (“The Supreme Court reserved intermediate scrutiny for discrimination on the bases of gender and illegitimacy.”).

<sup>151</sup> See Comment, *Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence*, 132 U. PA. L. REV. 1547, 1548 (1984) (“Rationality scrutiny . . . is a much more deferential standard of review under which a statute can easily pass constitutional muster.”).

<sup>152</sup> Gunther, *supra* note 3, at 8.

<sup>153</sup> Comment, *supra* note 151, at 1567.

<sup>154</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 40 (1973) (“A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application

Given that race is a suspect classification, race-conscious measures fall under strict scrutiny, presenting school districts seeking to promote diversity with a very difficult and sometimes impossible standard of review.<sup>155</sup> The Supreme Court has indicated that both beneficial and invidious uses of race trigger strict scrutiny:

all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding benign state and federal racial classifications to different standards does not square with them. A free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.<sup>156</sup>

Given the Supreme Court’s equally stringent approach to benign use of race, it is time to consider a new approach. Benign racial classifications should be framed—and therefore, protected—as government speech.

To set the stage for the discussion of the analysis that could support a government-speech approach to benign use of race in public schools, the next Part presents a summary of the facts and procedural history of *Parents Involved*.

### III. SYNOPSIS OF THE JOURNEY OF THE *PARENTS INVOLVED* CASE TO THE SUPREME COURT

In *Parents Involved*, the United States Supreme Court consolidated two cases to consider whether public schools can voluntarily use race-conscious measures to assign students to schools.<sup>157</sup> In one of the

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of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.”)

<sup>155</sup> See *supra* note 3 and accompanying text.

<sup>156</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (internal quotation marks, brackets, and citations omitted).

<sup>157</sup> *Parents Involved IV*, 551 U.S. 701, 710-11 (2007).

cases,<sup>158</sup> the plaintiff nonprofit Parents Involved in Community School sued in federal district court to challenge Seattle School District No. 1's use of racial tiebreakers for student assignments to its high schools.<sup>159</sup> The Equal Protection Clause challenge was brought on behalf of "parents of children who have been or may be denied assignment to their chosen high school in the district because of their race."<sup>160</sup>

Seattle School District No. 1 considered an applicant's race as well as the impact on racial balance of a school's racial demographics in student assignments.<sup>161</sup> The racial tiebreaker categorized students into one of two racial groups: white or nonwhite.<sup>162</sup> The district's overall racial demographics provided the baseline;<sup>163</sup> approximately fifty-nine percent of the students in the district were nonwhite and forty-one percent white.<sup>164</sup> If a school's racial demographic varied ten percent above or below this baseline, the school was deemed racially imbalanced.<sup>165</sup> Specifically, "[i]f an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls 'integration positive,' and the district employs a tiebreaker that selects for assignment students whose race will serve to bring the school into balance."<sup>166</sup> As the Supreme Court later pointed out, unlike school districts under court-ordered desegregation, Seattle's plan was not a response to a history of district-sanctioned segregation.<sup>167</sup>

The district court held that the racial tiebreaker passed constitutional muster under the strict-scrutiny standard of review.<sup>168</sup> A panel of the United States Court of Appeals for the Ninth Circuit disagreed.<sup>169</sup> The panel ruled that the school district had compelling reasons for its racial tiebreaker program: interests in student diversity and in avoiding racial

<sup>158</sup> *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1* (*Parents Involved I*), 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

<sup>159</sup> *Id.* at 1225-26.

<sup>160</sup> *Parents Involved IV*, 551 U.S. at 713; *see also Parents Involved I*, 137 F. Supp. 2d at 1226.

<sup>161</sup> *Parents Involved I*, 137 F. Supp. 2d at 1226.

<sup>162</sup> *Parents Involved IV*, 551 U.S. at 723.

<sup>163</sup> *Parents Involved I*, 137 F. Supp. 2d at 1226.

<sup>164</sup> *Parents Involved IV*, 551 U.S. at 712.

<sup>165</sup> *Parents Involved I*, F. Supp. 2d at 1226 n.2; *Parents Involved IV*, 551 U.S. at 712.

<sup>166</sup> *Parents Involved IV*, 551 U.S. at 712 (internal quotation marks omitted).

<sup>167</sup> *Id.* ("Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation.")

<sup>168</sup> *Parents Involved I*, 137 F. Supp. 2d at 1240.

<sup>169</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (*Parents Involved II*), 377 F.3d 949, 980 (9th Cir. 2004) ("Its racial tiebreaker . . . plainly fails the narrow tailoring component of the Constitution's strict scrutiny test.").

isolation of its students.<sup>170</sup> The panel, however, found the tiebreaker was not narrowly tailored to achieve those interests.<sup>171</sup> The Ninth Circuit granted rehearing en banc and reversed the panel, specifically ruling that the tiebreaker was narrowly tailored to achieve the compelling interests.<sup>172</sup>

In the second of the consolidated cases, *McFarland v. Jefferson County Public Schools*,<sup>173</sup> Crystal Meredith, among other plaintiffs, challenged Jefferson County Public Schools' use of a race-conscious student assignment program under the Equal Protection Clause after her son, Joshua McDonald, was denied a transfer to his school of preference.<sup>174</sup> The transfer was denied because it would have negatively impacted racial balance.<sup>175</sup>

The district's voluntary race-conscious student-assignment plan sought to increase black student enrollment at each of its non-magnet elementary schools to "at least 15% and no more than 50%" of the school's student population.<sup>176</sup> While approximately thirty-four percent of the district's students were black, most of the remaining sixty-six percent were white.<sup>177</sup> The district's plan classified students into one of two racial categories: black or other.<sup>178</sup>

The Supreme Court later pointed out that while there was a history of segregated schools in Jefferson County Public Schools, the district had attained unitary status in 2000.<sup>179</sup> Despite attaining unitary status, the district chose to implement the voluntary race-conscious plan so that the benefits it gained while under a desegregation decree would not be reversed.<sup>180</sup> The district court ruled that the school district had a compelling interest in racial diversity that justified its race-conscious

<sup>170</sup> *Id.* at 964.

<sup>171</sup> *Id.* at 980.

<sup>172</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Parents Involved III)*, 426 F.3d 1162, 1166, 1172 (9th Cir. 2005) (en banc).

<sup>173</sup> *McFarland v. Jefferson Cnty. Pub. Sch. (McFarland I)*, 330 F. Supp. 2d 834 (W.D. Ky. 2004).

<sup>174</sup> *Id.* at 836, 837 n.3; see also *Parents Involved IV*, 551 U.S. 701, 717 (2007).

<sup>175</sup> *McFarland I*, 330 F. Supp. 2d at 837 n.3; see also *Parents Involved IV*, 551 U.S. at 717.

<sup>176</sup> *McFarland I*, 330 F. Supp. 2d at 842 ("This reflects a broad range equally above and below Black student enrollment systemwide.").

<sup>177</sup> *Id.* at 840.

<sup>178</sup> *Parents Involved IV*, 551 U.S. at 723; *McFarland I*, 330 F. Supp. 2d at 840 n.6.

<sup>179</sup> *Parents Involved IV*, 551 U.S. at 715-16 (noting the procedural history leading to the district court's finding that Jefferson County had attained unitary status). Unitary status is attained when a district no longer runs a dual segregated school system. See Joseph O. Oluwole & Preston C. Green, III, *Charter Schools: Racial-Balancing Provisions and Parents Involved*, 61 ARK. L. REV. 1, 15 (2008).

<sup>180</sup> *McFarland I*, 330 F. Supp. 2d at 841-42.



assignment plan.<sup>181</sup> Additionally, the district court ruled that the plan was narrowly tailored to achieve the compelling interest.<sup>182</sup> The United States Court of Appeals for the Sixth Circuit affirmed.<sup>183</sup>

#### IV. GOVERNMENT-SPEECH DOCTRINE AND THE *PARENTS INVOLVED* DECISION

This Part examines the *Parents Involved* decision for support to characterize voluntary race-conscious student-assignment plans as government speech. The Justices in *Parents Involved*<sup>184</sup> recognized the legitimacy of some education policy goals or positions that could support use of race-conscious measures. Accordingly, *Parents Involved* offers support that race-conscious policies could be protected under the government-speech doctrine. By replacing the traditional Equal Protection Clause framework, the government-speech doctrine would eliminate the requirement that race-conscious programs be narrowly tailored to the government's compelling interest in diverse educational settings. Without the narrow-tailoring requirement, the assignment plans at issue in *Parents Involved* would have been found constitutional.<sup>185</sup>

While the Justices analyzed the *Parents Involved* case under the Equal Protection Clause, nuances of the government-speech doctrine can be found in the Justices' compelling-interest analysis. Chief Justice Roberts, writing for the Court, recognized two compelling policy goals or positions for race-conscious assignment plans, interests that embody government messages.<sup>186</sup> First is the remedial interest: if the government has intentionally sent a message that some races are inferior or superior, it can change its message through race-conscious measures designed to correct the vestiges of that past intentional discrimination.<sup>187</sup> The Court

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<sup>181</sup> *Parents Involved IV*, 551 U.S. at 717-18.

<sup>182</sup> *Id.*

<sup>183</sup> *McFarland v. Jefferson Cnty. Pub. Sch. (McFarland II)*, 416 F.3d 513, 514 (6th Cir. 2005).

<sup>184</sup> Chief Justice Roberts wrote the plurality opinion, and Justices Alito, Thomas, and Scalia joined that opinion. *Parents Involved IV*, 551 U.S. at 708. Justice Kennedy—the swing vote in *Parents Involved IV*—concurred in the judgment and wrote a separate opinion. *Id.* at 782. Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Ginsburg, and Souter, and Justice Stevens wrote a brief dissent. *Id.* at 798, 803.

<sup>185</sup> See *infra* notes 198, 200 and accompanying text.

<sup>186</sup> *Parents Involved IV*, 551 U.S. at 720-22. The Court appeared to indicate that it is open to adding other compelling interests in the future. See *id.* at 720 (“Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling.” (emphasis added)).

<sup>187</sup> *Id.* at 720 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)); see also *id.* at 793-96 (Kennedy, J., concurring) (discussing remedial programs designed to remedy past intentional discrimination).

found that Jefferson County Public Schools did not act with a remedial purpose, because the district had attained unitary status in 2000.<sup>188</sup> As for Seattle School District No. 1, the Court concluded that since the district had never officially sanctioned a message of racial discrimination, its race-conscious plan was not remedial.<sup>189</sup> The Court stated that, for both school districts, the “use of race must be justified on some other basis” than remedial.<sup>190</sup>

A second policy goal or position the Court recognized was diversity in higher education.<sup>191</sup> The Court noted that an acceptable policy would not focus solely on race; rather, diversity must include a broad range of factors such as viewpoints, ideas, and culture that could add to student diversity.<sup>192</sup> In fact, the Court noted that, in the past, it had tied its approval of race-conscious measures designed to achieve diversity in higher education to speech.<sup>193</sup> In essence, the Court itself has associated race-conscious measures with speech. Justice Kennedy indicated, in his concurrence, that diversity could be a compelling interest at the elementary and secondary education levels as well.<sup>194</sup>

Seattle and Jefferson County sought to convey through their plans that their schools were not racially concentrated and that they favored racial integration.<sup>195</sup> The *Parents Involved* plurality rejected the districts’ focus on racial integration as justification for the plans.<sup>196</sup> The districts also contended that they sought to provide students, through their plans, the benefits of socializing with other races.<sup>197</sup> The plurality rejected this message of socialization as justification for the plans, under the narrow-tailoring requirement, because the plans were tied to racial diversity rather the broader diversity referenced above.<sup>198</sup>

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<sup>188</sup> *Id.* at 720-21.

<sup>189</sup> *Parents Involved IV*, 551 U.S. at 720.

<sup>190</sup> *Id.* at 721.

<sup>191</sup> *Id.* at 722 (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

<sup>192</sup> *Id.* at 722-23, 726.

<sup>193</sup> *See id.* at 724 (“In upholding the [race-conscious] admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” (internal quotation marks omitted)).

<sup>194</sup> *See id.* at 791-93 (Kennedy, J., concurring). Justice Kennedy wrote his concurring opinion to discuss his disagreement with the plurality of Chief Justice Roberts and Justices Alito, Scalia, and Thomas, and the dissent authored by Justice Breyer. *See id.* at 782-83.

<sup>195</sup> *Id.* at 725-26 (plurality opinion).

<sup>196</sup> *Id.* at 726.

<sup>197</sup> *Id.* at 725-26.

<sup>198</sup> *Id.* at 726 (“[T]he racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.”).

The districts sought to increase the visibility of minorities and discourage racial isolation.<sup>199</sup> The plurality similarly rejected this policy under its narrow-tailoring analysis because the messages relied on racial diversity rather than broader diversity.<sup>200</sup> The plurality—Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito—indicated that constitutionally permissible policies must regard people as individuals rather than mere members of a racial group; in other words, the government position or policy goal must further individuality rather than racial group affiliation.<sup>201</sup> Further, the plurality admonished that race, and its relevance to governmental decisionmaking, should be deemphasized.<sup>202</sup>

The plurality noted that while districts may design their plans to remedy past *intentional* discrimination,<sup>203</sup> they cannot rely on the goal of redressing past general societal discrimination.<sup>204</sup> The plurality reasoned that societal discrimination is “too amorphous a basis for imposing a racially classified remedy.”<sup>205</sup> Consequently, the plurality of Justices ruled that remedying societal discrimination does not constitute a compelling interest.<sup>206</sup> Moreover, they stated that a “governmental agency’s interest in remedying societal discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster.”<sup>207</sup>

The plurality of Justices opined that even benign use of race is costly and conveys an “odious” message to “a free people whose institutions are founded upon the doctrine of equality.”<sup>208</sup> According to the plurality, voluntary race-conscious plans convey messages of “racial

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<sup>199</sup> *Id.* at 727-28.

<sup>200</sup> *Id.* at 726.

<sup>201</sup> *Id.* at 730 (“[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”).

<sup>202</sup> *Id.* at 730-31. The plurality reasoned that “[a]llowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race will never be achieved.” *Id.* at 730 (internal quotation marks and brackets omitted) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

<sup>203</sup> *Id.* at 720-21.

<sup>204</sup> *Id.* at 731.

<sup>205</sup> *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)).

<sup>206</sup> *Id.* (citing *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996)).

<sup>207</sup> *Id.* at 731-32 (internal quotation marks omitted) (quoting *Wygant*, 476 U.S. at 288 (O’Connor, J., concurring in part and concurring in the judgment)).

<sup>208</sup> *Id.* at 745-46 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995)).

inferiority” and “racial hostility.”<sup>209</sup> Writing for the plurality, Chief Justice Roberts stated that such plans send a message to citizens that their government “demeans the dignity and worth of a person.”<sup>210</sup> Additionally, the plurality opined that the plans “reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.”<sup>211</sup>

Unfortunately, the plurality attached no constitutional difference to the messages sent through invidious and benign uses of race.<sup>212</sup> In other words, it makes no difference whether a race-conscious plan promotes racial integration or racial resegregation, racial hostility or race harmony, racial isolation or avoidance of racial isolation, visibility of minorities or invisibility of minorities, racial inclusion or racial exclusion; the plurality rejects these messages simply because they are race-conscious. It is likely from the plurality opinion that Justices Alito, Scalia, Thomas, and Chief Justice Roberts would not be amenable to reviewing race-conscious student-assignment plans under the government-speech doctrine, particularly because of the broad immunity the doctrine affords government speech. Given their aversion to benign and invidious race-conscious plans alike, if these Justices choose to review race-conscious measures under the government-speech doctrine, they could opt to carve out an exception to the doctrine for race-conscious measures. Under such a scenario, the Justices would concede that voluntary race-conscious measures constitute government speech, while nonetheless holding that, unlike all other forms of government speech, race-conscious measures are not entitled to the broad immunity of the doctrine.

Justice Thomas, who wrote a separate concurrence, went even further than his plurality brethren. While the plurality would support race-conscious measures that satisfy the narrow-tailoring requirements discussed above, Justice Thomas made clear his general view that all government uses of race are unconstitutional.<sup>213</sup> Like the other Justices in the plurality, Justice Thomas stated that school districts can use race-conscious measures to correct past intentional discrimination but not

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<sup>209</sup> *Id.* at 746 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

<sup>212</sup> *Id.* at 740-48.

<sup>213</sup> *Id.* at 752 (Thomas, J., concurring) (“[A]s a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.”); *see also id.* at 751 (“The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives.”).

racial imbalance in schools.<sup>214</sup> Even then, unlike his plurality brethren, he believes that such acceptable remediation is “a *one-time process* involving the redress of a discrete legal injury inflicted by an identified entity.”<sup>215</sup> According to Justice Thomas, “the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation.”<sup>216</sup> He rejected the Seattle and Jefferson County plans as failing to serve acceptable race-based compelling interests because they lacked a “cognizable interest in remediation.”<sup>217</sup>

Justice Thomas stated that race-conscious plans send a demeaning message: “every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>218</sup> In other words, he believes that benign and invidious race-conscious plans alike send demeaning messages. Perhaps signaling where Justice Thomas would stand with respect to government speech and race-conscious measures, he declared that “[a]ssertions of general societal discrimination are plainly insufficient.”<sup>219</sup> In Justice Thomas’s view, voluntary race-conscious plans convey a message of “racial paternalism” with effects that are “poisonous and pernicious as any other form of discrimination.”<sup>220</sup> Justice Thomas also rejected race-conscious government actions designed to unite the races.<sup>221</sup> He believes such actions create “resentment,” “racial tension,” and “pit[] the races against one another.”<sup>222</sup>

Based on his fervent opposition to race-conscious measures, it is unlikely that Justice Thomas would accept the government-speech doctrine’s principle of judicial deference to school-board speech.<sup>223</sup> For instance, in opposing deference in *Parents Involved*, he essentially argued that the Court cannot approve school use of race-conscious

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<sup>214</sup> *Id.* at 755-56.

<sup>215</sup> *Id.* at 756 (emphasis added).

<sup>216</sup> *Id.* (citing *Freeman v. Pitts*, 503 U.S. 467, 496 (1992); *Missouri v. Jenkins*, 515 U.S. 70, 118 (1995) (Thomas, J., concurring)).

<sup>217</sup> *Id.* at 757.

<sup>218</sup> *Id.* at 752 (citing *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

<sup>219</sup> *Id.* at 755 (emphasis added) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499, 504 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978)).

<sup>220</sup> *Id.* at 759 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 766 (“To adopt the dissent’s deferential approach [to the school districts] would be to abdicate our constitutional responsibilities.”).

measures to create a more inclusive America.<sup>224</sup> Justice Thomas also rejected the message of pluralism as justification for the race-conscious plans.<sup>225</sup>

The race-based government speech of “socialization and good citizenship” would not be sufficient for Justice Thomas to uphold race-based plans.<sup>226</sup> Neither would an educational message that promotes “the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation” satisfy Justice Thomas.<sup>227</sup> He dismissed these “lessons” as “sweeping,” “generic,” and “not uniquely relevant to schools or uniquely teachable in a formal educational setting.”<sup>228</sup>

Justice Thomas, given his parameters for race-conscious student-assignment plans that would serve a compelling interest, would likely oppose a move to government-speech jurisprudence for race-conscious plans:

[T]he school boards cannot plausibly maintain that their plans further a compelling interest. . . . [O]nly those measures the State must take to provide a bulwark against anarchy . . . or to prevent violence and a government’s effort to remedy past discrimination for which it is responsible constitute compelling interests. Neither of the parties has argued—nor could they—that race-based student assignment is necessary to provide a bulwark against anarchy or to prevent violence.<sup>229</sup>

Justice Thomas’s opposition comes from his belief in and advocacy of a colorblind Constitution.<sup>230</sup> In fact, he stated that he is “quite comfortable in the company” of those who espouse that the United States Constitution is blind to the color of the nation’s citizens.<sup>231</sup>

Justice Kennedy—a critical and likely swing vote on future race-conscious student-assignment plans<sup>232</sup>—has given some indication of where he might stand on race-conscious government-speech

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<sup>224</sup> *Id.* at 766 n.14.

<sup>225</sup> *Id.* at 766.

<sup>226</sup> *Id.* at 767-68.

<sup>227</sup> *Id.* at 767 (criticizing this “democratic interest” as “limitless in scope”).

<sup>228</sup> *Id.* (internal quotation marks omitted) (citing *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part)).

<sup>229</sup> *Id.* at 771 (internal quotation marks and citations omitted).

<sup>230</sup> *Id.* at 772.

<sup>231</sup> *Id.*

<sup>232</sup> See generally Preston Green, III, Bruce D. Baker & Joseph O. Oluwole, *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283 (2008); Oluwole & Green, *supra* note 179.

jurisprudence. Justice Kennedy began his *Parents Involved* concurrence by acknowledging and lauding the message of racial unity that the districts sought to convey through their race-conscious plans:

[S]chools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.<sup>233</sup>

He expressed concern, however, that the districts' race-conscious plans might communicate and indeed "entrench the very prejudices we seek to overcome."<sup>234</sup> In essence, Justice Kennedy considered speech crucial to the analysis of race-conscious plans.<sup>235</sup>

Justice Kennedy expressed anxiety that official racial labeling could be a threat to individuality.<sup>236</sup> Labeling is, of course, a form of speech. Justice Kennedy's concern arose from the fact that labeling communicates a message that is "inconsistent with the dignity of individuals in our society."<sup>237</sup> Further, he observed that a racial label is "a label that an individual is powerless to change."<sup>238</sup>

Justice Kennedy rejects messages of racial inferiority, calling such messages illegitimate.<sup>239</sup> He approves a message of equal opportunity, which he characterizes as "legitimate."<sup>240</sup> He also made it clear that he rejects the message of racial isolation, noting that "[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."<sup>241</sup> According to him, school districts may properly attempt to correct racial isolation as well as

<sup>233</sup> *Parents Involved IV*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>234</sup> *Id.*

<sup>235</sup> The speech here is a prejudicial message that could come from racial grouping/labeling. Justice Kennedy warned that such speech should be cautiously managed lest it communicate divisiveness. *Id.* at 797. He also expressed fears that such speech could communicate to students that they are stigmatized. *Id.* at 798.

<sup>236</sup> *Id.* at 797.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 783 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>240</sup> *Id.* at 787-88.

<sup>241</sup> *Id.* at 788.

“de facto resegregation in schooling.”<sup>242</sup> He stated that there is a compelling interest in avoiding isolation, an interest that districts are free to pursue.<sup>243</sup>

Despite his concerns regarding racial labeling, Justice Kennedy declared that school districts can pursue diversity as a compelling interest.<sup>244</sup> He accepts a school district’s efforts to achieve diversity when race is one of the components of the definition.<sup>245</sup> He is evidently open to benign race-conscious plans that *explain* when and how race will be used, and clearly identify who will make the race-based decisions.<sup>246</sup> He also requires that school districts provide a “convincing explanation” for their plans’ designs.<sup>247</sup>

Justice Kennedy cautioned that when the message is racial integration, “*ambiguities* become all the more problematic in light of the contradictions and confusions that result.”<sup>248</sup> In other words, it is likely that a more precisely defined race-conscious plan could meet Justice Kennedy’s approval.<sup>249</sup> He requires that districts’ plans “first define what it means to be of a race. Who exactly is white and who is nonwhite?”<sup>250</sup> The Jefferson County and Seattle plans did not include this information and Justice Kennedy found that the language used to describe the plans was imprecise.<sup>251</sup>

Justice Kennedy indicated that, while he supports elementary and secondary schools’ use of race-conscious plans to achieve diversity, schools must not sacrifice student individuality.<sup>252</sup> He stated that:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and

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<sup>242</sup> *Id.* See Carter, *supra* note 6, at 21 (characterizing de facto segregation as expression).

<sup>243</sup> *Parents Involved IV*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>244</sup> *Id.* at 783; *see also id.* at 798 (“[N]eighborhoods in our communities do not reflect the diversity of our Nation as a whole.”).

<sup>245</sup> *Id.* at 788, 798 (“Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”).

<sup>246</sup> *See id.* at 783-85.

<sup>247</sup> *Id.* at 787.

<sup>248</sup> *Id.* at 785 (emphasis added).

<sup>249</sup> *Id.* at 785-87.

<sup>250</sup> *Id.* at 797.

<sup>251</sup> *See id.* at 786-87 (using language such as “fails to make clear,” “failed to explain why,” and “does not explain how”).

<sup>252</sup> *See id.* at 787-90.



without treating each student in different fashion solely on the basis of a systematic, individual typing by race.<sup>253</sup>

Under a government-speech analysis, Justice Kennedy would likely allow districts to use race-conscious measures to communicate their message of “bringing together students of diverse backgrounds and races” through such measures as

strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.<sup>254</sup>

Justice Kennedy favors these measures because he believes that, while they are race-conscious, they do not sacrifice student individuality.<sup>255</sup> He stated that these measures are not “based on a classification that *tells* each student he or she is to be defined by race.”<sup>256</sup> In essence, Justice Kennedy cautioned against measures telling individual students that their primary or only identity is race. With respect to these race-conscious measures, he opined:

Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.<sup>257</sup>

Justice Kennedy concluded that school districts should not view the Court’s decision as preventing their efforts to bring students of diverse racial background together.<sup>258</sup> In other words, Justice Kennedy does not want to disempower school districts. Indeed, one could conclude from the above discussion that Justice Kennedy would approve race-conscious measures promoting such messages as diversity, equal education opportunity and racial unity, as long as those measures do not also

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<sup>253</sup> *Id.* at 788-89.

<sup>254</sup> *Id.* at 789 (revealing that, under Equal Protection Clause jurisprudence, Justice Kennedy would not apply strict scrutiny to such race-conscious measures). Justice Thomas’s preference for the colorblind Constitution strongly indicates that he would reject these measures. *See supra* notes 230-231 and accompanying text.

<sup>255</sup> *Parents Involved IV*, 551 U.S. at 789.

<sup>256</sup> *Id.* (emphasis added).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 798.

convey messages of racial hostility by individually typing students by race.

In the dissent, Justice Breyer made it clear that the dissenting Justices would approve race-conscious measures.<sup>259</sup> According to Justice Breyer, the message of the race-conscious plans of Jefferson County Public Schools and Seattle School District No. 1 was “racially integrated education . . . long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake.”<sup>260</sup> He stated that the Constitution authorizes local school districts to choose race-conscious measures to convey this message.<sup>261</sup>

Recall that the immunity provided to the government by the government-speech doctrine implies judicial deference to the government when it speaks.<sup>262</sup> In essence, the government-speech doctrine embraces *local* decisionmaking. Justice Breyer emphasized this rationale in this opinion. For example, he pointed out that “the Court left much of the determination of how to achieve integration to the judgment of local communities.”<sup>263</sup> Further, he highlighted the fact that the *Brown* Court had ruled that:

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<sup>259</sup> See generally *id.* at 803-68 (Breyer, J., dissenting, joined by Ginsburg, Stevens, and Souter, JJ.). Of course, the dissenting Justices support race-conscious plans conveying remedial messages. See *id.* at 818-20, 838 (“[T]here is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation.”). While Justice Stevens agreed with Justice Breyer’s dissenting opinion, he wrote a separate dissenting opinion to emphasize his belief that race-conscious measures that communicate the inclusion of racial minorities, particularly in schools, should not be prohibited. *Id.* at 798-803 (Stevens, J., dissenting).

<sup>260</sup> *Id.* at 803 (Breyer, J., dissenting); see also *id.* at 805-06.

<sup>261</sup> *Id.* at 803-04, 823; see also *id.* at 821 (“A court finding of *de jure* segregation cannot be the crucial variable.”). Justice Breyer also declared:

Louisville’s history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view?

Are courts really to treat as merely *de facto* segregated those school districts that avoided a federal order by voluntarily complying with *Brown*’s requirements? This Court has previously done just the opposite, permitting a race-conscious remedy without any kind of court decree. Because the Constitution emphatically does not forbid the use of race-conscious measures by districts in the South that voluntarily desegregated their schools, on what basis does the plurality claim that the law forbids Seattle to do the same?

*Id.* at 821-22 (citations omitted).

<sup>262</sup> See Gey, *supra* note 111, at 1262. (“Government speech claims always arise in the context of First Amendment disputes with private speakers, and in these cases the private speakers lose their First Amendment claim not because the Court views the private speakers’ expressive claims as weak, but rather because the Court views the government’s competing expressive interests as stronger.”); Blocher, *supra* note 18, at 697, 711; Cambron-McCabe, *supra* note 119, at 754, 773.

<sup>263</sup> *Parents Involved IV*, 551 U.S. at 804 (Breyer, J. dissenting) (referring to the Supreme Court’s decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities.*<sup>264</sup>

This quote also reveals that Justice Breyer and his dissenting colleagues endorse race-conscious measures aimed at pluralism. This pluralism policy includes an “interest in producing an educational environment that reflects the pluralistic society in which our children will live.”<sup>265</sup> It also aligns with other laudable goals the dissenting Justices support: the racial harmony and cooperation evident in children of all races playing and working together.<sup>266</sup>

Expounding on the local control rationale, Justice Breyer observed that the “complexity” and “practical difficulties”<sup>267</sup> of achieving racially integrated schools justify giving school districts flexibility to implement race-conscious plans.<sup>268</sup> He opined that evidence in favor of an educational interest in racially integrated schools is so strong that it provides a reasonable basis to find the interest compelling.<sup>269</sup>

Justice Breyer expressed his approval of racial balancing as he advocated for deference to local officials in pursuing such plans.<sup>270</sup> Specifically, he noted that the Supreme Court has ruled that schools “have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”<sup>271</sup> This language indicates that the dissenting Justices would support school districts that choose, under the government-speech doctrine, to favor racial balancing policies over race neutral policies.

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<sup>264</sup> *Id.* at 804-05 (emphasis added) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

<sup>265</sup> *Id.* at 840 (internal quotation marks omitted) (citing *Swann*, 402 U.S. at 16).

<sup>266</sup> *See id.* at 841.

<sup>267</sup> *Id.* at 822.

<sup>268</sup> *See id.*

<sup>269</sup> *Id.* at 839.

<sup>270</sup> *Id.* at 823-24.

<sup>271</sup> *Id.* (internal quotations omitted) (quoting *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971)); *see also id.* at 824 (“These statements nowhere suggest that this freedom is limited to school districts where court-ordered desegregation measures are also in effect.”).

The dissenting Justices endorsed fostering unity among the races.<sup>272</sup> They rejected Justice Thomas's "colorblind" message, while emphasizing that messages designed to discriminate against minorities should not be equated, in constitutional terms, with messages designed to include them.<sup>273</sup>

Recall that a rationale for the government-speech doctrine is that citizens may hold the government accountable for its speech at the ballot box.<sup>274</sup> In *Parents Involved*, the dissent emphasized a similar rationale for their support of the voluntary race conscious plans of Jefferson County and Seattle School District No. 1:

[A] judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks they mention, for example, helping to end racial isolation or to achieve a diverse student body in public schools.<sup>275</sup>

Justice Breyer found the Jefferson County and Seattle School District plans acceptable because they did not seek to "pit the races against each other or otherwise significantly exacerbate racial tensions."<sup>276</sup> The districts had an acceptable message: the voluntary race-conscious plans were designed to foster racial unity rather than racial isolation.<sup>277</sup> Other forms of acceptable speech Justice Breyer recognized were the promotion of less racial prejudice and "interracial sociability and friendship."<sup>278</sup> He reasoned that "[p]rimary and secondary schools are where the education of this Nation's children

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<sup>272</sup> See *id.* at 829.

<sup>273</sup> *Id.* at 830. Justice Breyer, writing for the dissenting Justices, reasoned that "[t]he constitutional principle enunciated in *Swann*, reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance. And if the plurality now chooses to reject that principle . . . it must explain to the courts and to the Nation *why* it would abandon guidance set forth many years before, guidance that countless others have built upon over time, and which the law has continuously embodied." *Id.* at 831 (citation omitted).

<sup>274</sup> See *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.")

<sup>275</sup> *Parents Involved IV*, 551 U.S. at 836-37 (Breyer, J., dissenting).

<sup>276</sup> *Id.* at 835.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 841.

begins, where each of us begins to absorb those values we carry with us to the end of our days.”<sup>279</sup>

It is evident from the above discussion of the *Parents Involved* dissent that there is support on the Court for deference to school districts when it comes to benign use of race. Clearly, a faction of the Court does not support the plurality’s redlining of benign voluntary race-conscious plans.<sup>280</sup> Consequently, a school district’s advocacy for diversity, racial harmony, pluralism, interracial sociability through race-conscious policies might survive. Advocates for diversity, racial unity, pluralism, racial integration and racial inclusion in elementary and secondary education must not give up the fight now. For we know that “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>281</sup> If schools are allowed to implement race-conscious plans conveying the various messages above, the nation will hopefully progress into an era when there may no longer be a need for race-conscious measures.

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<sup>279</sup> *Id.* at 842; *see also id.* at 843 (“The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general societal discrimination, but of primary and secondary school segregation; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not compelling, what is?” (internal quotation marks and citations omitted)).

<sup>280</sup> While Justices Stevens and Souter have retired from the Court, Justices Kagan and Sotomayor—two Justices nominated by the Obama administration to replace Stevens and Souter respectively—are likely to continue the support for race-conscious measures. *See, e.g.,* Calhoun v. U.S., 133 S. Ct. 1136 (2013) (setting forth Justice Sotomayor’s strongly-worded statements against racial prejudice); Richard L. Hasen, *End Of The Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 242-251 (2013) (describing political polarization of the Supreme Court); Vikram David Amar, *Is Honesty The Best (Judicial) Policy in Affirmative Action Cases? Fisher v. University Of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 78, 85 & n.39 (2012) (noting that Justice Kagan recused herself from the case and suggesting that with respect to the *Fisher* case, which regards race-based affirmative action in higher education, Justices Ginsburg, Sotomayor, and Breyer would vote together while Justices Thomas, Scalia, Roberts and Alito would vote together). *See also id.* at 85 n.39 (“Justice Sotomayor has yet to vote in a conventional race-based affirmative action case at the Court.”). Further, during a 2001 speech, Justice Sotomayor spoke about the impact of a judge’s race on his or her judicial decisions: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. TIMES (May 14, 2009), [www.nytimes.com/2009/05/15/us/15judge.html](http://www.nytimes.com/2009/05/15/us/15judge.html). *See* Kenneth Duvall, *The Defendant Was Not Heard . . . Now What?: Prejudice Analysis, Harmless Error Review, And the Right to Testify*, 35 HAMLINE L. REV. 279, 320 (2012) (noting that “Justice Kagan often votes with Justice Sotomayor—they voted together more often last term than any other Supreme Court pairing save Justices Roberts and Alito”).

<sup>281</sup> *Id.* at 842 (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)); *see also id.* at 868 (“The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise.”).

## CONCLUSION

It is evident from *Parents Involved* that at least five of the Justices found merit in the pursuit of diversity through voluntary race-conscious student assignment plans.<sup>282</sup> Also evident is that Justice Kennedy does not support race-conscious plans that are not narrowly tailored.<sup>283</sup> As mentioned above, the narrow tailoring requirement in Equal Protection analysis is the death knell of benign voluntary race-conscious measures.<sup>284</sup> Given the apparently insurmountable nature of that requirement, the government-speech doctrine may provide a needed opening for school districts that seek to promote diversity and racial integration. Given that “such messages regarding the continued salience of race are both generated by and subject to correction through the political process, government-speech principles counsel against allowing individuals to transform their disagreements with those messages into constitutional claims.”<sup>285</sup>

As Professor Carter points out, “[r]ace consciousness itself has become a constitutional harm, regardless of its tangible effects.”<sup>286</sup> A government-speech jurisprudence might help us reverse this. Benign voluntary race-conscious plans would likely meet the *Johanns* index of control noted above,<sup>287</sup> as the plans are “effectively controlled”<sup>288</sup> by the local school boards. Schools can ensure that their plans meet the *Johanns* index of control by establishing the overarching message the plans convey and by retaining final approval authority over all aspects of the plans.

The government-speech jurisprudence would not require that school districts be viewpoint-neutral or content-neutral with respect to benign race-conscious plans. Besides, as Professor Carter observes, the judiciary should not dictate to or second-guess a majority-white community that decides it is willing to “disadvantage itself for what it sees as a greater social good.”<sup>289</sup>

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<sup>282</sup> *Id.* at 865.

<sup>283</sup> *Id.* at 784-87 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>284</sup> See *supra* notes 140-143 and accompanying text.

<sup>285</sup> Carter, *supra* note 6, at 43.

<sup>286</sup> *Id.* at 2.

<sup>287</sup> See *supra* note 67.

<sup>288</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560 (2005).

<sup>289</sup> Carter, *supra* note 6, at 55 (“When a numerical and electoral majority that has not faced a history of subordination or stigmatization has freely chosen to disadvantage itself for what it sees as a greater social good, that majority is able to remedy its situation through the ballot box. There would presumably be no need for a judicial check on the majoritarian process because the self-disadvantaging group is the majority.”).

We must not confuse government speech that seeks to segregate races from speech that seeks to include minorities in our nation's future. Invidious and pernicious race-conscious measures must remain subject to strict scrutiny even while benign voluntary race-conscious measures move to review under government-speech doctrine. This is critical because segregation policies were not only repugnant for defining minorities as inferior, "they perpetuated a *caste system* rooted in the institutions of *slavery* and 80 years of legalized subordination."<sup>290</sup>

Those who oppose the benign use of race should remember that "[t]he lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration."<sup>291</sup> To pretend that benign and invidious race-conscious plans are the same is wrong; for it is "a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined)."<sup>292</sup>

We must keep in mind that "judges are not well suited to act as school administrators."<sup>293</sup> Consequently, prudence cautions against judges dictating solutions that override local efforts to address resegregation. Unlike non-elected federal judges, school boards are accountable to their communities:

[A] school board is elected by the public, and until its current members are voted out of office, they "speak" for the school district through the policies they adopt. Furthermore, in the case of the typical school board, influence from the community does not end at the ballot box, but continues through publicly-held school board meetings at which parents and other interested parties may express satisfaction or dissatisfaction with the school board's policies or "speech."<sup>294</sup>

We must empower districts to use the tool of race-conscious programs that some districts now consider critical.<sup>295</sup> By continuing to

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<sup>290</sup> *Parents Involved IV*, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting) (emphasis added).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 848-49.

<sup>294</sup> *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000).

<sup>295</sup> *Parents Involved IV*, 551 U.S. at 862 (Breyer, J., dissenting); see also *id.* at 866 ("And what of respect for democratic local decisionmaking by States and school boards? For several decades this Court has rested its public school decisions upon *Swann's* basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of

apply the Equal Protection Clause strict-scrutiny analysis to benign race-conscious measures, we obstruct schools from promoting the compelling ideals of diversity and racial inclusion. If we continue on this path, advocates of race-conscious measures and our entire country should “fear the consequences of doing so for the law, for the schools, for the democratic process, and for America’s efforts to create, out of its diversity, one Nation.”<sup>296</sup>

In order not to undermine the efforts and messages of local school districts, benign voluntary race-conscious measures should be viewed as government speech. Under this approach, the electorate will be able to hold the government accountable, while districts will retain the flexibility and creativity to implement policies of pluralism, racial integration, and racial harmony. In so doing, we will equip students to deal with our pluralistic society and sustain the core values of our democracy. History has put us on notice that “the fate of race relations in this country depends upon unity among our children, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>297</sup> It is up to us—We the People—to “debate how best to educate the Nation’s children and how best to administer America’s schools to achieve that aim.”<sup>298</sup>

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race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.”).

<sup>296</sup> *Id.* at 863.

<sup>297</sup> *Id.* at 864 (internal quotation marks omitted) (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)).

<sup>298</sup> *Id.* at 862.