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Let Freedom Ring: Making *Grutter* Matter in School Desegregation Cases

RACHEL F. MORAN†

INTRODUCTION

When the United States Supreme Court granted certiorari in 2006 to hear challenges to two voluntary desegregation plans in *Parents Involved in Community Schools v. Seattle School District No. 1*,[1] civil rights activists watched with a mix of anticipation and trepidation. Some hoped that the litigation would offer a way to expand race-conscious policies in elementary and secondary education. Others feared that the cases would serve as the occasion to overrule *Grutter v. Bollinger*, a 2003 decision that upheld the constitutionality of affirmative action in admissions at the University of Michigan's law school.[2] In *Grutter*, Justice Sandra Day O'Connor endorsed diversity as a compelling interest but made clear that it was not a carte blanche for race-based decision-making.[3] Relying on a tradition of academic freedom, she recognized that a diverse student body promoted the free exchange of ideas by including a range of perspectives and experiences. Moreover, diversity advanced democratic legitimacy by opening pathways to leadership for individuals from many walks of life.[4] These goals justified the use of race as one factor in the holistic review of applicants, but race could not be weighed so heavily that, in effect, quotas were created.[5]

After *Grutter*, civil rights advocates immediately began to speculate that the diversity rationale, reinvigorated after the Michigan victory, could validate voluntary desegregation plans in elementary and secondary schools.[6] This strategy seemed vital to preserving some degree of

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1. 127 S. Ct. 2738, 2746 (2007).
2. 539 U.S. 306, 343–44 (2003).
3. *Id.* at 328–33.
4. *Id.* at 330–32.
5. *Id.* at 334–39.
6. *See, e.g.*, Caroline Hendrie, *In U.S. Schools, Race Still Counts*, EDUC. WK., Jan. 21, 2004, at 1. Indeed, this strategy led to an important early success in the en banc decision of *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005). *See* John Gehring & Caroline Hendrie, *Advocates Hail Ruling Backing Desegregation Plan*, EDUC. WK., July 13, 2005, at 3.

integration in public education because, with court-ordered remedies drawing to a close, many schools once again were becoming racially identifiable.[7] Efforts to rely on race-neutral alternatives, like socioeconomic integration, were not uniformly successful in countering these segregative trends.[8] Despite a sense of urgency in the civil rights community, a victory before the Court was by no means guaranteed. Justice O'Connor, the principal architect of the *Grutter* decision, had recently retired, and the time seemed ripe to revisit her reasoning about diversity.[9]

In fact, the question presented for review in *Parents Involved* was whether *Grutter* could be used to uphold voluntary plans that relied on race-conscious student assignments to achieve desegregation.[10] Despite every indication that the voluntary desegregation cases would be a referendum on *Grutter*, none of the Justices addressed the diversity rationale in depth. The *Parents Involved* litigation produced shifting majorities for key constitutional principles: one five-person majority for the proposition that strict scrutiny should apply to voluntary desegregation plans; one for the assertion that promoting diversity and preventing racial isolation are compelling interests that can justify such plans; and one for the view that the plans were not narrowly tailored to promote these interests. Amid this fragmentation, any careful analysis of how a diversity rationale could be transplanted from colleges and universities to elementary and secondary schools was lost.

Applying strict scrutiny, Chief Justice John Roberts rejected the desegregation plans as inconsistent with a colorblind Constitution.[11] His opinion dealt with *Grutter* by treating its color-conscious approach as peculiar to higher education.[12] Writing for the dissent, Justice Stephen

7. *See* Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in* DISMANTLING DESEGREGATION 53, 53–55, 61–63 (Gary Orfield et al. eds., 1996). Some schools have experimented with socioeconomic integration as an alternative to race-based plans. So far, the results in producing diversity are mixed and depend on the demographic makeup of each school district. *See* Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, § 6 (Magazine), at 38. Despite these challenges, in the wake of *Parents Involved* decision, Louisville, Kentucky began to develop such a plan. *Id.*

8. *See* Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL'Y ANALYSIS 49, 67 (2006).

9. JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 20–25 (2007).

10. Petitioner's Brief at i, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief of Petitioner at i, *Parents Involved*, 127 S. Ct. 2738 (No. 05-915); Brief for Respondents at i, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908); Brief for Respondents at 21, 24–27, 29–30, 36–44, 49, *Parents Involved*, 127 S. Ct. 2738 (No. 05-915); *see also* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 325 (2007) (discussing Louisville schools).

11. *See Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

12. *Id.* at 2754 (majority opinion); *see also* Peter Schmidt, *High Court Leaves Michigan Case*

Breyer supported the voluntary desegregation plans and undoubtedly was sympathetic to diversity. Even so, his opinion focused primarily on *Brown v. Board of Education*'s legacy as a desegregation mandate.[13] The crucial swing vote, Justice Anthony Kennedy, endorsed diversity but ultimately cast doubt on the constitutional viability of any race-conscious student assignment plan.[14] Kennedy had been skeptical of holistic review in the University of Michigan Law School case, and his decision in *Parents Involved* made plain his distaste for governmental policies that classify individuals on the basis of race.[15] With such divergent holdings,[16] even the five Justices who recognized diversity as compelling did not give significant consideration to its unique import for the elementary and secondary school setting.

In short, a case that began as a referendum on *Grutter* generally failed to address its full implications outside of higher education. Although *Parents Involved* was groundbreaking because it expanded the diversity rationale to elementary and secondary schools, even the Justices who endorsed voluntary desegregation did not fully capitalize on this unprecedented success. Instead, they mostly treated diversity and desegregation as a distinction without a difference. A careful comparison of the jurisprudential roots of these two bodies of law shows why they should not be conflated. There were real costs to the failure to disentangle the rationales. As I will show, a majority of the Justices were so concerned with limiting remedies for past discrimination that they largely overlooked the problem of constraining a community's capacity to imagine its racial future.

I. A Distinction Without a Difference: Diversity and Desegregation in *Parents Involved*

Parents Involved addressed the constitutionality of voluntary desegregation plans in Louisville, Kentucky and Seattle, Washington. Louisville adopted its plan when a federal district court terminated a

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Intact, CHRON. HIGHER EDUC., July 6, 2007, at A1 ("[T]he court's majority suggested that the key justification Michigan offered in defending its policies . . . did not hold as much weight in the context of elementary- and secondary-school education.").

13. *See Parents Involved*, 127 S. Ct. at 2818 (Breyer, J., dissenting) (noting that *Grutter* said that context matters and here the context turned on a history that "has required special administrative remedies").

14. *See id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) ("Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.").

15. *See id.*; Grutter v. Bollinger, 539 U.S. 306, 388–95 (2003) (Kennedy, J., dissenting).

16. Jonathan Fischbach et al., *Race at the Pivot Point: The Future of Race-Based Policies To Remedy De Jure Segregation After* Parents Involved in Community Schools, 43 HARV. C.R.-C.L. L. REV. 491, 491 (2008).

desegregation order after the school system had complied in good faith with remedies to eliminate the vestiges of past intentional discrimination. To preserve gains in integration made under the court's supervision, Louisville's voluntary plan required all non-magnet schools in the district to maintain a black enrollment of between fifteen and fifty percent. New students could apply for admission to their first and second choice of schools within designated clusters. Those who did not apply were simply assigned to a school.[17] After receiving an assignment, a student could request a transfer to another non-magnet school. These transfers would be denied if there were no available spaces or the transfers placed the school outside the guidelines for racial balance.[18] Crystal Meredith brought suit when her son's application to transfer to kindergarten in a school closer to home was denied. Although space was available, the transfer would have had "an adverse effect on desegregation compliance."[19]

Seattle had not been subject to court-ordered desegregation, although the district did face the threat of litigation.[20] Seattle experimented with a number of voluntary plans, which, over time, reduced the district's reliance on race in making student assignments. In 1978, school officials implemented a busing program. By 1988, however, they had responded to the problem of white flight by instituting a student choice plan.[21] In 1999, the district revised its approach yet again, this time to ensure that students received their first or second choice of high school. Seattle allowed ninth-graders to choose among schools by ranking them in order of preference. If too many students listed a school as their first choice, the district applied three tie-breaking criteria to allot the available seats. The first criterion looked at whether the applicant had a sibling attending the school; the second examined the impact on the balance of white and nonwhite pupils at the school; and the third evaluated geographic proximity to the school.[22] With respect to the racial tiebreaker, a student's request to transfer would be denied if the school deviated more than ten percent from the overall white enrollment of about forty-one percent in the district.[23] Parents Involved in Community Schools, a non-profit organization composed of parents whose children had been or might be denied admittance to their preferred high

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

18. *Id.* at 2750.

19. *Id.* There was some doubt as to whether the voluntary desegregation guidelines even applied to kindergarten applications. *Id.* at 2750 n.8.

20. *Id.* at 2747; *id.* at 2803–04 (Breyer, J., dissenting).

21. *Id.* at 2805 (Breyer, J., dissenting).

22. *Id.* at 2747 (majority opinion); *id.* at 2805 (Breyer, J., dissenting).

23. *Id.* at 2747 (majority opinion). For the 2001–2002 school year, the permitted deviation from the target racial composition was increased to fifteen percent. *Id.* at 2747 n.3.

schools, brought suit alleging that the use of a racial tiebreaker violated equal protection.[24]

The two plans differed in their mechanics but offered similar justifications for considering race in pupil assignments. Neither district could invoke a remedial rationale based on a court's finding of past discrimination. As a legal matter, Louisville had cured prior violations when it was declared unitary; Seattle never had been found guilty of intentional wrongdoing.[25] Given that a remedial justification was unavailable, diversity seemed to be the most promising basis for defending the plans. Both Louisville and Seattle capitalized on the *Grutter* decision by citing the importance of a diverse student body to the learning process in elementary and secondary schools. This interest in diversity was coupled with an independent purpose of reducing racial isolation.[26]

Writing for the majority, Chief Justice Roberts rejected any expansion of the diversity rationale, noting that *Grutter* had adopted a norm of deference based on a tradition of academic freedom unique to colleges and universities.[27] This stance was hardly surprising. None of the Justices who joined Roberts's opinion had evinced any real sympathy for diversity or affirmative action. Two of them, Antonin Scalia and Clarence Thomas, had dissented in the Michigan law school case,[28] and two others, Chief Justice Roberts and Justice Samuel Alito, had been appointed to the Court based on their conservative credentials and presumptive commitment to colorblindness.[29] All four seemed strongly inclined to interpret the Constitution as forbidding official racial classifications except when necessary to remedy past discrimination.

What is perhaps more surprising is that the plurality allowed *Grutter* to survive in higher education without much in the way of a challenge to its reasoning. Roberts's opinion struck a compromise that left the diversity rationale intact in higher education, but seemingly irrelevant everywhere else. He carefully limited the Michigan decision to its facts by noting the Court's reliance on the history of "expansive freedoms of speech and thought associated with the university environ-

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24. *Id.* at 2748.

25. *Id.* at 2752.

26. *Id.* at 2758–59 (plurality opinion). Although Seattle also justified its plan as a way "to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools," *id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment), the Court focused on the goals of promoting diversity and reducing racial isolation.

27. *Id.* at 2753–54 (majority opinion).

28. Grutter v. Bollinger, 539 U.S. 306, 346–47 (2004) (Scalia, J., concurring in part and dissenting in part); *id.* at 349 (Thomas, J., concurring in part and dissenting in part).

29. *See* GREENBURG, *supra* note 9, at 228–31, 305–07.

ment."[30] This tradition of academic freedom in turn created "a special niche in our constitutional tradition"[31] for institutions of higher education. Roberts chided the school districts for invoking *Grutter* without displaying any real sensitivity to the particulars of the Michigan case, which involved efforts to foster "a specific type of broad-based diversity and . . . the unique context of higher education."[32] This "broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints'"[33] stood in marked contrast to voluntary desegregation plans that focused almost entirely on race.[34] As a result, Roberts concluded that the Louisville and Seattle cases were not governed by *Grutter*.[35]

Roberts drew a sharp distinction between promoting diversity and the school districts' other stated goal of preventing racial isolation. He pointed out that Louisville and Seattle measured success in eliminating racially identifiable schools "solely by reference to the demographics of the respective school districts," a practice that was tantamount to "racial balancing."[36] Because the districts' guidelines were so closely tied to the racial make-up of schools, Roberts feared that upholding the plans would set a precedent with "no logical stopping point."[37] Indeed, his plurality opinion warned:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class."[38]

Even if *Grutter*'s recognition of diversity in higher education remained valid, Roberts noted, it could not justify a "patently unconstitutional" racial quota system.[39]

Justice Thomas joined the plurality in rejecting diversity as a compelling interest in elementary and secondary education, and he went to some lengths to explain why in a separate opinion. Because Thomas generally equated diversity with desegregation, he saw *Parents Involved* as a referendum not on *Grutter* but on the hoped-for gains associated

30. *Parents Involved*, 127 S. Ct. at 2754 (quoting *Grutter*, 539 U.S. at 329).
31. *Id.* (quoting *Grutter*, 539 U.S. at 329).
32. *Id.*
33. *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 330).
34. *See id.* at 2753–54.
35. *Id.* at 2754.
36. *Id.* at 2757 (plurality opinion).
37. *Id.* at 2758 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (plurality opinion)).
38. *Id.* at 2757 (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).
39. *Id.*

with integration. His opinion recounted a longstanding debate over the success of integrated classrooms in promoting measurable gains in minority student achievement.[40] Thomas pointed out that social science evidence was mixed and could not support the adoption of voluntary desegregation plans.[41] Nor was Thomas impressed by attempts to invoke the intangible benefits of creating classroom environments reflective of a pluralistic society. Thomas dismissed justifications rooted in inclusiveness and democratic legitimacy as "just another way to say racial balancing."[42]

For Thomas, amorphous and unsupported rationales could not dislodge the primacy of a colorblind Constitution. In his view, color-conscious remedies were appropriate only to remedy de jure segregation due to past governmental wrongdoing. Neither courts nor school districts were empowered to rely on race-based classifications to counter de facto segregation that resulted from neighborhood housing patterns.[43] Given the firm constitutional guarantee that governmental actors not treat individuals differently on the basis of race, Thomas saw no reason to defer to local officials' judgments about the desirability of voluntary desegregation plans.[44]

Writing for the dissent, Justice Stephen Breyer invoked diversity but emphasized desegregation. In his view, the Court's recognition of diversity as a compelling interest in *Grutter* necessarily extended to primary and secondary schools, "where the education of this Nation's children begins."[45] Even so, he made desegregation jurisprudence the core of his analysis, explaining that "it was *Brown*, after all, focusing upon primary and secondary schools, not *Sweatt v. Painter*, focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed[ucation]*, focusing on graduate schools, that affected so deeply not only Americans but the world."[46]

Reflecting his preoccupation with *Brown*'s legacy, Breyer equated the case for diversity in elementary and secondary schools with available evidence on the benefits of integration, much as Justice Thomas had. Breyer too concluded that the findings were mixed; however, he did not believe that this inconclusive record was fatal to the school districts' plans.[47] Acknowledging the inherent limitations of empirical evidence,

40. *See id.* at 2776–78 (Thomas, J., concurring).
41. *Id.* at 2778.
42. *Id.* at 2779.
43. *Id.* at 2768–70.
44. *See id.*
45. *Id.* at 2822 (Breyer, J., dissenting).
46. *Id.* (citations omitted).
47. *See id.* at 2820–21.

Breyer argued that social science research could never be the basis for recognizing any compelling interest if perfect certainty were required.[48] Under these circumstances, Breyer believed that local school boards should be given the leeway to decide how to proceed in the face of conflicting expert opinions.[49]

To support his deferential stance, Breyer cited desegregation precedents, insisting that they did not draw any bright-line distinction between de jure and de facto segregation so far as local boards were concerned. In his view, federal courts were confined to addressing de jure segregation, but a similar constraint should not apply to school officials. As his dissenting opinion explained, "A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[50] Citing *Swann v. Charlotte-Mecklenburg Board of Education*,[51] the Court's most comprehensive statement on how to craft school desegregation decrees, Breyer insisted that the Court had recognized and encouraged voluntary efforts like those in Louisville and Seattle as a way to realize *Brown*'s promise of equality.[52]

Like the dissenters, Justice Anthony Kennedy recognized diversity as a compelling interest.[53] He observed that "[t]he Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."[54] Acknowledging that the term "diversity" was used in multiple ways, Kennedy noted that its legitimacy as a constitutional justification "depend[ed] on its meaning and definition."[55] Kennedy took both Louisville and Seattle to task for their imprecision in defining a diverse student body, which in turn led to confusing and inconsistent implementation of their voluntary desegregation plans.[56] Although Kennedy agreed that diversity was compelling, he criticized the dissent for citing *Grutter* but then invoking *Brown*'s legacy to evade the stringent limits on using race to achieve diversity. Kennedy believed that, in the past, the Court had been extremely careful to avoid undue reliance on race, beginning with its rejection of quotas in *Regents of the University*

48. *Id.* at 2821–22.
49. *Id.* at 2819, 2826, 2835–36.
50. *Id.* at 2811.
51. 402 U.S. 1 (1971).
52. *Parents Involved*, 127 S. Ct. at 2811–12, 2814 (Breyer, J., dissenting).
53. *Id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).
54. *Id.* at 2788.
55. *Id.* at 2789.
56. *Id.* at 2789–91.

of California v. Bakke[57] and culminating with its cautious endorsement of holistic review in *Grutter*.[58]

Because of Kennedy's belief that governmental reliance on race must be minimized, he rejected the Louisville and Seattle plans. He found that race-based student assignments unduly constricted a child's ability to "find his own identity" or "define her own persona."[59] In Kennedy's view, *Bakke* and *Grutter* recognized race as one element of a person's background and experience, but were careful to avoid reifying an individual's identity in racial terms. In addressing the proper role of race in voluntary plans, Kennedy did not distinguish between promoting diversity and preventing racial isolation. Indeed, he largely equated these interests when he wrote that:

> A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.[60]

As a result, Justice Kennedy did not explain how voluntary desegregation plans could adopt a nuanced approach to a wide range of individual traits while simultaneously pursuing a singular commitment to reducing racial concentration.

In *Parents Involved*, none of the opinions fully engaged the distinction between diversity and desegregation. The majority limited *Grutter*'s reasoning to the realm of higher education without explaining in any detail why a tradition of academic freedom had no relevance to elementary and secondary schools. The dissent acknowledged diversity as a compelling interest but ultimately treated the desegregation precedents as sufficient to uphold the Louisville and Seattle plans. Justice Kennedy, the crucial swing vote, endorsed the importance of diversity in elementary and secondary education, but failed to consider how identity-building goals might be affected by the challenges of combating longstanding patterns of public school segregation.

II. DISTINGUISHING THE DOCTRINES: A BRIEF JURISPRUDENTIAL HISTORY OF DIVERSITY AND DESEGREGATION

Although the Justices in *Parents Involved* largely ignored the dis-

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57. 438 U.S. 265 (1978).

58. *See Parents Involved*, 127 S. Ct. at 2793–94 (Kennedy, J., concurring in part and concurring in the judgment).

59. *Id.* at 2797.

60. *Id.*

tinction between diversity and desegregation, these two rationales implicate different lines of authority: the school integration cases that grew out of the Court's historic decision in *Brown v. Board of Education*[61] and the higher education decisions that originated with *Bakke*. After *Brown*, the Justices grappled with the meaning of equal protection and discrimination, eventually becoming mired in a polemical debate about whether or not the Constitution is colorblind. Concerns about the proper scope of race-conscious remedies threatened to paralyze the Court when it evaluated the constitutionality of affirmative action in higher education. Diversity promised a way out of this deadlock by applying a different logic rooted in the First Amendment. The brief jurisprudential history set forth here will explore how these two lines of precedent developed and diverged before they became conflated in *Parents Involved*.

The Court's landmark decision in *Brown* actually grew out of cases involving higher education. From the late 1930s to 1950, the National Association for the Advancement of Colored People waged a campaign against policies that excluded blacks from access to colleges and universities.[62] The Court rejected state practices that barred black applicants from admission and redirected them to schools in neighboring states.[63] Nor could a public system of black colleges and universities justify barriers to entry at predominantly white institutions.[64] Once blacks were admitted to historically white colleges and universities, access had to be granted on equal terms. There could be no forced segregation in classrooms, dining halls, or libraries.[65] In reaching these conclusions, the Justices found that separate could never be equal in higher education because resources, both tangible and intangible, could not be rendered equivalent.

In *Brown*, the Court struck down laws mandating segregation in public elementary and secondary schools, declaring that "[s]eparate educational facilities are inherently unequal."[66] Intangible harms would persist, even if tangible resources, like investments in teachers, books, and facilities were equalized. At the outset, the Court focused on the South, where school systems had mandated segregation by law. There, the injurious consequences to children flowed directly from the deliberate acts

61. 347 U.S. 483 (1954).

62. Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality 251–55, 266, 323–57 (1975).

63. Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 632–33 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 348–52 (1938).

64. Sweatt v. Painter, 339 U.S. 631, 632–33 (1948).

65. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 640 (1950).

66. 347 U.S. at 495.

of state officials. Many observers nevertheless believed that the landmark decision condemned all forms of segregation, whether officially compelled or not, because of the inherently pernicious effects on children's "hearts and minds."[67] The Court would not resolve the question of whether *Brown* reached de facto segregation that occurred in the absence of state action for two decades because of significant delays in implementing the decision.

Even with stark evidence of official discrimination and *Brown*'s unanimous pronouncement, the Justices struggled to make their sweeping mandate a reality. One year later, in *Brown v. Board of Education* (*Brown II*), the Court ducked the question of relief by adopting a formula of "all deliberate speed"[68] that left to federal district courts the daunting task of crafting appropriate remedies on a case-by-case basis. There was far more deliberation than speed in the years immediately following *Brown*, but the Court affected a studied silence on the adequacy of progress in achieving integration.[69] After Congress passed the Civil Rights Act of 1964,[70] the Justices felt emboldened to enforce *Brown*'s mandate. The Court rejected "freedom of choice" plans that formally eliminated barriers to integration but did little to end persistent patterns of racial isolation.[71] Later, the Court provided remedial guidelines for desegregation cases and even unanimously endorsed busing, despite the controversy it had engendered nationwide.[72]

As civil rights advocates targeted the North and West, the Justices' resolve was tested. In these regions, official policies typically did not mandate separate schools. So, there was no glaring history of slavery and Jim Crow segregation to justify aggressive federal court intervention. Nonetheless, pervasive patterns of residential segregation made racially identifiable neighborhood schools a commonplace occurrence.[73] The looming question, then, was whether equal protection required remedies for not only de jure but also de facto segregation. Civil rights advocates argued that *Brown* stood for the proposition that racial concentration was inherently harmful, regardless of its causes. Conservatives who feared an activist judiciary insisted that only officially

67. *Id.* at 494.

68. 349 U.S. 294, 301 (1955).

69. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 321 (2004).

70. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1983, 2000a–2000cc (2000)).

71. *See* Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968).

72. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31–32 (1971).

73. *See* Gary Orfield, *Turning Back to Segregation*, *in* DISMANTLING DESEGREGATION, *supra* note 7, at 1, 10–11.

mandated segregation rose to the level of a constitutional violation.[74]

The Justices managed to sidestep this issue in 1973 when they decided *Keyes v. School District No. 1*.[75] The Court concluded that the school board in Denver, Colorado had deliberately promoted separate schools when it gerrymandered attendance zone boundaries, selected the site for a new elementary school, and deployed mobile classroom units to alleviate school overcrowding.[76] Based on these findings, the Court remanded with instructions to the trial judge to determine whether these school policies and practices "were . . . factors in causing the existing condition of segregation."[77] For the first time, though, the Justices could not preserve the vaunted unanimity that had characterized *Brown* and the desegregation decisions that followed. Members of the Court disagreed openly about the appropriate scope of relief.[78] Justice Lewis Powell filed a partial concurrence in which he questioned the de jure/de facto distinction,[79] while Justice William Rehnquist became the first member of the Court to dissent vigorously in a case promoting public school integration.[80]

In *Milliken v. Bradley*,[81] these divisions persisted and led civil rights attorneys to suffer their first high-profile defeat in a school desegregation case after *Brown*. A federal district court in Detroit had ordered a mandatory busing plan that enlisted white students in nearby suburban districts to desegregate heavily nonwhite central city schools. Five Justices overturned the order, finding that inter-district remedies were appropriate only when neighboring school systems had contributed to the de jure segregation that triggered judicial intervention.[82] In exempting suburban districts from court-ordered busing, the Court emphasized

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74. *See* Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION, *supra* note 7, at 291, 293.

75. 413 U.S. 189 (1973).

76. *Id.* at 191–92, 198–200. The Court also mentioned that faculty and staff were assigned to schools on the basis of race. *Id.* at 199–200.

77. *Id.* at 214.

78. Until the *Keyes* decision, the Justices had compromised to ensure unanimous opinions that reinforced the incontrovertible imperative of desegregation. In *Swann*, for instance, the Court struggled mightily to present a united front when establishing desegregation guidelines to preserve *Brown*'s legacy. *See* BERNARD SCHWARTZ, *SWANN'S* WAY 111–84 (1986).

79. *Keyes*, 413 U.S. at 218–20 (Powell, J., concurring in part and dissenting in part). Powell later retreated from this position, attributing it to his "Confederate emotion" over the unequal treatment of the South as compared to the rest of the country. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 298–300, 306 (1994).

80. *See Keyes*, 413 U.S. at 254; Orfield, *supra* note 73, at 10.

81. 418 U.S. 717 (1974). Later, the Court relied on compensatory programs to cure the history of discrimination in Detroit because meaningful desegregation was impossible without the cooperation of white students in suburban school systems. *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 279–89 (1977).

82. *Milliken*, 418 U.S. at 744–52.

not only their innocence but also their autonomy under a system of local control of the schools.[83] The Justices made clear that de jure segregation in Detroit could not justify remedies for de facto segregation in the suburbs. The patterns of segregation at issue in the case were fairly typical of those in other major metropolitan areas. As a result, *Milliken* sounded the death knell for meaningful school integration in most cities outside the South.[84]

The *Milliken* decision reflected the Justices' profoundly different interpretations of the Equal Protection Clause. Some members of the Court advocated a formalist approach, which focused on the government's use of racial classifications as the constitutional evil to be avoided. Because the Constitution was colorblind, race-conscious remedies were appropriate only when necessary to rectify past intentional discrimination. Therefore, the de jure/de facto distinction was critically important in evaluating the propriety of judicial relief. Meanwhile, other Justices insisted that color-conscious remedies should be available to address the persistence of racially identifiable schools and neighborhoods, whatever their cause. These members of the Court understood the equal protection guarantee as a sword against subordination and not simply a shield against state-sponsored discrimination. Accordingly, there was no reason to draw a bright-line distinction between de jure and de facto segregation.[85]

The diversity rationale in the realm of higher education developed, in part, as a response to this intractable controversy over the constitutionality of race-conscious remedies in the absence of past discrimination. The early higher education cases, which laid the foundation for *Brown*, were important in establishing a norm of non-discrimination, but they did not result in substantial increases in minority student enrollment.[86] Instead, affirmative action had diversified college and university student bodies, but the programs, which did not require proof of past wrongdoing, rested uneasily with the Court's focus on an individual's right to be free of discrimination. As a consequence, dissension among

83. *Id.* at 741–45; *see also* Orfield, *supra* note 73, at 11 ("Chief Justice Warren Burger cited the 'deeply rooted tradition' of local control of public schools as the legal rationale for denying a metropolitan remedy and allowing segregated schools to persist.").

84. *See* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 222–25 (1979); Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 How. L.J. 341, 346–47 (2004).

85. For an account of the clash between anticlassification and antisubordination interpretations of the Constitution, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

86. *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 382-83 (2005).

the Justices threatened to stymie the Court when it heard a challenge to affirmative action in university admissions a few years after *Milliken*.[87]

In *Regents of the University of California v. Bakke*, the plaintiff, a disappointed white applicant to the University of California at Davis medical school, alleged that he had been a victim of "reverse discrimination" because seats in the entering class were set aside for minority applicants with less competitive credentials than those of nonminority applicants.[88] Four Justices wanted to strike the Davis plan down because it violated a strict principle of colorblindness, given that the medical school had not engaged in past discrimination.[89] Meanwhile, another four wanted to uphold the program as a way to rectify general societal discrimination and underrepresentation in the medical profession.[90]

Justice Lewis Powell cast the deciding vote, and, in doing so, he turned away from this polarizing debate to "find a middle ground."[91] To that end, he invoked a tradition of academic freedom that allowed colleges and universities to promote an "atmosphere which is most conducive to speculation, experiment and creation."[92] According to Powell, institutions of higher education legitimately could value a diverse student body as a way to enrich the discourse among peers on campus.[93] Although Powell deferred to the judgment of higher education administrators in this regard, his deference was not without limits. He applied strict scrutiny to the programs, demanding that they be narrowly tailored to achieve the institution's compelling interest in diversity. Holistic review that allowed all applicants to compete against each other, with race as one factor among many, would pass muster. Quotas and set-asides like those used by the Davis medical school would not.[94]

Powell had hoped to deflect the controversy surrounding affirmative action, but his decision in *Bakke* remained the subject of intense criticism and continuing legal challenges.[95] By the time of the *Grutter* litigation, opponents of race-conscious admissions had begun to argue

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87. *See* BERNARD SCHWARTZ, BEHIND *BAKKE* 79–80 (1988).

88. 438 U.S. 265, 276–78 (1978) (opinion of Powell, J.). Although Justice Powell became identified as the pivotal vote, Justice Harry Blackmun's silence on *Bakke* became a source of deep anxiety and delay and made him a central factor in the case behind the scenes. *See* SCHWARTZ, *supra* note 87, at 120–30.

89. *See Bakke*, 438 U.S. at 413–17 (Stevens, J., concurring in the judgment in part and dissenting in part, joined by Burger, C.J., and Stewart & Rehnquist, JJ.).

90. *See id.* at 362–79 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

91. JEFFRIES, *supra* note 79, at 473.

92. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

93. *Id.* at 313–15.

94. *See id.* at 315–20.

95. *See* Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at*

that Powell wrote only for himself and that his lonely opinion had little precedential value.[96] In persuading a majority of the Court to endorse the diversity rationale, Justice O'Connor rehabilitated the First Amendment framework that Powell had established in *Bakke*. Like Powell, she applied strict scrutiny when evaluating the admissions program at the University of Michigan Law School, but she allowed for some deference to college and university officials based on academic freedom.[97]

That deference turned not only on the administrators' special expertise in shaping the learning process but also on their role as trusted gatekeepers to elite pathways to leadership. According to O'Connor, diverse leadership was a key component of democratic legitimacy, a point brought home by amicus briefs filed on behalf of business leaders and a group of retired military generals.[98] With O'Connor's interpretive gloss, diversity now had dual purposes: the production of knowledge through the exchange of ideas, as well as the legitimation of the democratic process through openness and inclusion. Even after bolstering the analysis of diversity as a compelling interest, however, O'Connor hewed closely to Powell's requirement of narrow tailoring. Like him, she enforced a distinction between holistic review, which was constitutional, and quotas and set-asides, which were not.[99]

Bakke and *Grutter* clearly adopted a different logic than the desegregation decisions. No longer was race defined as either a formal governmental classification or a mark of stigma and subordination. Instead, race became a proxy for perspectives and values that mattered in understanding the world and in forging a responsive political process.[100] In other decisions, the Court had focused on equality as an individual entitlement to be free of discrimination, but the higher education cases explored the collective implications of race. Producing knowledge and promoting democratic legitimacy required interaction among people from different backgrounds. The shared interest in diversity could not be protected by focusing exclusively on individual claims of right. Instead,

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Boalt Hall, 88 CAL. L. REV. 2241, 2253 (2000) (describing the increasing attacks on affirmative action in higher education admissions beginning in the 1990s).

96. *See* Rachel F. Moran, *The Heirs of* Brown*: The Story of* Grutter v. Bollinger, *in* RACE LAW STORIES 451, 463 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

97. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

98. *Id.* at 330–32. For a discussion of the role of the amici in the case, see Moran, *supra* note 96, at 485–90 and Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1462–66 (2005).

99. *See Grutter*, 539 U.S. at 334–39; Gratz v. Bollinger, 539 U.S. 244, 276–77 (2003) (O'Connor, J., concurring).

100. For a fuller account of how the desegregation and diversity cases diverge, see Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of* Parents Involved, 69 OHIO ST. L.J. 1321 (2008).

the make-up of the entire class had to be considered, and so institutions became essential to cultivating the conditions necessary for the exchange of ideas to flourish.

Despite these differences, the opinions in *Parents Involved* often tended to conflate diversity and desegregation. This tendency undoubtedly had its roots in the school districts' own strategizing. Regardless of *Brown*'s rhetorical power, later desegregation decisions had made clear that color-conscious remedies were designed to combat de jure discrimination. Because the Louisville and Seattle plans were voluntary, the districts faced serious constitutional obstacles to classifying students on the basis of race. Even if the boards' goals were benign, that is, to promote diversity and to combat racial isolation, the plans were subject to strict scrutiny. Only the diversity rationale in *Bakke* and *Grutter* had persuaded the Court to uphold the differential treatment of students absent a history of past discrimination. So, the school boards in Louisville and Seattle adopted the constitutional vocabulary of the affirmative action cases, even if the inspiration for the plans was in all likelihood the *Brown* decision.[101]

Treating diversity and desegregation as a distinction without a difference had real costs for the *Parents Involved* litigation. Both concepts became numbers-driven in ways that obscured their underlying rationales. Diversity was equated with promoting racial balance, while desegregation was treated as a cure for racial imbalance. Because desegregation was associated with an individual's right to be free of discrimination, even Justices sympathetic to the districts' plans focused on measures like student achievement. The opinions ignored the collective value of diversity that was at stake in *Bakke* and *Grutter*. With no unambiguous proof of academic benefits and no consideration of shared interests, Justice Kennedy could readily attack the efforts in Louisville and Seattle as mere racial balancing, a set of "[c]rude measures"[102] that treated students as "racial chits valued and traded according to one school's supply and another's demand,"[103] and the Roberts plurality could insist that a commitment to racial proportionality had "no logical stopping point."[104]

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101. *See* John Aloysius Farrell, Op-Ed., *Supreme Court Due To Decide if Race Still Matters in U.S.*, SAN JOSE MERCURY NEWS, Dec. 4, 2006, § A, at 2 (describing the Louisville plan as a legacy of *Brown*); Tom Brune, *School Desegregation Back in Court*, NEWSDAY, Dec. 3, 2006, at A18 (noting a Seattle School District attorney's statement recalling the "separate but not equal" principle of *Brown*).

102. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (Kennedy, J., concurring in part and concurring in the judgment).

103. *Id.*

104. *Id.* at 2758 (plurality opinion) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (plurality opinion)).

III. Does the Distinction Make a Difference?: Disentangling Diversity and Desegregation in *Parents Involved*

Had the Justices fully engaged the diversity rationale with its roots in expressive freedom, the opinions in *Parents Involved* might have looked different. Instead of a single-minded focus on equality and non-discrimination, the Court would have had to address problems of free speech and non-repression. In defining the hallmarks of a democratic education, philosopher Amy Gutmann has identified two principled constraints on popular sovereignty. The first is non-repression, which "prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society."[105] This right "secures more than a freedom from interference" and also includes "the freedom to deliberate rationally among differing ways of life," rather than "freedom to pursue the singularly correct way of personal or political life."[106] The goal of preventing communities from stifling rational deliberation is entirely consistent with diversity's objective of promoting a robust exchange of ideas.

The second principled limit is non-discrimination, which "extends the logic of nonrepression" by requiring that "all educable children . . . be educated."[107] This principle bars the state from being "selectively repressive by excluding entire groups of children from schooling or by denying them an education conducive to deliberation among conceptions of the good life and the good society."[108] Educational exclusion can have the effect of "repress[ing], at least temporarily, the capacity and even the desire of these groups to participate in the processes that structure choice among good lives."[109] Diversity's concern with promoting democratic legitimacy comports with an inclusive participatory ethic. Moreover, if racial concentration results in stigma that prevents minority children from deliberating about the good life, this segregation violates a principle of non-discrimination as well as one of non-repression.

Building on Gutmann's observations, here I will address two key ways in which disentangling diversity and desegregation might have made a difference in *Parents Involved*. First, I will discuss how a preoccupation with racial balancing in the absence of past discrimination led some Justices wrongly to invoke diversity as a constraint on voluntary school desegregation. In particular, they assumed that the concept of critical mass should apply to school districts in the same way that it does

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105. Amy Gutmann, Democratic Education 44 (1987).

106. *Id.*

107. *Id.* at 45.

108. *Id.*

109. *Id.*

to colleges and universities. Because institutions of higher education were concerned with preserving threshold representation so that students of color could effectively voice their views, admissions programs did not have to confront the problems of persistent racial concentration that Louisville and Seattle were addressing.

Second, I will explain why a norm of non-repression of student speech should apply in elementary and secondary schools, even if local boards do not enjoy the same insularity from political pressures that justifies academic freedom and diversity in higher education. Protecting freedom of expression safeguards rational deliberation and the identity-building process that Justice Kennedy in particular associated with a diverse student body. As I will show, insofar as the capacity to imagine a range of personas is part and parcel of expressive freedom, the Court should consider how well voluntary plans advance this value, particularly when racial concentration threatens to rigidify racial differences.

A. *How Diversity Wrongly Operated as a Constraint on Racial Balancing in* Parents Involved

In *Parents Involved*, a majority of the Court concluded that Louisville and Seattle had a compelling interest in reducing racial concentration. Concerns about concentration derive from *Brown*'s assertion that "[s]eparate educational facilities are inherently unequal."[110] This conclusion rests on the belief that segregation inevitably produces the intangible injury of a stigmatized racial identity.[111] Even if staff, facilities, curriculum, and extracurricular activities are equalized, the message of inferiority communicated by deliberate segregation persists.[112] In later decisions, the Court has taken the position that stigma—at least of the unconstitutional variety—resides in the use of official racial classifications rather than in the lived reality of racially identifiable schools.[113] The de jure/de facto distinction therefore has played a crucial role in identifying which segregated schools are inherently unequal and hence unconstitutional. Only de jure segregation prompts remedial intervention by the Court, including measures that promote racial balance.

When a majority of the Court in *Parents Involved* recognized that reducing racial concentration is a compelling interest, the holding sub-

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110. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

111. *See id.* at 493–94. This is a conclusion that Justice Clarence Thomas vigorously rejects. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2777 (Thomas, J., concurring) (noting "black achievement in 'racially isolated' environments").

112. *See* KLUGER, *supra* note 62, at 704–07.

113. *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 867–76 (2004) (describing the Court's shifting definitions of stigma since *Brown*).

verted any assertion that only de jure segregation merits constitutional concern under a colorblind Constitution. Mitigating racial isolation was compelling precisely because the Justices understood the segregation in Louisville and Seattle as presumptively harmful, regardless of its causes.[114] As a result, the Justices seemed to acknowledge—at least implicitly—that the constitutional distinction between de jure and de facto segregation is not so bright-line after all, at least with respect to whether governmental officials can employ race-conscious remedies. The dissent was prepared to ballast the de jure/de facto distinction altogether, at least when school boards adopt voluntary desegregation plans. According to Justice Breyer, the Court had placed limits only on the equitable powers of federal courts to mandate relief, not on the administrative authority of school boards to adopt race-conscious policies.[115] Justice Kennedy, however, was not willing to go this far. Even though race-conscious student assignments seemed to be the logical antidote to racial isolation, he insisted that they were rarely, if ever, likely to pass constitutional muster. The fact that racial concentration was destructive did not make racial balancing—defined as strict rules of proportionality—desirable.[116]

At this point, diversity became a useful device to deal with a constitutional conundrum: The cure for serious racial imbalance was not racial balancing. Kennedy, joined by the Roberts plurality, pointed out that under *Bakke* and *Grutter*, colleges and universities at most could seek a critical mass of underrepresented students, the level of representation necessary to make meaningful the exchange of ideas and access to leadership.[117] Because Louisville and Seattle had pursued proportionality, the diversity rationale could not justify the mechanics of their plans. As Roberts explained, the University of Michigan Law School "did not count back from its applicant pool to arrive at the 'meaningful number' it regarded as necessary to diversify its student body. Here, the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts."[118] For that reason, even assuming that *Grutter* applied to the voluntary plans, they still were unconstitutional because "[t]his working backward to achieve a particular type of racial balance, rather than working forward from some dem-

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114. *See* John A. Powell, Op-Ed., *Segregated Schools Ruling Not All Bad*, NEWSDAY, July 16, 2007, at A33. Only Justice Thomas took issue with this view, arguing that concerns about racially identifiable institutions were based on stereotypical assumptions about black inferiority. *See Parents Involved*, 127 S. Ct. at 2776–78 (Thomas, J., concurring).

115. *Parents Involved*, 127 S. Ct. at 2823–24 (Breyer, J., dissenting).

116. *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

117. *See id.* at 2757 (plurality opinion); *id.* at 2793–94 (Kennedy, J., concurring in part and concurring in the judgment).

118. *Id.* at 2757 (plurality opinion) (citation omitted).

onstration of the level of diversity that provides the purported benefits, is a fatal flaw under [the Court's] existing precedent."[119]

This analysis overlooked the distinction between promoting the exchange of ideas on the one hand and counteracting the harms of stigma on the other. The plurality, joined by Justice Kennedy, assumed that a principle of critical mass should comparably constrain the school districts' pursuit of both goals. Yet, in *Grutter*, Michigan officials had concluded that a threshold number of students were necessary to ensure that a range of perspectives would be represented on campus. Minority students enrolled in token numbers might be unwilling to speak candidly, and, if they did, they might wrongly be identified as spokespeople for their entire racial or ethnic group.[120] The concept of critical mass therefore was closely linked to the free expression of ideas on a diverse campus, one that was not constrained by entrenched patterns of segregation.

Although tokenism in colleges and universities admittedly could result in unwonted stereotyping and even stigma, the problem that Louisville and Seattle faced was very different. Minority students were clustered in racially isolated schools, which in turn led to educational harm. As a result, the school districts needed to be concerned with the threshold at which perceptions of isolation dissipate, not just the threshold at which critical mass would be created. Given the demographics in these two cities, voluntary plans that pursued only a critical mass of minority students would lead to diversity in some schools, but necessarily leave others identifiable by race. Pupils assigned to schools that remained segregated could suffer from a heightened sense of isolation when comparing their experience to that of select peers in diverse classrooms. If so, a mechanical invocation of critical mass might put the objective of promoting diversity at loggerheads with the goal of reducing racial concentration.[121] In short, there was no basis to assume that these two rationales would work in tandem, so there was no reason to presume that all of the remedial constraints in *Grutter* would apply with the same force to the Louisville and Seattle plans.

B. *How Diversity Might Have Operated as a Constraint on Racial Imbalance in* Parents Involved

Because the Justices did not carefully distinguish between diversity and desegregation, their opinions ignored the ways in which diversity

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119. *Id.*

120. Grutter v. Bollinger, 539 U.S. 306, 318–20 (2003).

121. *See* GUTMANN, *supra* note 105, at 162 (noting that "perfect proportionality" is unnecessary but that racial isolation violates "the democratic standard of nonexclusion").

actually might operate as a constraint on the perpetuation of racial imbalance in public schools. The Court's incomplete treatment of the diversity rationale in part reflects the fact that it is something of a constitutional anomaly and therefore incompletely theorized. Here, I first will explore why *Bakke* and *Grutter* do not fit neatly into either equal protection or First Amendment jurisprudence. Then, I will demonstrate how a fuller understanding of the diversity rationale might alter the analysis of voluntary desegregation plans in *Parents Involved.* In particular, I will show how a concern with a principle of non-repression can inform the meaning of non-discrimination. A focus on preserving students' capacities to imagine different versions of the good life can explain why choice plans bolster the case for deferring to school board decision-making. In addition, recognizing an interest in freedom of expression can reveal the limits of an unduly narrow preoccupation with the harms of formal racial classifications.

With respect to equality jurisprudence, the Justices have been split between those who embrace a formal norm of colorblindness and those who endorse color-conscious remedies to counter subordination and stratification.[122] Because the academic freedom justification in *Bakke* and *Grutter* differs so markedly from this preoccupation with anticlassification and antisubordination interpretations of the Constitution, diversity arguments generally have not saved affirmative action programs outside of colleges and universities. For example, the Court has rejected arguments that government set-aside programs in employment or contracting implicate First Amendment concerns about freedom of expression and the exchange of ideas.[123]

Diversity also has not been fully elaborated in the Court's First Amendment jurisprudence. Though justified on academic freedom grounds, *Bakke* and *Grutter* have had a negligible impact on free speech

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122. Siegel, *supra* note 85, at 1534–44.

123. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–39 (1995) (applying strict scrutiny to a Small Business Administration program that created a financial incentive for contractors if they employed minority sub-contractors); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989) (invalidating a city council's set-aside program for minority contractors doing business with the city). In *Metro Broadcasting, Inc. v. FCC*, the Court briefly recognized diversity as a justification for a program that gave a plus to racial and ethnic minorities in the award of broadcasting licenses. 497 U.S. 547, 567–68 (1990), *overruled by Adarand*, 515 U.S. 200. However, the decision did not survive. *See Adarand*, 515 U.S. at 225–27 (claiming that *Metro Broadcasting* used an intermediate standard of review rather than strict scrutiny and therefore overturning *Metro Broadcasting*). Despite these setbacks, scholars continue to argue that the diversity rationale is applicable elsewhere, most notably in the workplace. *See, e.g.*, Cynthia L. Estlund, *Putting* Grutter *To Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 38–39 (2005); Ronald Turner, Grutter, *the Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 200, 232–37 (2004).

cases in colleges and universities. Most lawsuits deal with professors' and students' claims that they were subject to impermissible censorship or retaliation when a college or university disapproved of their viewpoints. According to Professor Paul Horwitz, the Justices prefer to resolve these cases by relying on neutral principles that protect individual rights to freedom of expression.[124] So, administrators can require a professor to teach a particular subject, but they cannot dictate a pedagogical approach.[125] Students, too, enjoy protection from suspension, expulsion, or other sanctions based on the expression of unpopular positions.[126]

Bakke and *Grutter* are anomalous because courts have not paid much attention to the conditions that shape individual choices about speech. For instance, courts have not been receptive to efforts to regulate speech based on a desire to improve a campus's racial climate. Judges generally have rejected "hate speech" codes adopted to protect students from "words that wound" because these measures chill the legitimate discussion of racial difference and curtail individual rights of expression.[127] With an emphasis on the personal right to be free of censorship and repression, First Amendment jurisprudence has shown little regard for "the real-world context in which many speech acts take place" and

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124. *See* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 471 (2005) ("The Court repeatedly has sought to use generally applicable principles, such as neutrality and equality, as its guiding principles in First Amendment jurisprudence. . . . *Grutter*'s First Amendment approach thus stands out as a rare . . . exception to the Court's generally institution-indifferent approach.").

125. *See* Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring in the result) (describing "four essential freedoms" in the academy, including "what may be taught" and "how it shall be taught"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.").

126. *See* Healy v. James, 408 U.S. 169, 185–88 (1972).

127. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1183 (6th Cir. 1995); Doe v. Univ. of Mich., 721 F. Supp. 852, 863–64 (E.D. Mich. 1989). *But see* Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1421 (C.D. Cal. 1995) (allowing regulation of a professor's classroom speech under a sexual-harassment policy). For a sense of the academic debate on this subject, see, for example, Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249 (1995); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991); and Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991). For a seminal piece that played a key role in framing the debate, see Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

"the importance of the institutions in which so much First Amendment activity—worship, study, debate, reporting—occurs."[128]

Bakke and *Grutter* are notable exceptions because both explicitly recognize that institutional settings, as well as acts of censorship or retaliation, can have a powerful impact on the expression of ideas.[129] The recognition that structural conditions shape speech is by no means new. In *Bakke*, Justice Powell drew on a concept of academic freedom that was first developed in public universities in Germany and then transplanted to the United States in the mid- to late-nineteenth century. Autonomy for institutions of higher education was designed to allow the pursuit of knowledge without burdensome state interference.[130] To that end, university administrators were granted substantial discretion as a way to insulate themselves from outside political pressures to conform.[131]

In his plurality opinion, Chief Justice Roberts concluded that the diversity rationale did not apply outside of higher education. Although he did not offer much in the way of an explanation, there certainly are important differences between colleges and universities, on the one hand, and elementary and secondary schools, on the other. Popularly elected boards typically oversee the operation of local school districts. Even though board elections are generally non-partisan, members are directly accountable to a popular constituency.[132] With this electoral structure, it is hard to argue that school officials are or should be insulated from external political pressures except to the extent that partisanship leads to factionalization. Perhaps recognizing this difficulty, Justice Breyer justified autonomy for school boards on other grounds. He contended that the Louisville and Seattle plans were part of "a democratic political system through which the people themselves must together find

128. Horwitz, *supra* note 124, at 471.

129. *See id.*

130. *Id.* at 474; *see also* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265, 1269–71 (1988) (discussing German academic freedom).

131. Horwitz, *supra* note 124, at 475.

132. Questions related to the politics of local school boards and how they affect accountability are complex. The nonpartisan quality and off-cycle scheduling of school board elections can lead to notoriously low voter turnouts. *See* Ann Allen & David N. Plank, *School Board Election Structure and Democratic Representation*, 19 Educ. Pol'y 510, 511–12 (2005) ("In many school board elections, 5% or fewer of voters cast ballots . . . ."). Moreover, school boards now face significant challenges to their authority from city councils, state boards, and legislatures, as well as the courts. *See id.* at 510. *See generally* Besieged: School Boards and the Future of Education Politics (William G. Howell ed., 2005) (discussing the lack of true autonomy of local schools). Although the Court's account of school board politics may have been unduly formalistic or romanticized, that complicated issue lies beyond the scope of this article.

answers"[133] to pressing racial problems. According to Breyer, the Constitution allowed "the people, acting through their elected representatives, freedom to select the use of 'race-conscious' criteria from among their available options."[134] In short, his defense of school board autonomy drew much more on respect for a federalist system than on regard for academic freedom.

There certainly are precedents for Breyer's endorsement of school board autonomy. Ironically, one of the strongest came in the very case that effectively halted court-ordered desegregation outside the South, *Milliken v. Bradley*.[135] In overturning an inter-district desegregation remedy, the Court emphasized that suburban boards had not been found guilty of any misconduct that led to the segregated conditions in core city schools.[136] In a federalist system of government, the Justices reasoned, the district court had to acknowledge limits on its equitable powers and could not simply "deprive the people of control of schools through their elected representatives."[137]

Breyer's reliance on federalism, rather than academic freedom, to justify school board autonomy poses distinct challenges for the analysis in *Parents Involved*. The Court recognized that the districts could use race-conscious remedies to promote diversity and reduce racial concentration. However, if boards are merely political actors, it is unclear why they should be trusted to make decisions about race when other officials are not. *Brown* highlighted the risks of political overreaching when a white majority subjugated blacks by enforcing Jim Crow segregation. In later cases, the Justices recognized that race could be an insidious influence, whatever the identity of the majority and minority. In *City of Richmond v. J.A. Croson Co.*, the Court expressed alarm at the specter of "simple racial politics" when a city council dominated by African Amer-

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133. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2833 (2007) (Breyer, J., dissenting).

134. *Id.* at 2834. Breyer has expressed these views regarding the benefits of local government elsewhere, although he has questioned some of the Court's federalism decisions as misguided. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 56–65 (2005).

135. 418 U.S. 717 (1974). Another powerful endorsement of local control came in *San Antonio Independent School District v. Rodriguez*, where the Court rejected an equal protection challenge to a property tax system that led to severe disparities in per-capita student expenditures. 411 U.S. 1, 56–59 (1973). In finding that the system was constitutional, *Rodriguez* held that there was no fundamental right to an equal educational opportunity. *See id.* at 35. Together, *Milliken* and *Rodriguez* might suggest that liberty interests typically thwart equality claims. However, *Bakke* and *Grutter* show how liberty and equality can work in tandem to establish principles of institutional access and participation.

136. *Milliken*, 418 U.S. at 745.

137. *Id.* at 744.

icans set aside municipal contracts for minority-owned companies.[138] As Justice O'Connor explained:

> In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.[139]

Although the city council was predominantly black and the disenfranchised minority was white, the Court nonetheless applied strict scrutiny and struck the plan down.

According to the Court, the Richmond plan was fatally flawed because "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[140] The underrepresentation of minority firms, standing alone, was insufficient to justify a remedial plan because the city council made no attempt to determine how many qualified minority businesses were available and instead relied on "the unsupported assumption that white prime contractors simply will not hire minority firms."[141] By insisting on a thoroughly documented, factual record to support affirmative action when a predominantly black city council dispreferred white contractors, *Croson* made clear that all governmental racial classifications are inherently suspect, regardless of who is disadvantaged.[142]

Based on this deep distaste for racial politics, the Court has struck down affirmative action programs in public employment and government contracting.[143] Moreover, a justification based on diversity has not made significant in-roads in defending these programs.[144] In that sense, *Parents Involved* is something of a breakthrough because a majority of the Court recognized diversity as a compelling reason for school boards to make race-based decisions, even though the plans were not designed to remedy past discrimination. The Roberts plurality saw the voluntary

138. 488 U.S. 469, 493 (1989) (plurality opinion). For a fuller account of the story behind this case, see Reginald Oh & Thomas Ross, *Judicial Opinions as Racial Narratives: The Story of* Richmond v. Croson, *in* RACE LAW STORIES, *supra* note 96, at 381.

139. *Croson*, 488 U.S. at 495–96 (plurality opinion).

140. *Id.* at 498 (majority opinion).

141. *Id.* at 502.

142. *See id.* at 494 (plurality opinion) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.").

143. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–39 (1995); *Croson*, 488 U.S. at 508; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (opinion of Powell, J.).

144. The Court seemed to endorse a diversity rationale for affirmative action in the award of broadcasting licenses, but this opinion proved to be short-lived. *See supra* note 123.

plans as fungible with impermissible set-asides, but the rest of the Justices disagreed. They were convinced that the Louisville and Seattle plans did not amount to a politicized competition for scarce resources because access to public education was guaranteed for all children. As Justice Breyer explained, the school districts did not use race "to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply."[145] As a result, there was little risk that diversity would operate to mask the harsh realities of pork-barrel racial politics.

Though willing to acknowledge diversity as a compelling interest, the majority in *Parents Involved* had no ready model for a constitutionally acceptable politics of race at the municipal level, in part because *Croson* had so soundly rejected the notion that any such politics was possible. Standing alone, *Bakke* and *Grutter* could not offer a completely satisfying framework for the voluntary desegregation cases because public colleges and universities had been characterized as cosmopolitan organizations removed from politics in general and racial politics in particular. Diversity simply did not speak to the dangers of racial overreaching in local communities. To dispel concerns about potential unfairness, Justice Breyer described how the voluntary plans displayed an ongoing commitment to equity and choice for students of all races. According to his dissenting opinion,

> [T]he districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.[146]

His analysis suggested that a broadly inclusive decision-making process coupled with expanded enrollment options for all students served as a safeguard against an abusive political process.

Justice Kennedy shared Breyer's commitment to diversity and his basic faith in the democratic process but parted ways on the propriety of race-conscious student assignments. *Brown* and its progeny had reflected concerns about officials' discriminatory motivations, but Kennedy worried about the corrupting effects of racial categories on the communities that Louisville and Seattle served. Even if the boards' objectives were laudable, differential treatment of individuals on the basis of race could generate a politics of "divisiveness" and a "corrosive

145. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2818 (2007) (Breyer, J., dissenting).

146. *Id.*

discourse."[147] Insofar as this danger inhered in the use of racial classifications, no amount of broad consultation or school choice could mitigate the dangers. As a result, Kennedy was willing to allow the school boards to "bring to bear the creativity of experts, parents, administrators, and other concerned citizens" in fashioning race-conscious policies, but not if they relied on "widespread governmental allocation of benefits and burdens on the basis of racial classifications," barring an extraordinary justification.[148] For Kennedy, an inclusive process was not a sufficient counterweight to the dangers of a poisoned public discourse. Instead, he insisted that boards could be race-conscious, but only if their decisions took the right form, for instance, when race played a part in drawing attendance boundaries or selecting new school sites.

Although Justice Breyer and Justice Kennedy reached disparate conclusions about the dangers of simple racial politics, both Justices focused exclusively on how to implement a principle of non-discrimination. For Breyer, racial classifications were a legitimate way to overcome a history of subordination, while for Kennedy their use was yet another transgression against a norm of equal treatment. What is missing from either analysis is any clear sense of how diversity's unique goals of fostering discourse and promoting democratic legitimacy might independently bear on the use of race. To fill this gap, Breyer and Kennedy would have had to look beyond equality concerns to questions of liberty: the right to express ideas and develop an identity free of government repression.

On other occasions, the Justices have drawn on college and university precedents to find that protecting freedom of expression in junior high and high schools leads to the "robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[149] This classroom environment sounds very much like the forum for peer-to-peer learning that *Grutter* envisioned. In protecting public schools as a forum for speech, the Court has focused on students' rights, rather than on institutional autonomy. The Court has made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[150] and that "state-operated schools may not be enclaves of totalitarianism."[151] Pupils who express unpopular views are protected unless they create a "material and substantial interference with schoolwork or disci-

147. *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

148. *Id.*

149. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (alteration in original) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

150. *Id.* at 506.

151. *Id.* at 511.

pline."[152] These decisions prevent indoctrination and permit students to imagine a range of good lives.[153] Given the political realities of local school governance, a jurisprudence of individual speech rights is probably a more realistic way to shield students from pressures to conform than is an autonomy principle that insulates board decisions.

Despite the critical importance of protections for student speech, there have been lapses that are sobering reminders of how difficult it can be to promote free expression and democratic values in public school classrooms. With respect to efforts to turn schools into a marketplace of ideas, the Court in recent years has begun to prize conformity in the name of civility. The Justices have accorded school officials increasing discretion to censor speech that offends the sensibilities of the community, even if there is no threat of material disruption to school operations.[154] By granting this expanded authority to administrators, the Justices cast students in the role of passive learners rather than active participants in the instructional process.

With respect to promoting democratic legitimacy, public schools play an integral role in the nation-building process, but, again, there have been instances of overreaching, this time in the name of patriotism. Although *Grutter* focused on elite pathways to leadership, local school boards have a long tradition of preparing children for their civic responsibilities. Indeed, *Brown* itself recognized this commitment:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[155]

At the elementary and secondary levels, democratic legitimacy resonates with images of the "common school."[156] Ideally, the common school should be a place where children come together to bridge their differences and forge a shared set of values, beliefs, and attitudes that ready them for the workplace and civic life.[157] At times, however, jingoistic zeal has led boards to engage in harsh programs of "Americanization"

152. *Id.*

153. GUTMANN, *supra* note 105, at 122–23.

154. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

155. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

156. For a description of competing definitions of the "common school," see Aaron Jay Saiger, *School Choice and State's Duty To Support "Public" Schools*, 48 B.C. L. REV. 909, 930–39 (2007).

157. *See generally* Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*,

that sought to stamp out immigrant students' linguistic and cultural differences as a test of loyalty.[158]

Lapses like these do not invalidate the role that schools play in socializing children for work and citizenship. Rather, these transgressions are a reminder that politics can fail and that courts therefore must remain alert to the perils of ideological repression, especially where disadvantaged and disenfranchised groups are concerned. These risks are especially great because children in elementary and secondary schools generally are a captive audience. Unlike college and university students, pupils are compelled to attend school until a specified age.[159] Even when families are dissatisfied with their local school, they may find it difficult to move to another district or pay tuition for a child to attend a private institution.[160]

This analysis reveals that local political processes create dangers of ideological repression as well as of racial discrimination. Reframing the problem of deference to school boards in this way casts some of the Justices' concerns about voluntary desegregation plans in a different light. First, those who endorsed diversity should look at whether the plans created opportunities for students to imagine different versions of the good life, particularly where race is concerned. For instance, Justice Breyer could have invoked norms of non-repression as well as non-discrimination in explaining why he preferred plans that enlarge student choice. In his defense of local board autonomy, he noted that the voluntary plans systematically sought to enhance educational options as well as to diminish segregation. If non-repression is a constitutional value in its own right, then efforts to promote equality will be most deserving of deference when they preserve individual freedom. In Louisville and Seattle, the benefits of integration were coupled with choices among several schools. As a result, all students had an expanded range of ways to develop their skills and interests through specialized curricular offerings, alternative teaching methodologies, and different extracurricular activities. These possibilities likely would not have been available in a single neighborhood school. Of course, choice alone can never provide carte blanche to use race in a crude and stereotypical fashion, but the

51 CLEV. ST. L. REV. 581 (2004) (describing the normative ideal of the common school and how it emerged as a national philosophy that influenced state practice).

158. *See* DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 16–17, 169–86 (1987).

159. *See* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 64–66, 76–84 (2002).

160. Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 13, 30 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

availability of educational options does serve as evidence that a local board was not engaging in repressive politics, racial or otherwise.[161]

In addition, a focus on problems of repression requires the Justices who rejected race-conscious student assignments to explain why this approach is consistent with preserving the capacity to imagine a range of racial futures. Because Justice Kennedy explicitly recognized diversity as part of an identity-building process, this is an especially pressing challenge for him. In highlighting the dangers of "divisiveness" and "a corrosive discourse," Justice Kennedy sought to preempt collective incivility where race is concerned. His efforts to preserve a harmonious public discourse necessarily limit the possibilities for robust exchange that explores different versions of the racial good life. By allowing fears of a hostile reception to preclude race-based classifications, Kennedy's approach is reminiscent of the "heckler's veto."[162] Members of any race who are sufficiently disgruntled and dissent loudly enough can block voluntary desegregation plans like the ones in Louisville and Seattle. Indeed, the mere prospect of dissension suffices because Kennedy presumed profound disruption without requiring any real evidence of it other than the classification itself (and perhaps the lawsuits that were filed).[163]

Kennedy also assumes that other race-conscious measures will be more palatable than race-based student assignments.[164] Again, he offers

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161. Explicit recognition of norms of both non-discrimination and non-repression would have strengthened Justice Breyer's efforts to rely on choice as evidence that the voluntary plans in Louisville and Seattle were constitutional. He focused on increasing options for students as a way to dispel anxieties about simple racial politics and school board discrimination. However, expanding choice also should have been relevant in addressing Justice Kennedy's concerns about the role of schools in identity building and the dangers of ideological repression and racial reification. *See supra* notes 146–48 and accompanying text.

162. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 674–76 (1983) (analogizing judicial efforts to circumscribe rights in discrimination and affirmative action cases in response to popular resistance to a heckler's veto). I say "reminiscent" because by assigning students under the voluntary desegregation plans, the boards engaged in conduct and not simply speech. The analogy becomes more apt when the mere naming of race through the use of governmental classifications triggers the concern. Then, a strong expression of dissenting views chills speech. In this case, however, the speaker is the government, rather than a private individual whose statements are censored or punished by officials to preserve the public peace. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992); Cox v. Louisiana, 379 U.S. 536, 557–58 (1965); Terminiello v. Chicago, 337 U.S. 1, 2–6 (1949). At least some members of the Court have recognized the danger of allowing a heckler's veto to chill governmental speech, however. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574–75 (2005) (Souter, J., dissenting, joined by Stevens & Kennedy, JJ.).

163. *See* GUTMANN, *supra* note 105, at 164–65 (noting unique role of public officials in coordinating desegregation efforts and calming dissent in the process).

164. Here, Kennedy's approach resembles that of Powell and O'Connor. All were willing to brook some race consciousness in governmental decision-making but insisted that it take the right form. When Powell first distinguished between illicit quotas and permissible holistic review in

no evidence to support this view. In fact, it seems quite unlikely that any simple division between racial classifications and other race-conscious remedies can fully capture the local politics of resistance to reform. Some communities like Louisville and Seattle may be able to adopt and implement race-based student assignment plans, while other cities would find it difficult to weigh race in any way because of a popular demand for complete colorblindness. Kennedy does not say whether dissatisfied constituents could foreclose the consideration of race in drawing attendance boundaries or selecting school sites if threatened protests would poison the political process. At the end of the day, there might be no efficacious way to pursue voluntary desegregation plans if they had to survive a political litmus test based on preservation of civil discourse and racial harmony.[165] As a result, fear of racial dissent would impose serious costs for those who want to consider meaningful school integration as part of a definition of the good life. This constraint in turn would hamper the imaginative capacities of children of all races and arguably produce a different kind of racial politics, a constriction of the multiracial futures that local communities can contemplate.

Finally, Kennedy's emphasis on narrow tailoring to avoid discrimination largely ignores the potential for repression that inheres in persistent racial concentration. Should race-conscious student assignments prove to be the only effective way to desegregate a school system, then boards could be forced to acquiesce in the perpetuation of racial isolation under Kennedy's approach.[166] Yet, if reducing concentration is a compelling constitutional interest because of concerns about stigmatic harms, then students in racially identifiable schools are not enjoying the chance to explore a full range of good lives. The ability of children to imagine their racial futures is crippled by this isolation. Entrenched segregation therefore can reify race in ways more lasting and insidious than any race-conscious student assignment plan would.

As this analysis shows, *Parents Involved* missed the opportunity to

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Bakke, critics (including some of his own law clerks) thought that there was no constitutional basis for treating the approaches differently. JEFFRIES, *supra* note 79, at 476–77, 484–85. Powell, however, thought that a plus for race would be politically acceptable, while a quota would not. *Id.* Immediately after the *Bakke* decision, his compromise seemed to succeed in quelling the controversy. *Id.* However, the attacks that continue to undercut affirmative action in college and university admissions suggest that his political instincts were only partly right.

165. *See* Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 939 (2008) (noting that Kennedy's proposed alternatives to race-conscious student assignment plans could still trigger constitutional challenges if disgruntled groups were disproportionately affected).

166. *See* Charles J. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?*, 30 U. ARK. LITTLE ROCK L. REV. 279, 290–91 (2008) (noting that a number of school districts have abandoned voluntary desegregation plans after *Parents Involved* in part out of concerns about litigation).

grapple with the interplay of the principle of equality augured by *Brown* and the interest in academic freedom acknowledged in *Bakke* and *Grutter*. As a result, the Court did not fully appreciate all of the interests at stake in voluntary desegregation plans, nor did the Justices thoroughly address the complexity of fashioning remedies that simultaneously stimulate the exchange of ideas, promote democratic legitimacy, and combat the stigma of racial isolation. Had the distinction between diversity and desegregation been fully explored, the Court need not have found itself once again embroiled in debates over the anticlassification and antisubordination Constitution. Instead, the *Parents Involved* case could have clarified why the use of race is sometimes appropriate not only to remedy past discrimination but also to structure environments in which students can imagine a range of racial identities.

CONCLUSION

Parents Involved was a breakthrough insofar as a majority of the Court recognized that the diversity rationale could apply outside the realm of higher education. Unfortunately, because the Justices conflated diversity and desegregation, the promise of this breakthrough was not fully realized. The opinions focused almost entirely on the battle over the meaning of non-discrimination that has come to be associated with *Brown*'s legacy. There was very little analysis of the norm of non-repression that underpins the principle of academic freedom in *Bakke* and *Grutter*. As a result, a majority of the Court reverted to a narrow preoccupation with the discriminatory dangers of racial classifications and failed to appreciate the expressive possibilities of more flexible approaches to race. The cost of this incomplete vision may be a diminished capacity to build our collective racial futures.