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THE SEATTLE AND LOUISVILLE SCHOOL CASES:  
THERE IS NO OTHER WAY

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In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>1</sup> the Supreme Court addressed two student assignment plans that relied upon race to determine which public schools certain children could attend. The Seattle suit challenged high school assignments; the Louisville action, elementary and middle school placements. The Court characterized each plan as voluntary rather than remedial and held that each violated the Fourteenth Amendment's Equal Protection Clause.

That judgment required Justice Kennedy's crucial fifth vote, and his concurring opinion explicitly declined to rule out the achievement of diversity as a compelling educational interest or to eliminate the utilization of all race-conscious means.<sup>2</sup> Nonetheless, *Parents Involved* goes a considerable way toward affirming that our common citizenship and shared humanity transcend differences of ethnicity and race and that a Republic riddled with race-conscious decisionmaking is not what America aspires to be.

Five Justices contributed opinions in this case, and the debate was as impassioned as one would expect a debate on race, schools, and the country's past and future course to be. In general, these high stakes elicited a high quality of judicial discourse. Yet this battle brought no peace or even truce, and indeed left only the impression that the Court's own decisions on the use of race in education remain in tension<sup>3</sup> and that the profound differences that persist within the Court and throughout the country on these questions will be argued just as heatedly another day.

I propose to examine the five opinions in three groups: first the Roberts court and plurality opinion and Thomas concurrence; next the Kennedy opinion concurring in part and concurring in the judgment; and then the Stevens and Breyer dissents. As a judge of an inferior court, I approach my task with the deepest respect for the Court and

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<sup>1</sup> 127 S. Ct. 2738 (2007).

<sup>2</sup> *Id.* at 2789, 2797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>3</sup> Compare, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("[W]e hold that the Law School has a compelling interest in attaining a diverse student body. The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."), with *Parents Involved*, 127 S. Ct. at 2754 ("The present cases [involving elementary and secondary schools] are not governed by *Grutter*.").

its members and in the hope that the candor necessary for worthwhile commentary is but a mark of appreciation for the conscientious manner in which that fine institution goes about its work.

### I. THE ROBERTS AND THOMAS OPINIONS

The Chief Justice appropriately took the lead opinion for himself. The tradition of Chief Justices writing on race and education, while hardly uniform, goes back to *Brown*<sup>4</sup> (Earl Warren) and *Swann*<sup>5</sup> (Warren Burger). Yet this case, unlike *Brown* and *Swann*, was not unanimous. In fact, the 5–4 decision, with crucial portions of the lead opinion not supported by a majority, was about as far from unanimity as a court could be. And this case, unlike *Brown* and *Swann*, did not vindicate the efforts of the parties seeking to achieve a greater degree of racial integration in our public schools.<sup>6</sup>

For these and other reasons, holding the Seattle and Louisville plans invalid portends a ferocious onslaught. It will be said that the very Court that led the fight for school desegregation turned history on its head; that the Court's decision served to perpetuate resegregative trends in public education already underway; that the Court allowed the fact of housing segregation to foreclose educational opportunities as well; that the Court forsook not only its traditions but also its respect for precedent; that a Court majority ostensibly opposed to activism was all too ready to practice it; and, most seriously, that the Court abandoned African Americans in their long struggle to achieve true equality in these United States. Justice Stevens expressed his "firm conviction that no Member of the Court that [he] joined in 1975 would have agreed with [the] decision."<sup>7</sup> Justice Breyer predicted the decision would be one that "the Court and the Nation will come to regret."<sup>8</sup> The *New York Times* warned that there "should be no mistaking just how radical this decision is."<sup>9</sup> And in the *Washington Post*, Eugene Robinson insisted that society's quest for fairness and equality could proceed only "by working around those dour men in black robes on Capitol Hill. They have decided to stand in the schoolhouse door."<sup>10</sup>

<sup>4</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>5</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>6</sup> In *Parents Involved*, the parties seeking to achieve a greater degree of integration were the school districts. *Parents Involved*, 127 S. Ct. at 2746. In *Brown* and *Swann*, they were the plaintiff schoolchildren and their parents. *Swann*, 402 U.S. at 7; *Brown*, 347 U.S. at 487.

<sup>7</sup> *Parents Involved*, 127 S. Ct. at 2800 (Stevens, J., dissenting).

<sup>8</sup> *Id.* at 2837 (Breyer, J., dissenting).

<sup>9</sup> Editorial, *Resegregation Now*, N.Y. TIMES, June 29, 2007, at A26.

<sup>10</sup> Eugene Robinson, Op-Ed., *Standing in the Schoolhouse Door*, WASH. POST, June 29, 2007, at A21.

The best of these arguments are not without poignancy and force. And the Supreme Court majority must have known for a certainty that all this and more was coming. It took some courage therefore for the Court plurality to express itself in such unequivocal terms. The Court could have seized upon some narrow defect in means and left it at that. It could have reserved judgment on the school's stated goals, holding simply that the goals themselves were only loosely correlated with school district demographics<sup>11</sup> and that racially neutral means, such as drawing attendance zones to achieve socioeconomic diversity,<sup>12</sup> showed promise of achieving them. That approach would have attracted the fifth vote (Justice Kennedy joined the Chief Justice's means-based scrutiny) and served the Chief Justice's stated preference for narrow, incrementalist rulings.<sup>13</sup>

But the Roberts opinion to its credit did much more. The concessions it made were only those recent precedent required it to make.<sup>14</sup> It limited the nonremedial state interest of diversity to the expressive interests unique to higher education.<sup>15</sup> It characterized the school boards' interest, by contrast, as that of simple racial balancing which, were it accepted as compelling, "would justify the imposition of racial proportionality throughout American society."<sup>16</sup> The opinion courted a powerful dissent which it then took on in hard-nosed terms.<sup>17</sup> It praised *Brown v. Board of Education* as unambiguously committed to the rejection of all forms of discrimination based on race.<sup>18</sup> And fi-

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<sup>11</sup> The Louisville school district is approximately 34% black and 66% white. *Parents Involved*, 127 S. Ct. at 2749. The district's plan required "all nonmagnet schools to maintain a minimum black enrollment of 15%, and a maximum black enrollment of 50 percent." *Id.* In Seattle District No. 1, the school population is approximately 41% white and 59% nonwhite. *Id.* at 2747. That district's plan applied a racial tiebreaker when a school was oversubscribed and deviated more than ten (later fifteen) percentage points from the district's overall racial composition. *Id.*

<sup>12</sup> Many school districts do this already. See RICHARD D. KAHLENBERG, THE CENTURY FOUND. A NEW WAY ON SCHOOL INTEGRATION 2-4 & n.10, available at <http://www.tcf.org/publications/education/schoolintegration.pdf>; *id.* at 2 ("Today about forty American school districts, with some 2.5 million students, are known to employ socioeconomic status as a factor in student assignment."); see also Amit R. Paley & Brigid Schulte, *Court Ruling Likely to Further Segregate Schools, Educators Say*, WASH. POST, June 30, 2007, at A4 (discussing a school district in Wake County, North Carolina, that utilizes socioeconomic status as a factor in student assignment).

<sup>13</sup> See Webcast: Chief Justice John G. Roberts, Commencement Address at Georgetown University Law Center (May 21, 2006), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144> ("If it is not necessary to decide more to dispose of the case, in my view, it is necessary not to decide more."); see also *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16.

<sup>14</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>15</sup> *Parents Involved*, 127 S. Ct. at 2754.

<sup>16</sup> *Id.* at 2757 (opinion of Roberts, C.J.).

<sup>17</sup> Part IV, replying to Justice Breyer, took up nearly one-third of the opinion.

<sup>18</sup> *Parents Involved*, 127 S. Ct. at 2768 (opinion of Roberts, C.J.).

nally: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>19</sup>

There are great risks in this sort of ringing clarity, particularly in an area so burdened by history, so fraught with contemporary controversy, and so open to strong opposing argument. But there are far greater risks in failing to defend a principle that is not easily sliced and diced or otherwise compromised. The clarity in the Chief Justice’s one concluding sentence ensures its endurance beyond the particulars of this debate. Dismissed by Justice Kennedy as insufficient,<sup>20</sup> derided by Justice Breyer as a “slogan,”<sup>21</sup> this sentence will make its way.

The sentence lacks the resonance of Justice Harlan’s timeless plea: “Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>22</sup> But to ask that of it is to ask the impossible. Justice Harlan spoke to a nation still actively trying to rob black Americans of those guarantees of equality that vast blood and treasure had been spent to establish. Nothing like that can or should be recreated in the present day. But the Roberts statement — that the way to end discrimination is to stop discriminating — is, at long last, the effective rejoinder to Justice Blackmun’s view in *Bakke*<sup>23</sup> that “[i]n order to get beyond racism, we must first take account of race”<sup>24</sup> and to the *Grutter*<sup>25</sup> majority’s hope that “25 years from now, the use of racial preferences will no longer be necessary.”<sup>26</sup> The Roberts rejoinder is effective because it is grounded in text, not judicial policy or predictive calculus. To wit the Fourteenth Amendment: “nor shall any State [Seattle and Louisville] . . . deny to any person [any schoolchild] within its jurisdiction the equal protection of the laws [the right to be treated equally — without regard to race — by the state].”<sup>27</sup> That the Fourteenth Amendment defines equality in so personal and individualized a way is the textual rock of truth.

Yet to say the race and education cases should be decided solely as a matter of textual literalism misses an important point. At least in this one area, the Court will always be judged in part by whether, to be blunt, the Court “got it right.” No amount of learned discourse will

<sup>19</sup> *Id.* This statement was a more forceful iteration of Judge Bea’s comment from his dissenting opinion in the Ninth Circuit. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1222 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (“The way to end racial discrimination is to stop discriminating by race.”).

<sup>20</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>21</sup> *Id.* at 2834 (Breyer, J., dissenting).

<sup>22</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>23</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>24</sup> *Id.* at 407 (opinion of Blackmun, J.).

<sup>25</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>26</sup> *Id.* at 343.

<sup>27</sup> U.S. CONST. amend. XIV, § 1.

ever convince Americans that *Dred Scott v. Sandford*<sup>28</sup> and *Plessy v. Ferguson*<sup>29</sup> were anything other than horrible mistakes. What was long was wrong. The fact that *Dred Scott* ran for 241 pages, *Plessy* for 28, and *Brown* for only 14 should convince us that in this area something larger even than law is afoot.<sup>30</sup> The plurality opinion looked for support from the briefing, argument, and opinion in *Brown*, but that decision is best understood through the long journey that preceded it.<sup>31</sup>

It is in this respect that I wish the plurality opinion had run an even bigger risk. As much as the opinion should be commended for its engagement of basic principle, there is something missing. That something is an acknowledgment of the tragic elements of the African American experience in this country and how that history can be reconciled with the Court's present-day equal protection argument. It is not merely a matter of the segregated schools, buses, water fountains, restrooms, lunch counters, swimming pools, movie theaters, or all the amenities and necessities of life that were denied to this one race. It is the slave auctions, the families that were bought and sold and split apart, and the laborers who were neglected or whipped or hunted or treated even by the least malicious of owners literally as chattel. And it would not have been remiss for the Chief Justice of the United States to address, not just the briefing and argument and import of *Brown*, but the full brunt of this sad story and to make it a part of the argument.

No doubt the mention of this story would prompt an outcry. Reaching for interracial understanding in the course of reaching the "wrong" result can seem to add insult to injury. Earlier in the Term, Justice Kennedy was pilloried for noting, in the course of upholding a congressional partial birth abortion ban, that some women might "come to regret their choice to abort the infant life they once created and sustained."<sup>32</sup> Inasmuch as Justice Kennedy is a man, his words were repeatedly decried as an indefensible exercise in "paternalism."<sup>33</sup>

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<sup>28</sup> 60 U.S. (19 How.) 393 (1857).

<sup>29</sup> 163 U.S. 537 (1896).

<sup>30</sup> Even the brevity, the diplomacy, and the unanimity of *Brown* failed unfortunately to spare it from scathing attacks. See J. HARVIE WILKINSON III, FROM *BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 29-35 (1979).

<sup>31</sup> See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004); RICHARD KLUGER, SIMPLE JUSTICE (rev. and expanded ed. 2004).

<sup>32</sup> *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

<sup>33</sup> See, e.g., Martha Coakley & Constance L. Rudnick, Editorial, *Abortion and the Court*, PATRIOT LEDGER (Quincy, Mass.), June 20, 2007, at 16; Ellen Goodman, Editorial, *Father Knows Best, Our Paternal Supreme Court*, PITTSBURGH POST-GAZETTE, Apr. 27, 2007, at B7; Deborah Leavy, Op-Ed., PHILA. DAILY NEWS, May 8, 2007, at 19; Erin Syth Madison, Letter to the Editor, *Justice Kennedy's Paternalism Insulting*, CAPITAL TIMES (Madison, Wis.), May 1,

This notion that one sex cannot hope to understand the other or that one race cannot appreciate the plight and travails of another is nothing more than a subtle form of apartheid. It wholly denies the value of empathy — the view that we cannot venture valid observations beyond our gender, race, or class risks making ours a separatist nation in mind and thought.<sup>34</sup>

So addressing straight on the full harms and depredations visited upon our fellow citizens serves not only the purposes of honesty and realism but the lesson that those in public life in this variegated country must not be tethered to our narrow experiences or roots. Acknowledging the entirety of the African American journey would not have changed the Court's result. It is well settled that "societal discrimination" cannot serve as a predicate for more societal discrimination,<sup>35</sup> and the further we move from the era of legally sanctioned segregation, the more valid this principle becomes. In fact, the substantial progress along all fronts achieved by millions of African Americans has made indicia of socioeconomic status such as income more reliable indicators of the proclaimed goal of diversity than race. According to census reports, in a twenty-year span, the African American poverty rate dropped to a record low, while the median household income tripled and the number of black college graduates doubled.<sup>36</sup> To say in the face of one's professional peers and colleagues that race must remain what defines us is to give up on the very sorts of educational and economic progress that were supposed to render race, if not irrelevant, at least less and less so.

So the plurality need not deny the truth of Justice Breyer's point that "[n]ot every decision influenced by race is equally objectionable"<sup>37</sup> or that it would be "a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day."<sup>38</sup> The past and present are indeed not comparable — not comparable, that is, except in one vital and critical respect. The whole sad saga of the early African American experience teaches that racial decisions by the state remain unique in their capacity to demean. To squeeze hu-

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2007, at A7; Cheryl T. Sabel, *Supreme Court Reveals Its Disdain for Women's Rights*, MOBILE REG., May 27, 2007, at D2.

<sup>34</sup> See J. HARVIE WILKINSON III, ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA 85–96 (1997) (discussing dangers of an inaccessible racial experience).

<sup>35</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive.").

<sup>36</sup> See Editorial, *The Good News on Race*, WALL ST. J., Apr. 8, 2002, at A26.

<sup>37</sup> *Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

<sup>38</sup> *Id.* at 2836.

man beings of varying talents, interests, and backgrounds into an undifferentiated category of race is to submerge what should matter most about us under what should matter least. To seize upon this one proven odious criterion of judgment as the basis for preferment of some and disfavor for others, and as a potential determinant of the destiny of all, is to commit this country to the perpetuation of means employed in the darkest hours of its history. From this, the Fourteenth Amendment was supposed to be the instrument of deliverance.

In an important sense, the holding in *Parents Involved* is in fact liberating. While the ruling restricts the use of race in public decisions, it ironically frees Americans to think about people and their problems in less rancorous ways. We are freer now to look at education, job training, health care, and the rest as human needs to be addressed wherever any child of any race is receiving substandard schooling, and wherever any elderly American of any ethnic background is without the shelter, nourishment, or medical attention necessary to live in basic dignity. Race and religion are the great potential dividers in America<sup>39</sup> — just as the Establishment Clause inhibits governmental preferences based on religion, the Fourteenth Amendment inhibits governmental preferences based on race. *Parents Involved* helps in a small way to fortify the basic social compact: that the suffering of each is a challenge for all, and that the walls and fences often built by governmental actions based on race must yield, however haltingly, to a nation of shared purpose and ecumenical heart.

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The Roberts and Thomas opinions are complementary. The former brings lucidity and precision to the debate; the latter, passion and eloquence. The whole of the two efforts is greater than the sum of their parts. And the Thomas concurrence is a culmination of a remarkable string of pronouncements on race and education by the Court's sole African American Justice.<sup>40</sup> The opinions for the most part have been solitary exercises (the lone exception being *Grutter*, where Justice Scalia joined in part), either because other Justices did not share the views expressed therein or because they represented intensely personal statements.

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<sup>39</sup> See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

<sup>40</sup> See *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part); *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring); cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (involving government contracts).

The crux of the Justice's philosophy is the famous quote from Frederick Douglass:

The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. . . . All I ask is, give him [the black man] a chance to stand on his own legs! Let him alone!<sup>41</sup>

From this exhortation — Let him alone! — Justice Thomas's views unfold seamlessly. State-enforced segregation was manipulative by nature<sup>42</sup> — a wholesale repudiation of the Douglass plea. But so too was racial balancing, even the benign variety, the sort of interference that Douglass would never countenance. Thus the repeated suspicion in his *Parents Involved* concurrence of federal judges as “social engineers”<sup>43</sup> and of “elites bearing racial theories.”<sup>44</sup> Even those best of intentions would have been anathema to Douglass — Let him alone!

Much of the reason for Justice Thomas's rejection of enforced balance involves the simple element of condescension. Condescension in the educational sphere takes two distinct forms. At the elementary/secondary level, the Justice believes it is insulting to suggest that black students can only learn in the company of whites.<sup>45</sup> To refute this canard, the Justice cited in *Parents Involved* an array of studies on black achievements in schools with predominantly black enrollments and the exemplary pre-*Brown* attainments of the graduates of Dunbar High School.<sup>46</sup> Enforced balancing or diversity, to the extent it is premised on the view that “blacks, when left on their own, cannot achieve,” reflects “a jurisprudence based upon a theory of black inferiority.”<sup>47</sup>

At the college and graduate level, condescension takes a different form, namely the assumption of affirmative action programs that black applicants must be given something in order to get something. “I believe blacks can achieve in every avenue of American life without the

<sup>41</sup> See *Grutter*, 539 U.S. at 349–50 (Thomas, J., concurring in part and dissenting in part) (first omission in original) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).

<sup>42</sup> See *Jenkins*, 515 U.S. at 120–22 (Thomas, J., concurring).

<sup>43</sup> *Parents Involved*, 127 S. Ct. at 2779 n.14 (Thomas, J., concurring).

<sup>44</sup> *Id.* at 2787.

<sup>45</sup> See *Jenkins*, 515 U.S. at 119–20 (Thomas, J., concurring).

<sup>46</sup> See *Parents Involved*, 127 S. Ct. at 2777 (Thomas, J., concurring) (“[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan.” (alteration in original) (quoting THOMAS SOWELL, *EDUCATION: ASSUMPTIONS VERSUS HISTORY* 29 (1986)) (internal quotation marks omitted)).

<sup>47</sup> *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).



meddling of university administrators,” the Justice wrote in *Grutter*.<sup>48</sup> In his view, the meddling damaged black self-esteem in every way. “The majority of blacks are admitted to the Law School because of discrimination,” the Justice continued, “and because of this policy, all are tarred as undeserving. . . . When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma . . . .”<sup>49</sup>

What to make of this remarkable series of opinions? To begin with, they have catalyzed a campaign of almost unparalleled vituperation — beginning with Judge Leon Higginbotham’s slur that the Justice was “entangled with racial self-hatred”<sup>50</sup> and continuing with Howard Law Professor Michael Newsom’s charge that the Justice was “a hypocrite — an ‘affirmative action baby’ who oppose[d] affirmative action.”<sup>51</sup> The campaign had the unmistakable purpose of racial ostracism. When the ACLU of Hawaii invited Justice Thomas to a debate on affirmative action, Eric Ferrer, one of three black board members, resigned, stating that having the Justice speak on the subject would be like “inviting Hitler to come speak on the rights of Jews.”<sup>52</sup> The tension in a Memphis hotel ballroom was described as “palpable” before Justice Thomas addressed the National Bar Association, the nation’s largest organization of black attorneys.<sup>53</sup> The campaign was by no means joined by all African Americans — Professor Randall Kennedy among others wrote a thoughtful assessment of the Justice<sup>54</sup> — but it was broad and sustained enough to elicit this response: “I am a man, a black man, an American. . . . It pains me deeply, or more deeply than any of you can imagine[,] to be perceived by so many members of my race as doing them harm.”<sup>55</sup>

The concurrence in *Parents Involved* shows that, the torrent of criticism notwithstanding, the Justice has no thought of giving ground.

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<sup>48</sup> *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>49</sup> *Id.* at 373.

<sup>50</sup> A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1429 (1994).

<sup>51</sup> Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes — A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U. L.J. 327, 412 (2004).

<sup>52</sup> Kevin Merida & Michael A. Fletcher, *Supreme Discomfort*, WASH. POST MAG., Aug. 4, 2002, at W08.

<sup>53</sup> Judy Peres, *Judge Thomas Enters a Plea for Tolerance of His Views*, CHI. TRIB., July 30, 1998, at 1.

<sup>54</sup> Randall Kennedy, *Justice Thomas and Racial Loyalty*, AM. LAW., Sept. 1998, at 91 (criticizing allegations of “racial disloyalty” and the ostracism of Justice Thomas).

<sup>55</sup> Clarence Thomas, *I Am a Man, a Black Man, an American: Searching for Real Solutions to Racial Hatred* (July 29, 1998), in 64 VITAL SPEECHES OF THE DAY 708, 711–12 (1998).

The concurrence is bold and consistent with the Justice's earlier views, and it restates in the most uncompromising terms that the racial balancers of today are in essence no different from the segregationists of old. To Justice Breyer's claim that today is different — that Seattle's and Louisville's preferences are inclusionary rather than exclusionary<sup>56</sup> — Justice Thomas offers his resounding "No." The segregationists pleaded for deference to localities, respect for federalism, and the eternal peace of the racial status quo — the very things the dissenting Justices were asking for now.<sup>57</sup> But (and here again the unmistakable echo of Douglass), the Constitution does not permit "measures to keep the races together" any more than it allowed measures to keep the races apart.<sup>58</sup> Only neutrality will do — Let him alone!

We have seen this extraordinary tenacity of principle before. And there has been talk of other judges who were "traitors to their race."<sup>59</sup> Justice Hugo Black knew better than "his colleagues could how intensely resistant white southerners would be" to school desegregation and that his "immediate family members living in Alabama would feel the repercussions of his vote."<sup>60</sup> Nonetheless, "the black man had never had a better friend on the Supreme Court than this lean, courtly son of the Deep South."<sup>61</sup> In the communities of the pre-*Brown* era, where social and economic and occasionally political power overlapped, ostracism could be complete. Judges such as John Minor Wisdom of the Fifth Circuit and J. Skelly Wright of the Louisiana federal district court were among those who felt its sting: Wright was "the most hated man in New Orleans," where 90% of the public knew of him by name or as the "integration judge" and where old friends crossed the street to avoid having to speak.<sup>62</sup>

As to Justice Thomas, the views and the race may be different, but the demonstration of courage in defense of constitutional principle has been no less. His long and rather lonely quest for a rightful place for black Americans makes him a worthy successor to the Blacks, Wrights, and Wisdoms from whose region he hails. Intemperate opposition may not always validate a judge's views, but it reminds us of precisely why the Framers thought judicial independence an invaluable gift.

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<sup>56</sup> *Parents Involved*, 127 S. Ct. at 2816–19 (Breyer, J., dissenting).

<sup>57</sup> *Id.* at 2783–86 (Thomas, J., concurring).

<sup>58</sup> *Id.* at 2787.

<sup>59</sup> See Kennedy, *supra* note 54, at 91 (noting that Thomas is considered a "race traitor" by his most bitter detractors).

<sup>60</sup> KLARMAN, *supra* note 31, at 298.

<sup>61</sup> KLUGER, *supra* note 31, at 209.

<sup>62</sup> JACK BASS, UNLIKELY HEROES 114–15 (1981).

As for the views themselves, Let Him Alone suggests to many Americans an indefensible indifference — a washing of national hands with respect to difficulties that state-imposed disabilities did much to create.<sup>63</sup> The Court had its own version of Let Him Alone in the *Civil Rights Cases*<sup>64</sup> of 1883, when it struck down a public accommodations statute of 1875 as a restriction of private property rights and hence beyond the power of Congress under the Fourteenth Amendment to enforce.<sup>65</sup> Justice Bradley wrote:

[T]here must be some stage in the progress of his [the former slave's] elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.<sup>66</sup>

To many, therefore, Let Him Alone overlooks the fact that bursts of commitment to racial progress in this country (Reconstruction; the 1960s) have been followed by long periods of retreat and neglect (*fin-de-siècle* Jim Crow; the Nixon Southern Strategy).

Justice Thomas, of course, has never counseled neglect of poverty or deprivation, only an end to public decisions based on race. His is not a plea for indifference, but for the state not to repeat its mistakes. And there are reasons to believe that unitary public school districts will wish to avoid dual practices and that nondiscrimination can and will be the new order of the day. African Americans have the power of the franchise; city councils, school boards, school superintendents, staff, and faculty are more representative and more committed than in times past to fair treatment of all students and, it must be said, to staying out of court. There remains, however, the difference between formal equality and genuine equality which Let Him Alone theories may ignore. That difference should remind conservatives — and all Americans — that the task before them is twofold. The first is to avoid the destructive and corrosive effects of race-conscious decision-making. The second is to offer race-neutral strategies that may open opportunity in this country for students of all races for whom family breakdown and privations beyond number have foreclosed true opportunity in life. The latter may not be the job of a Justice, but the task nonetheless is one that remains to be done.

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<sup>63</sup> See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 10 (1989) (noting that the merely “observing state may itself have played a major role in shaping the world it observes”).

<sup>64</sup> 109 U.S. 3 (1883).

<sup>65</sup> *Id.* at 13–14. The Court also held that the legislation fell outside the scope of Congress's power under the Thirteenth Amendment because the discrimination at issue was not a badge or incident of slavery. *Id.* at 20–25.

<sup>66</sup> *Id.* at 25.

*Parents Involved* thus provides as good a time as any to sum up Justice Thomas's place in the national dialogue on race. The black community has generally been far more supportive of affirmative action programs and racial integration efforts than Justice Thomas himself.<sup>67</sup> But to say the Justice turned his back on integration would be wrong. He has deplored only race-conscious manipulations by the state to bring it about. The support for integration within the black community has never been without some awareness of its costs. For it is African Americans who have paid a disproportionate price for progress — they met in the first instance resistance and violence; they rode the buses more frequently and for longer hours to achieve the promised integration, often to find that “[s]imply putting students together under the same roof does not necessarily mean that the students will learn together [due to tracking] or even interact.”<sup>68</sup> And they were the subjects of condescending and unwarranted assumptions that even well-intentioned efforts brought about.

No one has been more eloquent than Justice Thomas in pointing out the heavy price in human pride and dignity that black Americans have been asked to pay — a case that the Carmichaels and Browns and Cleavers of the late 1960s tried radically and unsuccessfully to make outside the councils of influence and power. In the process, the Justice has shattered stereotypes of how African Americans were expected to behave and think, and he has done this with an unquenchable faith in the ability of African Americans to draw upon their personal resources, not only for themselves, but to make our country a better place to be. The *Parents Involved* concurrence should give the final boot to any notion that the Justice is an outlier. In his insistent pleas for true nondiscrimination, he has spoken from the depths of the American and the African American experience and made a priceless contribution to the debate on race and education in this country.

## II. THE KENNEDY CONCURRENCE

Justice Kennedy voted with the plurality to invalidate the Seattle and Louisville plans. The districts, he explained, had resorted to “explicit” and “sweeping” racial classifications that were dangerous in themselves and unrelated or unnecessary to the districts’ stated purposes of promoting educational diversity.<sup>69</sup> The Justice withheld his vote, however, from crucial portions of the Roberts opinion,<sup>70</sup> namely

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<sup>67</sup> See, e.g., Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action*, GALLUP POLL TUESDAY BRIEFING, Aug. 23, 2005 (finding that 72% of blacks favor affirmative action while 21% oppose).

<sup>68</sup> *Parents Involved*, 127 S. Ct. at 2780 (Thomas, J., concurring).

<sup>69</sup> *Id.* at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>70</sup> See *id.* at 2788.

the Chief Justice's rejection of the plans as exercises in forbidden racial balancing, as well as the Chief's point by point rebuttal of Justice Breyer's dissent.<sup>71</sup> The Kennedy concurrence pointedly distances itself in almost equal measure from both the plurality and the dissent. As the narrowest rationale in support of the prevailing judgment, the Kennedy opinion becomes the controlling one<sup>72</sup> and the subject of close scrutiny for educators and lawyers alike.

It is plain that the Justice is marginally more open to the use of race in the achievement of diversity than the plurality. In addition to the compelling interest in remedying past intentional discrimination, Justice Kennedy identifies at least two other instances where some use of racial considerations to achieve diversity might be allowed. One lies in the adoption of general school policies with regard to new school construction, the drawing of attendance zones, the allocation of resources, the recruitment of students and faculty, and the like.<sup>73</sup> The other lies in "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."<sup>74</sup> That "highly individualized, holistic review of each applicant's file"<sup>75</sup> was, however, precisely what Justice Kennedy's dissenting opinion declined to accept in *Grutter*, chiefly on the ground that it was "used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."<sup>76</sup>

Whether *Parents Involved* represents some change of view on the Justice's part or a simple acquiescence in precedent will be subject to extended discussion. Yet the fact remains that Justice Kennedy has not voted to uphold a race-conscious program in a nonremedial context, and his *Parents Involved* concurrence reflects the Justice's long-standing skepticism of racial classifications.<sup>77</sup> That skepticism is heartfelt: "To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome."<sup>78</sup> And further: "Reduction of an individual to an assigned racial identity for dif-

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<sup>71</sup> See *id.* at 2755–59, 2761–68 (opinion of Roberts, C.J.).

<sup>72</sup> See *Marks v. United States*, 430 U.S. 188, 193 (1977); see also *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Marks*, 430 U.S. at 193).

<sup>73</sup> *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>74</sup> *Id.* at 2793.

<sup>75</sup> *Grutter*, 539 U.S. at 337.

<sup>76</sup> *Id.* at 389 (Kennedy, J., dissenting).

<sup>77</sup> See *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment); *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>78</sup> *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

ferential treatment is among the most pernicious actions our government can undertake.”<sup>79</sup> Such moving sentences help explain why Justice Kennedy remains unwilling to jettison the distinction between de jure and de facto segregation, which operates as a foremost limitation upon the unrestrained use of race-based distinctions.<sup>80</sup>

Justice Kennedy’s concurrence bears resemblance to Justice Lewis Powell’s separate opinion in *Regents of the University of California v. Bakke*.<sup>81</sup> Like Justice Powell, Justice Kennedy occupies a lone position between two strongly competing views on the permissible use of race in education. While Justice Powell referred to the use of race as a “plus”<sup>82</sup> and Justice Kennedy refers to the benign use of race as a “factor”<sup>83</sup> or “component,”<sup>84</sup> there is not much difference. Indeed, a “factor” or “component” would most often be a “plus” for any student at whatever educational level whose race would contribute to greater balance.

Beyond that, the two opinions bear resemblance in both methodology and purpose. Each makes a commendable effort to think a contentious matter through, finding some merit in each side of the debate and accepting a point here and a point there from the more unqualified positions. They both allow a little use of race, but not too much. They both bear the earmarks of caution and circumspection. The ultimate purpose of each effort is to soften the edges of a harsh controversy and allow a fractured nation the chance to muddle through.

This even and calm approach may appear at first blush unobjectionable. And yet the drawbacks of allowing just a little use of race are substantial. To begin with, the concept is litigious. No one can be certain when a little use of race becomes too much. The answer Justice Kennedy gives is that race may become less objectionable when it is not used by itself to determine the educational placement of a student but rather used in conjunction with many other criteria, such as “the age of the students, the needs of the parents, and the role of the schools.”<sup>85</sup> But as the Justice recognized, Seattle itself, for example, did use some nonracial criteria, among them the placement of a student’s siblings and the distance of the student from the school.<sup>86</sup> Plainly we are dealing with a continuum. At some point, the use of criteria presumably changes from impermissibly “rigid” to more per-

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<sup>79</sup> *Id.* at 2796.

<sup>80</sup> *See id.* at 2794–96.

<sup>81</sup> 438 U.S. 265, 269 (1978) (opinion of Powell, J.).

<sup>82</sup> *Id.* at 317–18.

<sup>83</sup> *Parents Involved*, 127 S. Ct. at 2791, 2794 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>84</sup> *Id.* at 2793, 2797.

<sup>85</sup> *Id.* at 2793.

<sup>86</sup> *Id.* at 2794.

missibly “flexible.”<sup>87</sup> But how many additional nonracial criteria there must be and the extent to which those other criteria must address academic aptitudes and achievement (not always the easiest thing to do with young children) is hard to say. The mix of racial and nonracial criteria can of course all be left to the judgment of educators, but those judgments will assuredly be challenged in the courts.

The problems with allowing just a little use of race do not end there. Closely related to the risk of extensive litigation is the difficulty of drawing lines. The Court must make sense, in other words, of those instances where it permits race to be used and those instances where it does not. It will prove difficult, to say the least, to devise a rational explanation of exactly when one may use race. Indeed, the Court has already encountered this very difficulty. In *Grutter*, for example, a majority stated that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”<sup>88</sup> It then proceeded to uphold a law school admissions program as in keeping with “the expansive freedoms of speech and thought associated with the university environment.”<sup>89</sup> One would think, however, that freedom of speech and thought were important to the entire enterprise of education, not just to college and graduate schools — a point made repeatedly by many members of the Court in a high school free speech case just last Term.<sup>90</sup> Indeed, earlier educational experiences may determine later educational opportunities, and for those students who do not go on to college, the different views encountered in their elementary and secondary school experiences may prove all the more important. Thus, distinctions between the different levels of education on whatever contextual ground would seem to be dwarfed by the inequity of denying educational opportunities at whatever level to students on the basis of their race. Using just a little bit of race will immerse the courts in endless line-drawing exercises, which in the absence of adherence to a basic underlying principle will be unfathomable to the American public.

In permitting the use of just a little bit of race, courts cannot overlook the limited accountability of those making the racial judgment calls. University faculties and administrators, for all their real importance, are not elected bodies. Their personal and political prospects are arguably not affected in any significant way by racial decisions in

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<sup>87</sup> *Id.*

<sup>88</sup> *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343–44 (1960)).

<sup>89</sup> *Id.* at 329.

<sup>90</sup> *See Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (majority opinion of Roberts, C.J.); *id.* at 2636–38 (Alito, J., concurring, joined by Kennedy, J.); *id.* at 2644–45 (Stevens, J., dissenting, joined by Souter and Ginsburg, JJ.).

student admissions. The absence of accountability at the elementary and secondary level is of a different sort. Most school boards and local governing bodies are elected to be sure, but the race-based decisions, like many others, somehow seem to end up in the bowels of the bureaucracy. The Fourteenth Amendment indicates, at a minimum, that these decisions are too important to leave there. One of the strongest points in Justice Kennedy's concurrence is that while race was concededly being used in Jefferson County school assignments, no one seemed to know exactly how.<sup>91</sup> The school district, for example, had made contradictory assertions about whether the racial guidelines applied to requests for transfer from kindergarten students.<sup>92</sup> Justice Kennedy's further examination of the record revealed only further contradictions. In short, no one was clear, at least as to some aspects of the plan, about anything except the fact that confusion reigned. The whole mess understandably led the Justice to conclude:

[While] racial classifications are used to make certain assignment decisions, [the school district] fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision.<sup>93</sup>

If the Justices could not entirely figure out when race was and was not used, heaven help the parents and students who tried to do so. Such lack of accountability, one fears, is not isolated but systemic. It demonstrates the dangers an absence of simple measures of accountability lends to even the limited use of race in student assignments and admissions.

The question remains whether America must allow the use of a little bit of race to muddle through. Justice Kennedy, like Justice Powell before him, hints that progress in race relations may come only if benign race-based decisions are not wholly disallowed.<sup>94</sup> This perspective tends to remove the debate from the realm of law toward that of policy. As to policy, one can debate forever the question of how race relations in America have evolved. Arrayed against episodes involving the use of racist rhetoric by public figures, the disturbing rash of incidents directed at African Americans on college campuses, and the gaps between the races as to health care, education, housing, and income are the more hopeful trends of minority political participation, greatly

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<sup>91</sup> See *Parents Involved*, 127 S. Ct. at 2789–90 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>92</sup> *Id.* at 2789.

<sup>93</sup> *Id.* at 2790.

<sup>94</sup> For a thoughtful defense of Justice Powell's approach, both in 1978 and the present day, see John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 18–22.



increased minority spending power, civil rights laws to combat discrimination, and the fact that some of the aforementioned gaps are now shrinking. In this respect, conservatives tend to emphasize the progress as an argument for ending benign classifications, and liberals, in an effort to keep them, stress that much remains to be done. Justice Kennedy concludes reasonably that both are right — “we enjoy a society that is remarkable in its openness and opportunity” but must “go beyond present achievements, however significant, . . . to recognize and confront the flaws and injustices that remain.”<sup>95</sup> His solution: that we have evolved to the point where race should be a tool of “last resort” but not to the point where benign uses of race can be discarded entirely.<sup>96</sup>

This view of the country’s evolution — to the point that just a little use of race need be allowed — misses what is most important. No evolutionary picture of America can overlook the demographic changes sweeping the country. These changes have been so often commented upon that it seems necessary to do no more than recapitulate the obvious: for every three U.S. residents, one is a minority,<sup>97</sup> with Hispanics expected to be 15.5% of the U.S. population by 2010, blacks 13.1%, and Asian Americans 4.6%.<sup>98</sup> Because Seattle’s classification scheme (white/nonwhite) and Louisville’s (black/other) were both binary, the “obvious,” however, was largely ignored. Though the point is hardly indisputable, the increasing diversity of America with its infinite subgroupings and mixed ancestries could diminish the sense of isolation that African Americans have felt as America’s sole sizeable minority of color. If increased diversity holds at least some prospect of decreased isolation, it would seem the worst possible moment to risk recreating isolation through categorizations based on race. When government classifies on the basis of race, citizens may start perceiving themselves in the officially sanctioned categories. Our evolving demographics argue for the increasing interaction of Americans to be sure, but not through means that risk promoting the self-conscious separation they purport to overcome.

In using just a little bit of race, perhaps we are not taking that much of a chance — except that we are. Race is not simply a pernicious way of thinking, but a sloppy one as well. It provides public de-

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<sup>95</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>96</sup> *Id.* at 2792.

<sup>97</sup> Press Release, U.S. Census Bureau News, *Minority Population Tops 100 Million* (May 17, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html>.

<sup>98</sup> U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin tbl.1a* (Mar. 18, 2004), <http://www.census.gov/ipc/www/usinterimproj/natprojtabo1a.pdf>.

cisionmakers a temptingly facile way to deal with volume and spares them the need to devise more creative approaches to achieving true diversity. The irony is that Justice Kennedy has appreciated these and other pitfalls of racial labeling much better and more consistently than most.<sup>99</sup> This awareness makes all the more puzzling his failure to recognize that experimentation with unlawful means may shade imperceptibly into addiction to them. The Justice will win respect over time for prizing independence and belonging to no camp, but this principle is one that is not easily divisible.

### III. THE STEVENS AND BREYER DISSENTS

Two Justices wrote dissenting opinions in the case. The first, shorter dissent by Justice John Paul Stevens is a moving reflection of the depth of conviction aroused by this issue. It will be most noted for its concluding personal declaration: “It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”<sup>100</sup> Coming from the Court’s gracious and deeply patriotic<sup>101</sup> senior Associate Justice, those words will draw attention. There is, however, a problem. One of the tributes to the colorblind Constitution is the Justice’s own dissent in *Fullilove v. Klutznick*,<sup>102</sup> which the Chief Justice, in an interesting bit of byplay, cited twice.<sup>103</sup> Justice Stevens responds by distinguishing the need to confine remedies “for past wrongdoing to the members of the injured class” from the need to provide for educating children in the future.<sup>104</sup> Fair enough, but one cannot resist the notion that the Chief Justice’s references to his colleague’s earlier dissent were intended as a comment on the hazards of prediction.

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We come finally to the Breyer dissent. Its length is extraordinary (thirty-eight pages), with two appendices for good measure.<sup>105</sup> Length is not any guarantee of impact or effectiveness in a judicial opinion. But this one is powerful. It combines the elements of pragmatism and restraint for which the Justice is respected. It is rhetorically resonant,

<sup>99</sup> See *Parents Involved*, 127 S. Ct. at 2796–97 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting views that the use of race should be a permissible means on the ground of its efficiency).

<sup>100</sup> *Id.* at 2800 (Stevens, J., dissenting).

<sup>101</sup> See the marvelous tribute to the American flag in *Texas v. Johnson*, 491 U.S. 397, 437 (1989) (Stevens, J., dissenting).

<sup>102</sup> 448 U.S. 448, 532 (1980) (Stevens, J., dissenting).

<sup>103</sup> *Parents Involved*, 127 S. Ct. at 2752; *id.* at 2758 (opinion of Roberts, C.J.).

<sup>104</sup> *Id.* at 2798 n.4 (Stevens, J., dissenting) (emphasis omitted).

<sup>105</sup> See *id.* at 2800–42 (Breyer, J., dissenting) (including two appendices).

with question marks used with some frequency and to effect. The opinion does not disdain the necessary work of digging deeply into particulars. And it does not fail to link those particulars to its general message of according leeway to local governing entities in their use of race for inclusionary and integrative purposes. “[T]he opinion’s reasoning is long,” concedes the Justice, “[b]ut its conclusion is short: The plans before us satisfy the requirements of the Equal Protection Clause.”<sup>106</sup> Even those of us who strongly disagree with that conclusion would grant that the best case was made for it in this dissent.

The dissent rests in part on a shrewd tactical maneuver. The Justice seeks to co-opt all the traditional conservative arguments against race-based decisionmaking and harness them to his own ends. The process of co-opting conservative values in the debate began conspicuously in *Grutter*. It had long been a cardinal principle of opponents of race-based decisions that “the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*,”<sup>107</sup> or as Justice Scalia put it in *Croson*,<sup>108</sup> under the Fourteenth Amendment, “[t]he relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, ‘created equal,’ who were discriminated against. And the relevant resolve is that that should never happen again.”<sup>109</sup>

But in *Grutter*, those Justices voting to uphold the Law School’s admission program sought to seize the value of individualization, calling the admissions decision a “highly individualized, holistic review of each applicant’s file” undertaken in a way that does not make race or ethnicity “the defining feature of his or her application.”<sup>110</sup> This attempt to characterize a school’s review as individualized falters for the simple reason that every person of a preferred racial or ethnic group was accorded some positive bump or “plus”;<sup>111</sup> there was nothing individualized about it. But the discussion plainly indicated the commitment of the program’s supporters not to cede the issue of individual versus group rights without a fight.<sup>112</sup>

<sup>106</sup> *Id.* at 2834.

<sup>107</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>108</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>109</sup> *Id.* at 528 (Scalia, J., concurring in the judgment).

<sup>110</sup> *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

<sup>111</sup> *See id.* at 334 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

<sup>112</sup> At the heart of the two dominant jurisprudential interpretations of the Fourteenth Amendment lies a basic tension between collective and individual rights. In *Parents Involved*, the dissent’s decision to pursue a group perspective rather than an individual one creates a tension with the commitment to an intensely personal approach in such well-known decisions as *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Roe v. Wade*, 410 U.S. 113 (1973). Those who embrace the group-centric view of the Amendment in this case would resolve the tension through a distinction between public and private spheres of activity. Those who would embrace the individualized view

Justice Breyer has carried the effort to co-opt much further. It has long been an article of faith among conservatives that the Constitution permits the use of race only for strictly remedial ends, and “that the remedial power extends no further than the scope of the continuing constitutional violation.”<sup>113</sup> This was the import of the Chief Justice’s observation that the Seattle public schools had never segregated by law and that the Louisville public schools had been declared unitary, thus dissolving the court’s desegregation decree.<sup>114</sup> Justice Breyer converts the term “remedial” to his own uses, declaring that school boards retain a continued “interest in setting right the consequences of prior conditions of segregation,”<sup>115</sup> whether or not imposed by law, and that because “stubborn facts of history linger and persist,”<sup>116</sup> remedial interests do not “vanish the day after a federal court declares that a district is ‘unitary.’”<sup>117</sup>

The efforts to wrest control of terminology from conservatives do not end with the claims staked by affirmative action proponents to “individualization” and “remediation.” It has long been critical to the conservative self-perception that opponents were “activist” and that conservatives were guardians of “restraint.” It was, after all, the Warren Court that made activism “a dirty word,” and *Roe v. Wade*<sup>118</sup> that exemplified intrusive jurisprudence at its worst. Conservatives saw themselves as protectors of restraint, stability, and the federal system with all its appreciation of democratic values and of the rights of states and localities to pursue their own distinctive policies.

In *Parents Involved*, Justice Breyer seeks to turn the tables. In some respects, the opinion is one long paean to the tradition of local control over local school systems, a plea for respect for a “local school board’s knowledge [and] expertise,” and for recognition “that judges are not well suited to act as school administrators.”<sup>119</sup> It is for the

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in *Parents Involved* would resolve their own apparent conflict — preferring an individualized approach in this case but not in *Lawrence* or *Roe* — through a combination of text and history. That is to say, the words of the Fourteenth Amendment confer no general right of privacy but do confer a right on the part of the individual to be free from discrimination on the basis of race. The conflict may not be a comfortable one for either camp. (Of course, a pure libertarian or pure statist might perceive no tension at all.) But inasmuch as the meaning of our greatest constitutional amendments is to enhance personal dignity and freedom by securing certain rights from state infringement, it would be most unfortunate to forsake that purpose in the face of a plain textual commitment to it.

<sup>113</sup> *Croson*, 488 U.S. at 525 (Scalia, J., concurring in the judgment).

<sup>114</sup> See *Parents Involved*, 127 S. Ct. at 2746, 2749, 2752.

<sup>115</sup> *Id.* at 2820 (Breyer, J., dissenting).

<sup>116</sup> *Id.* at 2824 (quoting *Freeman v. Pitts*, 503 U.S. 467, 495 (1992)) (internal quotation mark omitted).

<sup>117</sup> *Id.*

<sup>118</sup> 410 U.S. 113 (1973).

<sup>119</sup> *Parents Involved*, 127 S. Ct. at 2826 (Breyer, J., dissenting).

people working through their democratic processes “to debate how best to educate the Nation’s children and how best to administer America’s schools to achieve that aim. The Court should leave them to their work.”<sup>120</sup> This will bring calm, he says, as opposed to the disruption wrought by the activist solutions of activist judges.

And then there is the final competition over the concept of balkanization. To the conservative view that race preferment promotes a “politics of racial hostility”<sup>121</sup> and constitutes “the most divisive of all policies,”<sup>122</sup> the Justice rejoins that it is inclusive efforts aimed at promoting integration that will produce, in his repeated words, “one Nation.”<sup>123</sup> That term, or “one America,” appears four times in the Breyer opinion.<sup>124</sup> “[F]or unless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>125</sup> And this lesson is expanded to include the need to develop skills for the global marketplace, which can only be acquired “through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>126</sup>

The Justice has left no stone unturned. It is his view, he says, that will foster the deference to democracy, the appreciation for local experimentation, the diminished litigation, the judicial restraint, and, above all, the binding ties to one nation that conservatives have wanted all along. The opinion consciously seeks to use the terminology of the other side and flip it. In one sense the dissent is unrelenting; in another it seeks to make a conciliatory case. The maneuver must be admired for its shrewdness and its attempt to appeal to opponents in a case made largely through their values and on their terms.

Why then does this best case fail ultimately to persuade? It fails because it recognizes few, if any, limits to the explicit use of race and ethnicity in public decisions. It fails because it risks abandoning America to a race-based course. The Justice acknowledges that “there is a cost in applying ‘a state-mandated racial label.’”<sup>127</sup> But it is a cost well worth paying, he concludes. And, in any event, the plans in this case “use race-conscious criteria in limited and gradually diminishing ways.”<sup>128</sup> This observation, however, overlooks the critical point.

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<sup>120</sup> *Id.* at 2833; see also James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 338–39, 345 (2006).

<sup>121</sup> *Parents Involved*, 127 S. Ct. at 2767 (opinion of Roberts, C.J.) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)) (internal quotation mark omitted).

<sup>122</sup> *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

<sup>123</sup> *Parents Involved*, 127 S. Ct. at 2821, 2834, 2836 (Breyer, J., dissenting).

<sup>124</sup> *Id.* at 2821, 2824, 2834, 2836.

<sup>125</sup> *Id.* at 2835 (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)) (internal quotation marks omitted).

<sup>126</sup> *Id.* at 2822 (quoting *Grutter*, 539 U.S. at 330) (internal quotation mark omitted).

<sup>127</sup> *Id.* at 2836 (quoting *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>128</sup> *Id.* at 2810.

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Without the prospect of strict judicial scrutiny of race-based classifications, it is anything but certain that racial proportionality would not become more prevalent as citizens and their representatives demand that public benefits be based on race, namely their own. At a minimum, supporters of racial allocation must offer analytical breaks on a practice that, once blessed, would start rolling downhill.

But instead the constraints come off. Justice Breyer suggests specifically that the *de jure/de facto* distinction, used in the past to delimit racial classifications, is meaningless here.<sup>129</sup> That distinction, contends the Justice, “concerns what the Constitution requires school boards to do, not what it permits them to do.”<sup>130</sup> If that is the case, however, then a very great deal of racial decisionmaking must be allowed. Never mind that no constitutional violation has been found. Never mind that a district has been declared unitary. Just go ahead. The green light gets even greener when the Justice’s definition of remedial is considered. What needs to be remedied may stretch indefinitely back, because historical injustice is slow to dissipate.<sup>131</sup> Under this new regime, public authorities are invited to make up their own minds as to what old wrongs must be corrected by a renewed resort to race. The whole idea of declaring a school district unitary, however, was to establish some point in time when public entities could both acknowledge and atone for their past failures and determine not to repeat racial misadventures in the future. With the *de jure/de facto* distinction vitiated and with remediation meaning virtually anything public entities wish it to mean, the pressures to practice the politics of race throughout this country would soon begin to rise.

That this would be the effect is further evident from the manner in which the dissent defines the public interest in the promotion of diversity. That interest has three components: first, the “historical and remedial element: an interest in setting right the consequences of prior conditions of segregation”;<sup>132</sup> second, the educational interest “in overcoming the adverse educational effects produced by and associated with highly segregated schools”;<sup>133</sup> and third, a “democratic element,” defined as “an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live.”<sup>134</sup> But to define the compelling state interest in those terms is again to suggest the absence of a limitation on the use of racial classifications, at least in education. For every educational institution can proclaim the edu-

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<sup>129</sup> See, e.g., *id.* at 2802, 2810–11, 2813–14, 2823–24.

<sup>130</sup> *Id.* at 2823 (emphasis omitted).

<sup>131</sup> See *id.* at 2824.

<sup>132</sup> *Id.* at 2820.

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

<sup>134</sup> *Id.* at 2821 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

cational and pluralistic benefits of achieving racial balance anytime, anywhere. For that matter, many of these same benefits may inhere in a racially balanced workplace as well. While we are told repeatedly that “context matters,”<sup>135</sup> context often conspires to expand rather than restrict the resort to racial criteria. In *Grutter*, for example, the context of higher education provided the rationale for the consideration of race in admissions because “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”<sup>136</sup> In *Parents Involved*, context was said to provide the rationale for race-based decisions because, among other things, children must start at an early age to learn together if they are to live amicably as adults.<sup>137</sup> In short, “context” places no meaningful limitation on the dissent’s definition of diversity. Under the dissent’s formulation, the compelling state interest, traditionally a critical component of strict scrutiny, would become a test that any minimally ingenious public agency should be able to satisfy.

With the compelling state interest test satisfied with relatively little difficulty, strict scrutiny of means would be left as the last remaining limit on the routine reliance on race in public action. But that limit, too, would be thrown over. Justice Breyer discusses at length a number of states and districts that make explicit inclusionary use of race.<sup>138</sup> But there is no comparable discussion of those that do not, much less of how meaningful diversity has fared under different approaches. There should be no shortage of ideas. Innovative strategies in education are needed always, and our Constitution applies but one single limitation to them: that they not be based on race.

Yet school boards are effectively relieved by the dissent of the burden of showing that race-neutral alternatives will not work. Given the relatively small number of students in these cases whose assignments were actually determined by race, it is difficult to conclude that the use of race-based means had much, if any, impact on diversity.<sup>139</sup> Beyond that, we are told by the dissent only that other alternatives cannot work because the school districts have already struggled with the problems of “avoiding forced busing, countering white flight, [and] maintaining racial diversity” by various means, and “[n]othing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals.”<sup>140</sup> But again, the same could be

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<sup>135</sup> See *id.* at 2817–19 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

<sup>136</sup> *Grutter*, 539 U.S. at 332.

<sup>137</sup> See *Parents Involved*, 127 S. Ct. at 2822 (Breyer, J., dissenting).

<sup>138</sup> See *id.* at 2831–33.

<sup>139</sup> See *id.* at 2759–60 (majority opinion).

<sup>140</sup> *Id.* at 2828 (Breyer, J., dissenting).

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said of every school district employing racial assignments if, as here, no showing was made that race-neutral strategies to achieve diversity were either contemplated or utilized.<sup>141</sup> Moreover, the experiences of school districts over time were under very different conditions than those of the present day. Some districts were operating under laws mandating dual school systems; some districts were operating under court order. Most every district was operating under different and often more hostile racial attitudes than those prevailing now. The districts' experience over time, therefore, cannot satisfy by itself the burden on the advocates of racial balancing to demonstrate that race-neutral strategies cannot be expected to succeed.

The relationship of race to educational diversity is at least open to discussion. The use of race as a crude measure presumes that a member of one race is different from a member of another race, when in fact individuals of different races may have an enormous amount in common. If that is the case, measurements of income, personal interests, and family and geographic background may be far more reliable indicators than race of the variety of experiences and viewpoints that an educational environment seeks to achieve. The law requires a close fit between educational diversity and race, but the diminishing correlation between class and race may be decreasing differences among races.

We are thus left by the dissent to a world of meager limits, to no real scrutiny of either ends or means. Judicial restraint, so dear to the dissent and so admirable as a general matter, carries three distinct risks when racial classifications are involved. First, the risk to the rule of law of breaking the Fourteenth Amendment's most solemn command. Second, the risk to the individual citizen whose rights are determined by resort to his race. Third, the risk to society itself of interminable race-based rancor.

It is not too much to expect that such a splendid jurist express deeper respect for the dangers of a race-based journey. The great silence of these cases is whether the use of racial classifications will squander the opportunities that America's multicultural future promises to provide. Justice Breyer recognizes the dilemma that binary plans, such as Seattle's and Louisville's, might produce insufficient diversity, but that the inclusion of multiple groups might "produce divisiveness among minority groups that is incompatible with the basic objectives of the Fourteenth Amendment."<sup>142</sup> The answer, he suggests, is

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<sup>141</sup> See *id.* at 2760 (majority opinion).

<sup>142</sup> *Id.* at 2829 (Breyer, J., dissenting).



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that courts give weight to a school board's determination of the best way to go about achieving its diversity objectives.<sup>143</sup>

That, however, overlooks the real problems facing school districts. Schoolchildren in some districts represent over a hundred different ethnic or racial backgrounds and speak over a hundred different languages. What racial classifications should these districts use? How will districts decide which children belong to which category, especially in an era when children themselves are more likely to have parents with different ethnic heritages? And even assuming proper lines can be drawn, how will the pie be divvied up? Racial animosities are stoked when officials even pose such questions, let alone answer them. To forsake the goal of looking at each child for himself is to enter a true morass or swamp and invite racial rivalries to consume the diminishing vestiges of a common heritage.

Much of the Court's discussion unavoidably involves race by the numbers. That, after all, was the subject matter of the suit before it. At a certain point, the drumbeat of the numbers becomes itself a numbing exercise, and one gets the sense that we have lost our way. Regaining our bearings requires two essential steps. The first bedrock requirement is that no child bear the burden in school of separation or discrimination based on race. Beyond that, perhaps the best a democracy can do — and it will be no small achievement — is to provide every kid the best education it possibly can. If all we do is concentrate on the first of these requirements and neglect the second, then we will have fundamentally defaulted on our larger obligations.

Diversity for all its value is not the be-all and end-all, and it will not begin to provide children what they need to succeed if the basic elements of instruction are otherwise lacking. All the diversity in the world will not help unless kids learn to read and write, to master mathematics and science, to develop computer skills, and to undergo the kind of training needed in a world whose demands for skills will continue to shift rapidly. Just a great education, thank you, is the gift one generation owes another. Whether a student assignment plan "works" should thus begin with the notion of educational benefit; learning is possible in many environments where students, teachers, and parents are committed to it. The obstacles to learning lie in the poverty, both spiritual and material, that surrounds the lives of so many children. The solutions to such heartwrenching situations are anything but easy, but they do not lie in offending the bright and basic promise of the American Constitution.

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<sup>143</sup> *Id.* at 2835–36.

## IV. CONCLUSION

On a court, the expression of individual differences can become a source of institutional pride. And so it should be with *Parents Involved*. Our hopes for the Court are that it will rise to occasions such as this, and the Justices did so. But quality of craftsmanship cannot obscure the fact that these cases raise nothing less than the question of what kind of nation we wish to become. The struggle over these issues will continue for years, because both the Court and the country are so divided on them. But the majority took at least a small step toward establishing a principle that what unites us overshadows what divides us by race. In doing so, it vindicated the ideals of the Declaration of Independence and the Fourteenth Amendment alike: that we are human beings in the sight of God and American citizens in the eyes of the law. No more, but no less. There is no other way.