

NOTE

A NARROW PATH TO DIVERSITY: THE CONSTITUTIONALITY OF REZONING PLANS AND STRATEGIC SITE SELECTION OF SCHOOLS AFTER *PARENTS INVOLVED*

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Justice Kennedy's concurrence in Parents Involved in Community Schools v. Seattle School District Number 1 raised an important and timely constitutional issue: whether the Constitution permits K-12 public school districts not under existing desegregation orders to use site selection of new schools or rezoning plans to achieve racial diversity. Numerous scholars and journalists have interpreted Justice Kennedy's concurrence as explicitly answering the question in the affirmative. This Note argues that the opposite is true. Justice Kennedy's past jurisprudence, as well as his language in Parents Involved, favors the use of strict scrutiny. Indeed, in Parents Involved, Justice Kennedy reveals his three principal concerns: classification of individuals by race, courts interfering with school districts in their daily functions, and the inappropriate use of strict scrutiny when school districts do not intend to affect students because of their race. This Note contends that all three of those concerns militate in favor of using strict scrutiny for rezoning and site selection plans. Such plans most likely will result in the classification of students by race, strict scrutiny of such plans will not prevent school districts from performing their daily functions, and courts may still implement a lower level of scrutiny when school districts do not intend to act based on race. School districts should, therefore, proceed with caution and ensure that any racially based rezoning or site selection plans they use are narrowly tailored to achieve the compelling interest of diversity.

* J.D. candidate, December 2008. First and foremost, I thank my wife, Jerusha, for all her support and love along the journey to make this Note a reality. She alone understands its meaning and significance. I also thank Professor Joan Larsen, as well as Matt Owen and Leigh Wasserstrom. Words cannot capture the gratitude I feel for their wonderful editorial advice, and, more importantly, their extreme selflessness. Finally, I thank Lance Phillips, Samuel Brenner, and the rest of the Notes Office for their final suggestions and comments.

TABLE OF CONTENTS

INTRODUCTION	502
I. PARENTS INVOLVED RAISED BUT DID NOT RESOLVE A TIMELY CONSTITUTIONAL QUESTION	504
A. Parents Involved <i>Dealt with Societal Segregation, Not Government-Sponsored Segregation</i>	505
B. <i>The Justices Were Ambiguous About the Effects of the Holding in Parents Involved</i>	506
II. UNDER JUSTICE KENNEDY'S REASONING, STRICT SCRUTINY IS THE APPLICABLE STANDARD OF REVIEW TO ASSESS THE CONSTITUTIONALITY OF SITING OR REZONING PLANS.....	510
A. <i>It Is Not Clear Whether a Majority of the Court Would Demand Strict Scrutiny</i>	511
B. <i>Justice Kennedy's Reasoning—Strict Scrutiny Is More Likely than He Thinks</i>	515
1. <i>Justice Kennedy's Language Suggests Three Areas of Concern</i>	515
2. <i>Rezoning and Site Selection Raise the Same Concerns as Classifying Individuals by Race</i>	516
3. <i>Applying Strict Scrutiny to Race-Motivated Plans Will Not Prevent State Officials from Performing Their Necessary Duties</i>	519
4. <i>Justice Kennedy Is Not Calling for a More Lenient Standard</i>	521
CONCLUSION.....	522

INTRODUCTION

Five months before the Supreme Court issued its decision in *Parents Involved*,¹ Professor Goodwin Liu predicted that the case would “write perhaps the final chapter of the constitutional and cultural legacy of *Brown* in public education.”² Unfortunately for lower court judges and school districts across the nation, Professor Liu’s hopeful forecast did not come to fruition. A five-to-four majority held that school assignment plans designed to achieve racial diversity in Seattle and Kentucky violated the Equal Protection Clause because they classified students by race. Justice Kennedy was the fifth vote in the majority, but he agreed only with the conclusion, not the reasoning.³ He offered the narrowest, and therefore the controlling, opinion.⁴ That opinion raised, but did not answer, the following important

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

2. Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 277 (2007).

3. *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring).

4. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the

and timely constitutional question: whether the Constitution permits K–12 public school districts not under existing desegregation orders, in an attempt to achieve racial diversity, to site new schools on the borders of racially different neighborhoods, or, alternatively, to change school attendance zones. Some have argued that Justice Kennedy answered the question in the affirmative, and they encourage schools to embrace site selection and rezoning as a constitutional means for achieving diversity.⁵ A deeper analysis of Justice Kennedy’s reasoning, however, reveals that school districts who engage in such practices will face strict scrutiny by the courts and will pass that scrutiny only in the narrowest of circumstances.

Because many school districts across the country use programs similar to those struck down in *Parents Involved*, this open question of constitutional law is both timely and important.⁶ Such school districts must revise their plans in light of the Court’s holding and analysis.⁷ Indeed, just days after the Court announced its decision, a lawsuit in Boston challenged a “public school assignment plan similar to those the Justices struck down” in *Parents Involved*.⁸ School districts are scrambling to create plans “that can pass muster with the court.”⁹

Further, a number of school officials, scholars, and even opponents of the use of race in any form are interpreting Justice Kennedy’s opinion as an answer to the constitutional question that gives full-fledged approval of school site selection and redrawing of attendance zones in order to achieve racial integration.¹⁰ Comments by Roger Clegg of the Center for Equal Opportunity

holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

5. See, e.g., Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 13–16 (2007) (embracing the idea of using site selection and changing attendance zones).

6. See Maria Godoy, *Parsing the High Court’s Ruling on Race and Schools*, NPR, June 28, 2007, <http://www.npr.org/templates/story/story.php?storyId=11507539> (“The 5–4 ruling . . . is likely to prompt revisions of similar plans in schools across the country.”).

7. See Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race In Integration Plans*, N.Y. TIMES, June 29, 2007, at A1 (“How important a limitation Justice Kennedy’s opinion proves to be may become clear only with time, as school districts devise and defend plans that appear to meet his test.”).

8. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/first-sequel-to-school-decision/> (July 5, 2007, 17:42 EST).

9. Greenhouse, *supra* note 7.

10. See Kaufman, *supra* note 5, at 13. (“Justice Kennedy indicates that before employing the ‘last resort’ of student assignment based on race, a school district should attempt to meet its goal of fostering student body diversity through means such as strategic site selection and attendance zoning”); Roger Clegg, *A Good—If Mixed Bag . . .*, CENTER FOR EQUAL OPPORTUNITY, July 4, 2007, <http://www.ceousa.org/content/view/409/114>; Posting of Bryan Fair to Talking Justice, <http://communities.justicetalking.org/blogs/day12/archive/2007/07/12/not-separate-but-still-unequal.aspx> (July 12, 2007, 9:21 EST) (“Kennedy has opened the door for school officials to promote diverse schools. My hope is that more officials will take his lead to champion equal educational opportunity.”); Ibram Rogers, *The Weight of One Man’s Opinion*, DIVERSE, July 26, 2007, http://www.diverseeducation.com/artman/publish/article_8870.shtml (“In his opinion, Kennedy provided school districts with several alternative strategies for pursuing diversity.”).

are illustrative: “Justice Kennedy would allow school systems to locate individual schools with the idea of promoting racial diversity in them.”¹¹ Indeed, some school districts have already put forth proposals to change attendance zones to achieve, among other things, “demographically” balanced schools.¹²

In light of this interpretation of and reaction to Justice Kennedy’s opinion, this Note argues that schools should proceed with caution and that Justice Kennedy will still require schools to face strict scrutiny if they use racially based site selection or rezoning to achieve diversity. The constitutional question is complex, and Justice Kennedy’s statements were hardly definitive. They most likely did not embrace all uses of site selection and attendance-zone manipulation to achieve racial diversity. Indeed, to assume otherwise is to misread Justice Kennedy’s opinion and to impute to his comments far more significance than he may have intended. Justice Kennedy certainly raised possibilities for school districts to consider, but the likely resolution of the constitutional question is that those districts will still need to ensure that their site selection and rezoning plans are narrowly tailored to achieve racial diversity.

Schools should understand that Justice Kennedy does not endorse wholeheartedly all forms of school site selection and attendance-zone manipulation; rather, his reasoning and language call for the application of strict scrutiny, which means courts will likely find that many rezoning and siting plans do violate the Constitution.¹³ Accordingly, Part I of this Note argues in more detail that the Justices’ opinions in *Parents Involved* left open a constitutional question for which school districts will need an answer. Part II then contends that Justice Kennedy’s concurrence requires lower courts to apply strict scrutiny when evaluating school site selections or changing attendance zones as integrative methods, and that those who argue otherwise may have misinterpreted Justice Kennedy’s language.

I. *PARENTS INVOLVED* RAISED BUT DID NOT RESOLVE A TIMELY CONSTITUTIONAL QUESTION

This Part argues that *Parents Involved* left open an important issue of constitutional law. Section I.A details the basic background of desegregation law and argues that societal shifts created a complex environment in which the Court decided *Parents Involved*. Section I.B argues that ambiguity in the Justices’ opinions regarding the effects of the holding in *Parents Involved* raised but failed to answer the question of whether state officials may under

11. Clegg, *supra* note 10.

12. See Michael Alison Chandler, *Vote on School Zones in Fairfax Pits Neighbor Against Neighbor*, WASH. POST, Feb. 28, 2008, at A1 (discussing the extreme parental animus that emerged when a school board proposed a measure to change attendance zones to achieve demographic and academic balance in the school district).

13. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring).

the Constitution use rezoning plans or strategic site selection to achieve diversity in schools.

A. Parents Involved *Dealt with Societal Segregation,
Not Government-Sponsored Segregation*

As society has shifted away from the intentional, state-sponsored segregation of the past, the law has developed and created a background for *Parents Involved* far different from what the Court faced in earlier decisions. This is most evident in the case law related to race in schools. At the time of *Brown v. Board of Education*,¹⁴ many states operated segregated school systems as a matter of state policy.¹⁵ *Brown*'s order to schools was fairly simple: desegregate. In the decades since *Brown*, however, many school systems shifted their focus from remedying state-sponsored, or de jure, segregation to remedying societal, or de facto, segregation.¹⁶ The law adjusted accordingly.

The shift happened as a result of two developments: first, states that never participated in de jure segregation decided to combat de facto segregation;¹⁷ second, states that did practice de jure segregation kept their integrative plans in place even after achieving what the courts call "unitary status."¹⁸ This label means that school districts under desegregation orders

14. 347 U.S. 483 (1954).

15. See *id.* at 486 & n.1.

16. For continuity's sake, I have glossed over the Fourteenth Amendment's rich jurisprudence regarding racial preferences. Those developments that are crucial to this Note I will deal with in more depth later. Suffice it to say for now that the development of the jurisprudence has been gradual, precept upon precept as society has shifted. For a general understanding of that development, see *Korematsu v. United States*, 323 U.S. 214 (1944) (introducing, though arguably not applying, the use of strict scrutiny for reviewing racial discrimination); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (holding that choice plans for children still violate *Brown*'s mandate if the children have no practical choice where to attend school and if the choice plans do not lead to desegregation); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that evidence of intent to burden a particular racial group will give rise to strict scrutiny); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that a law that is racially neutral on its face and rationally may be said to serve a permissible government purpose will not be subjected to strict scrutiny, and that the government may adopt such a law in spite of a racial effect, but not because of its racial effect); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 339–40 (1978) (discussing the scope of the Equal Protection Clause as it stood in the early 1960s and how it then related to de jure and de facto discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (holding that the City of Richmond had failed to demonstrate a compelling interest for awarding municipal contracts to racial minorities); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever . . . federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that a point system used to ensure higher enrollment of minorities was not narrowly tailored to achieve the asserted compelling interest of a diverse student body); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (reasoning that even in instances when strict scrutiny is applied, courts may defer to government actors on whether they have a compelling interest and on whether they used a narrowly tailored means to achieve that interest).

17. See Michael Besso, Sheff v. O'Neill: A Research Note, 34 CONN. L. REV. 315, 327 (2002) (discussing a mandate issued by state officials that schools eliminate de facto segregation).

18. See *Lee v. Macon County Bd. of Educ.*, 681 F. Supp. 730, 739–40 (1988) (holding that a state technical college had achieved unitary status).

by federal courts have “implemented a desegregation plan in good faith and that the vestiges of discrimination have been eliminated to the extent practicable.”¹⁹ In other words, federal courts do not compel unitary school districts to continue their integrative plans. Many districts, however, choose to engage in integrative policies because de facto segregation still exists among their students.²⁰

While courts uniformly support the amelioration of de jure segregation, in the years before the *Parents Involved* decision, they had often looked at programs to eliminate de facto segregation with some skepticism.²¹ This was often because school admissions programs designed to combat de facto segregation prompted charges of racism and unequal protection under the law.²² Thus the issue of whether schools should be engaged in the process of solving societal segregation has divided politicians, voters, and judges. This is the background against which the Court decided *Parents Involved*.

B. *The Justices Were Ambiguous About the Effects of the Holding in Parents Involved*

Ambiguous statements in Justice Kennedy’s concurrence in *Parents Involved* failed to resolve the constitutional question conclusively, leaving government officials and lower courts uncertain as they devise and scrutinize plans to achieve diversity in public schools. His language suggests a departure from his previous view that strict scrutiny should be applied in all cases where racial classifications are used.²³ His *Parents Involved* opinion reflects an expansion of another strain of his reasoning in previous cases, one concerned with the problem of stigma.²⁴ Justice Kennedy is skeptical of state programs that affect not only how students are perceived but how they perceive themselves.

Parents Involved dealt with two very similar student assignment plans under which students who wished to enroll in particular schools were denied admission solely because of their race.²⁵ The first, in Kentucky, operated at

19. *United States v. Georgia*, 171 F.3d 1344, 1350 (11th Cir. 1999).

20. William E. Thro, *The Constitutionality of Eliminating De Facto Segregation in the Public Schools*, 120 EDUC. L. REP. 895, 897 (1997) (“Nevertheless, some school districts have chosen to make efforts to eliminate de facto segregation.”); *see also* Besso, *supra* note 17, at 327–28 (describing efforts by state officials to combat de facto segregation).

21. *See Bakke*, 438 U.S. at 298–99 (discussing the negative effects that could result from trying to ameliorate de facto segregation).

22. *See, e.g., id.* at 289–90.

23. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) (“[A]ny racial preference must face the most rigorous scrutiny by the courts.”).

24. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (“There is the danger that the ‘stereotypical thinking’ that prompts [these] policies . . . ‘stigmatizes the disadvantaged class . . .’” (quoting *Croson*, 488 U.S. at 516 (Stevens, J., concurring))).

25. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2748–51 (2007).

the elementary school level.²⁶ The plan required “all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent” in a school district that was about 34 percent black and 66 percent white.²⁷ Students indicated which schools they would prefer to attend, but if a student’s race would contribute to a school’s “racial imbalance,” the district would not assign a student there.²⁸ The Kentucky school district had operated under a desegregation decree until 2000, when the federal district court declared that the school district had achieved unitary status.²⁹

The second assignment plan, in Seattle, assigned students to one of ten high schools, but it first allowed incoming ninth graders “to choose from among any of the district’s high schools, ranking however many schools they wish in order of preference.”³⁰ In the event that too many students opted for the same school, the district used a series of three tiebreakers.³¹ The first selected students who had “a sibling currently enrolled in the chosen school.”³² The second used the racial composition of a particular school and the race of the student involved.³³ If an “oversubscribed school” was not within “10 percentage points of the district’s overall white/nonwhite racial balance,” a student whose race would bring the school closer to the 10% mark was selected for that school.³⁴ The third tiebreaker selected students based on their geographic proximity to the school.³⁵ Seattle was never under a desegregation order; the district designed its plan to remedy de facto segregation only.³⁶

A divided Supreme Court reviewed the programs with strict scrutiny³⁷ and held that both were unconstitutional.³⁸ The majority held that the schools’ programs were not narrowly tailored to achieve what the schools claimed was their compelling interest—achieving racial diversity.³⁹ Thus, they were unconstitutional under the Equal Protection Clause. That basic holding garnered a majority of the Court.⁴⁰

26. *Id.* at 2749.

27. *Id.*

28. *Id.* at 2750.

29. *Id.* at 2749.

30. *Id.* at 2746–47.

31. *Id.* at 2747.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 2751.

38. *Id.* at 2768.

39. *Id.* at 2760.

40. Justices Roberts, Scalia, Kennedy, Thomas, and Alito comprised the majority. Justice Kennedy left the other four Justices to write his concurrence. Justice Thomas also wrote a separate

From there, however, the Justices failed to agree, and ambiguous statements by Justice Kennedy resulted in the following unanswered constitutional question: To what extent can school districts use race-conscious means to achieve racial diversity in schools after *Parents Involved*? Justice Kennedy's concurrence introduced the issue with less-than-definitive language. In it, he said:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools [and] drawing attendance zones with general recognition of the demographics of neighborhoods [I]t is unlikely any of them would demand strict scrutiny to be found permissible.⁴¹

With these words, Justice Kennedy significantly limited the majority's otherwise broad prohibition on the use of race-conscious means, and embraced a more narrow rule that preserves the ability of school districts to achieve what he considers a compelling interest—diversity in public schools.⁴² His language, however, is not entirely clear. He stated only that siting new schools and rezoning are “unlikely” to “demand strict scrutiny.”⁴³ He offered no guarantee that they will not require strict scrutiny, and he certainly did not promise that siting new schools or rezoning will pass the strict scrutiny test, should courts use it.

Justice Breyer, in dissent, added to the ambiguity.⁴⁴ It is probably safe to assume, given the dissent's language, that Justice Breyer and the other dissenters would agree with Justice Kennedy regarding rezoning and site selection. Still, Justice Breyer did not say that definitively. Rather, he focused on the plans states have used to combat de facto resegregation.⁴⁵ He explained that various states implemented over 300 plans between 1961 and 1985.⁴⁶ “A majority of these desegregation techniques,” he argued, “explicitly considered a student's race.”⁴⁷ He then averred that the controlling opinion will make the use of race in selecting school sites unconstitutional:

concurrence, but he joined all of the plurality's opinion. Justice Stevens wrote a lone dissent, and Justice Breyer wrote a dissent in which Justices Stevens, Souter, and Ginsburg joined.

41. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

42. *Id.* at 2789. It is important to note that *Grutter v. Bollinger*, 539 U.S. 306 (2003), dealt with diversity in higher education. Before *Parents Involved*, the Court had not addressed diversity in K–12 public schools.

43. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring) (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995)) (“[I]t is unlikely any of [the methods Kennedy lists] would demand strict scrutiny . . .”).

44. *Id.* at 2834 (Breyer, J., dissenting).

45. *Id.* at 2832–33.

46. *Id.* at 2831. Justice Breyer discussed a wide range of different plans, emphasizing transfer programs in California and New York. He states that at “the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intra-district open choice plans.” *Id.* at 2832. Of those, eight require that the transfer lead to increased integration. Another eleven require boards to “deny transfers that are not in compliance with the local school board's desegregation plans.” *Id.* He further listed plans in Arkansas, Connecticut, and Ohio that seek to maintain a certain racial balance in schools. *Id.* at 2832–33.

47. *Id.* at 2832.

“The fact that the controlling opinion would make a school district’s use of such criteria often unlawful (and the plurality’s ‘colorblind’ view would make such use always unlawful) suggests that today’s opinion will require setting aside the laws of several States and many local communities.”⁴⁸ Justice Breyer did not explain what laws or methods he thinks *Parents Involved* will invalidate, and thus it is not clear whether or not he was arguing that the majority’s holding would preclude rezoning or site selection.

Finally, the majority opinion itself did not resolve the question, and Chief Justice Roberts’s plurality opinion expressly refused to address it. While criticizing the dissenters for “greatly exaggerat[ing] the consequences”⁴⁹ of the majority’s holding and dismissing their concerns as “cataclysmic,”⁵⁰ the plurality opinion declined even to take a position on siting schools or rezoning. It merely argued that Justice Kennedy’s “other means—*e.g.*, where to construct new schools . . . implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta.”⁵¹ In other words, the Roberts plurality leaves the question entirely unanswered.

Because *Parents Involved* raised the question but failed to answer it, lower courts and school districts must turn to preexisting jurisprudence for guidance; unfortunately, that guidance proves less than clear. Siting a school on a biracial boundary to affect its racial composition is not a new idea, but doing so outside the remedial context is. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court emphasized that there was broad agreement that a school district may not locate a school for the purposes of *furthering* segregation.⁵² Inversely, the lower courts have been clear that in remedial situations—where a school district is under an existing desegregation order to remedy prior *de jure* segregation—a district may locate a school on a biracial boundary line in order to comply with the desegregation order.⁵³ Further, some courts have allowed shifting attendance zones or siting of new schools even if it results in incidental segregation when the evidence supports a finding that the school district did it for reasons not associated with race.⁵⁴ But courts have not been clear about the circumstance

48. *Id.* at 2833.

49. *Id.* at 2761 (plurality opinion).

50. *Id.* at 2766.

51. *Id.*

52. 402 U.S. 1, 21 (1971); *see also* *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980) (disapproving of school board’s attempt to desegregate by redrawing attendance zones in a way that left racially identifiable black school unchanged).

53. *Cf.* *United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031 (5th Cir. 1986) (requiring district court to implement change in school attendance zones to accomplish desegregation and eliminate racial identification of schools as far as possible); *Stell v. Bd. of Pub. Educ.*, 724 F. Supp. 1384 (S.D. Ga. 1988) (approving city’s plan involving, *inter alia*, revised attendance zone in order to achieve desegregation in a district that had never achieved unitary status).

54. *E.g.*, *United States v. Georgia*, 171 F.3d 1333 (11th Cir. 1999) (holding that a facilities plan did not violate a desegregation order, despite causing some resegregation, when school board acted with good faith and met other criteria); *see* *Elston v. Talladega County Bd. of Educ.*, 997 F.2d

presented by Justice Kennedy's suggestion: using rezoning plans or site selection for integrative purposes *outside* the context of a desegregation order.⁵⁵

Yet clarity in this area is vital assuming that many school districts will have to change their plans after *Parents Involved* and that significant weight is placed on Justice Kennedy's opinion. Until *Parents Involved*, many school districts across the country engaged in assignment plans similar to that employed in Seattle and Louisville, or in other plans that considered race.⁵⁶ This is particularly true in areas where there had been no past de jure segregation or in areas that had already achieved unitary status.⁵⁷ Many school districts saw no need to employ alternative measures until the decision in *Parents Involved*.⁵⁸ Now, school districts considering the use of siting or rezoning must mull over the constitutional question such methods raise, and the answer is not as simple as some commentators have assumed.

II. UNDER JUSTICE KENNEDY'S REASONING, STRICT SCRUTINY IS THE APPLICABLE STANDARD OF REVIEW TO ASSESS THE CONSTITUTIONALITY OF SITING OR REZONING PLANS

This Part argues that the broad interpretation many have given Justice Kennedy's concurrence in *Parents Involved* is premature and that his reasoning supports the use of strict scrutiny to evaluate rezoning or site selection plans.⁵⁹ Section II.A explains how the Justices align on the question of when strict scrutiny should apply to race-based decision making and argues that Justice Kennedy's position is not entirely clear. Section II.B argues that although Justice Kennedy did advance new rhetoric regarding race in his opinion, he likely believes that strict scrutiny should apply in cases where school districts employ site selection and attendance-zone manipulation to achieve diversity.

1394 (11th Cir. 1993) (reaffirming the principle that the Equal Protection Clause bars only intentional discrimination).

55. See *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.").

56. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2832–34 (2007) (Breyer, J., dissenting).

57. *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246 (5th Cir. 2005) (applying strict scrutiny to the use of race in a school admissions policy); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999) (holding that a district court was required to adhere to the presumption against racial classifications vis-à-vis a district's transfer program); *Tasby v. Edwards*, 799 F. Supp. 652 (N.D. Tex. 1992) (holding that a school district could not relocate a Montessori magnet school to relieve overcrowding when the magnet schools had already helped the Montessori program achieve desegregation).

58. See *Greenhouse*, *supra* note 7; *Godoy*, *supra* note 6.

59. See Posting of Bryan Fair to Talking Justice, *supra* note 10.

A. *It Is Not Clear Whether a Majority of the Court
Would Demand Strict Scrutiny*

The Supreme Court is divided about when to apply strict scrutiny to government decision making about race. All the Justices agree that when a state actor intends to *segregate* the races, courts must apply strict scrutiny to ensure the state has a compelling interest and that its methods are narrowly tailored to achieve that interest. The difficulty occurs when the state actor intends to *integrate* the races. In that situation, the Justices are divided.

Chief Justice Roberts, along with Justices Scalia, Thomas, and Alito, embrace the notion that “‘all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.’”⁶⁰ Further, they maintain that the Court “already rejected” the “view that classifications seeking to benefit a disadvantaged racial group should be held to a lesser standard of review” than those seeking to segregate the races.⁶¹ For these four Justices, any racial classification by a state actor, whether meant to include or exclude members of a particular race, must face strict judicial scrutiny.⁶² This logic would apply when a state actor manipulates attendance zones or sites schools in an effort to achieve racial diversity; by doing so the actor would be creating zones “because of, and not merely in spite of, racial demographics.”⁶³ Indeed, Justices Thomas and Scalia argued in *Bush v. Vera*, a voting rights case involving gerrymandered voting districts, that “[s]trict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting.”⁶⁴ Justices Roberts and Alito affirmed this principle in *Parents Involved*.⁶⁵ Thus, these four Justices would require strict scrutiny of siting and rezoning decisions designed to affect racial demographics as a matter of course.

For a second group of four—Justices Stevens, Souter, Ginsburg, and Breyer—the courts should use strict scrutiny more sparingly. Justice Breyer’s dissent in *Parents Involved* argued for a “contextual approach to scrutiny,”⁶⁶ in which courts apply a different standard of review depending

60. *Parents Involved*, 127 S. Ct. at 2762–63 n.16 (plurality opinion) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

61. *Id.* at 2762.

62. See *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications . . .”); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[A]ll governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.” (internal quotation marks omitted)).

63. *Bush v. Vera*, 517 U.S. 952, 1001 (1996) (internal quotation marks omitted).

64. *Id.* at 1000 (citing *Miller v. Johnson*, 515 U.S. 900, 913–15 (1995)).

65. *Parents Involved*, 127 S. Ct. at 2751–52 (“[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” (internal quotation marks omitted)).

66. *Id.* at 2819 (Breyer, J., dissenting).

on whether a state actor is applying an exclusionary use of racial criteria⁶⁷ or an inclusive use of such criteria.⁶⁸ Where state actors intend to further segregation, these Justices would apply strict scrutiny.⁶⁹ By contrast, where local regulations or policies impose “racial limits that seek, not to keep the races apart, but to bring them together,”⁷⁰ courts should apply a “standard of constitutionality review that is less than ‘strict.’”⁷¹

What that standard would be is not entirely clear, although it seems to embrace a balancing test that is less stringent than strict scrutiny. From Justice Breyer’s language in *Parents Involved*, the standard appears to move away, without explanation, from the strict/intermediate scrutiny framework of the past and would instead “require . . . careful review” greater than a mere rational basis test.⁷² Justice Breyer seems to hint that it would be some kind of proportionality test, where the state’s “use of race-conscious criteria” is meant to achieve an important enough end “to overcome the risks” associated with racial classifications.⁷³ In opposition to the first group of Justices, then, this group would evaluate the use of rezoning plans and school site selection in order to achieve diversity using, as Justice Breyer puts it, “a standard of review that is not ‘strict’ in the traditional sense of that word.”⁷⁴ In their view, courts need strict scrutiny to smoke out invidious intent on the part of state actors, but when it is clear that schools are acting for integrative—or benign—purposes, courts need not be as demanding.⁷⁵

As one might expect, lower courts trying to determine what test to apply in these cases will have to look to Justice Kennedy to break the tie.⁷⁶ His view is not nearly as clear, or as soft, as rezoning advocates have argued, but instead seems to be evolving. His stance is ambiguous, and his statements in *Parents Involved* offer little illumination. Still, we can be certain of some things. First, as with all the other Justices, Justice Kennedy would apply strict scrutiny to any state programs that use race-conscious criteria to effect

67. Justice Breyer introduced the exclude/include distinction in this case, but the terms appear to be nothing more than another way of distinguishing between those programs that have “invidious” (exclusive) or “benign” (inclusive) intent.

68. *Parents Involved*, 127 S. Ct. at 2817.

69. *See id.* at 2817–19.

70. *Id.* at 2818.

71. *Id.* at 2819.

72. *Id.* In his dissent, Justice Stevens hinted at why the dissenters want to move away from the strict/intermediate scrutiny dichotomy when he stated that the “Court’s misuse of the three-tiered approach to Equal Protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution. . . . [A] rigid adherence to tiers of scrutiny obscures *Brown*’s clear message.” *Id.* at 2798–99 (Stevens, J., dissenting).

73. *Id.* at 2819 (Breyer, J., dissenting).

74. *Id.*

75. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) (discussing the need for courts to acknowledge the difference between benign and invidious discrimination).

76. *See Charles Lane, Kennedy Seen as the Next Justice In Court’s Middle; Alito Expected to Tilt Conservative*, WASH. POST, Jan. 31, 2006, at A4.

segregation.⁷⁷ Regarding the use of race for integrative purposes, however, Justice Kennedy's position is much more difficult to grasp. His conflicting past jurisprudence on the issue signals a possible shift in his thinking,⁷⁸ and his statements in *Parents Involved*, while suggestive, are certainly not concrete.⁷⁹ In the past, Justice Kennedy's statements and the opinions he has joined have suggested his alignment with the pro-strict scrutiny group. In *Croson*, for example, he favored a hard-line, clear rule that "would strike down all preferences which are not necessary remedies to victims of unlawful discrimination."⁸⁰ In other words, he wanted a rule even stricter than strict scrutiny. For him, at the time, the only reason for the Court not to embrace fully "a rule of automatic invalidity for racial preferences in almost every case" was because doing so "would be a significant break" from the Court's precedents.⁸¹ He therefore reluctantly agreed to the more tepid rule that "any racial preference must face the most rigorous scrutiny by the courts."⁸²

Similarly, in later cases, Justice Kennedy offered a spirited defense of strict scrutiny as the "surest test the Court has yet devised for holding true to the constitutional command of racial equality."⁸³ He chastised the Court for abandoning what he perceived as a fundamental rule: "strict scrutiny of all racial classifications."⁸⁴ He seemed to maintain this stance in *Adarand*, where he joined an opinion by Justice O'Connor that stated that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."⁸⁵ Even as late as 2003, Justice Kennedy's dissent in *Grutter* opined that the "majority proceeds to nullify the essential safeguard . . . [of] rigorous judicial review, with strict scrutiny as the controlling standard."⁸⁶ Thus, up to that time, lower courts had no problem knowing exactly where Justice Kennedy stood regarding the application of strict scrutiny to review the state's use of racial criteria to achieve so-called integrative goals.

In part, Justice Kennedy's concurrence in *Parents Involved* strikes the same chord, yet it seems to deviate in a confusing way. In evaluating the school allocation programs at issue in that case, he expressly finds that they "classify individuals by race and allocate benefits and burdens on that basis;

77. See *Adarand*, 515 U.S. at 227.

78. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 105 (2007).

79. See *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring).

80. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring).

81. *Id.* at 519.

82. *Id.*

83. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 634 (1990) (Kennedy, J., dissenting).

84. *Id.*

85. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

86. *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

and as a result, they are to be subjected to strict scrutiny.”⁸⁷ Taken by itself, that language suggests his position has remained steady: any classification by race demands strict scrutiny. Given that, his later remark that strict scrutiny may not be necessary in the site selection and rezoning cases is somewhat puzzling.

Professor Heather Gerken suggests⁸⁸ that something changed in Justice Kennedy’s views on race in 2006 when he wrote the lead opinion in *League of United Latin American Citizens v. Perry (LULAC)*.⁸⁹ Though the case does not speak explicitly to the application of strict scrutiny in Equal Protection cases, it does show a possible change in Justice Kennedy’s views on race and is therefore worth exploring. In *LULAC*, Professor Gerken argues, Justice Kennedy celebrates the fact that Latinos in a particular voting district “‘had found an efficacious political identity.’”⁹⁰ This is a radical departure from his previous line of thought: in the past, Justice Kennedy had emphatically rejected the notion that people of any one race can ever be assumed to vote as a bloc or to have the same political interests.⁹¹ Professor Gerken sees this shift as a “softening” of Justice Kennedy’s “views on race and race neutrality.”⁹²

Justice Kennedy’s concurrence in *Parents Involved* bolsters Professor Gerken’s claim, though it does not support it entirely. In it, Justice Kennedy stated that a number of race-conscious practices by states to achieve diversity—e.g., “strategic site selection of new schools” and “drawing attendance zones with general recognition of the demographics of neighborhoods”—would be “unlikely” to “demand strict scrutiny to be found permissible.”⁹³ Professor Gerken argues that this position runs “directly contrary to [his] prior equal protection jurisprudence.”⁹⁴ If Professor Gerken is right, then it would seem that Justice Kennedy has joined the set of Justices that embraces the contextual use of the strict scrutiny test.⁹⁵ It is important to note, however, that Justice Kennedy qualified his statement, merely arguing that it is “unlikely” the above techniques would demand strict scrutiny.⁹⁶ This qualification suggests that he is not fully committed to any one rule in the context of school site selection and changing attendance zones. Rather, he

87. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring).

88. Gerken, *supra* note 78, at 109–10.

89. *See* 548 U.S. 399, 423–25 (2006).

90. Gerken, *supra* note 78, at 110 (quoting *LULAC*, 548 U.S. at 435).

91. *Id.*

92. *Id.* at 108.

93. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring).

94. Gerken, *supra* note 78, at 105.

95. *See* Kaufman, *supra* note 5, at 3 (arguing that Justice Kennedy provides the crucial fifth vote to allow school districts to use race-conscious criteria to achieve certain compelling interests).

96. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

may be open to the possibility of a less-stringent test and, more importantly, to a “searching inquiry” into whether strict scrutiny is necessary.⁹⁷

*B. Justice Kennedy’s Reasoning—Strict Scrutiny Is
More Likely than He Thinks*

While Justice Kennedy suggests that strict scrutiny *may* not be necessary when evaluating school site selection and rezoning plans, this Section argues that once the effects of those plans become clear, he will conclude that it is. The Section will first lay out the language he uses and dissect it to show the three areas that seem to be of most concern to Justice Kennedy. It will then argue that each of those areas supports the application of strict scrutiny in the school site selection and rezoning contexts.

1. Justice Kennedy’s Language Suggests Three Areas of Concern

Justice Kennedy’s language reveals his ambivalence and the issues about which he is concerned. He says only that it is “unlikely”—not certain—that siting or rezoning plans will encounter strict scrutiny, which suggests that he may be open to considering a variety of arguments about when the test should apply. In *Parents Involved*, Justice Kennedy briefly explains why he believes the techniques he mentioned might not demand strict scrutiny:

These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. 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.⁹⁸

97. *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)). I am not the only one to find Justice Kennedy’s statement less than a ringing endorsement of a more lenient test in these cases. Professor Gerken, for example, inserts a note of caution in her argument:

It would be foolhardy . . . to suggest that . . . these two decisions signal a permanent shift in Justice Kennedy’s views. The gloss I offer here is decidedly mine, not Justice Kennedy’s There is a significant risk that by largely ignoring the anti-essentialist boilerplate in both opinions, I underplay the continuity between these and Justice Kennedy’s prior opinions. The parts of his opinion I spin out here represent tentative gestures and initial instincts. Whether the Justice ever pursues them remains to be seen.

Gerken, *supra* note 78, at 107–08. More importantly, those on the Court who would seem to benefit most from Justice Kennedy’s defection call attention to it with a tone that can best be described as hesitant: “[a]pparently Justice Kennedy also agrees that strict scrutiny would not apply in respect to certain ‘race-conscious’ school board policies.” *Parents Involved*, 127 S. Ct. at 2819 (Breyer, J., dissenting).

98. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

Justice Kennedy's reasoning touches on three key concerns that seem to form the foundation of his new stance. First, he is concerned about the effects of classifying individual students by race; second, he is worried about the ability of executive and legislative branches to perform the policies and practices they have carried out for decades without worrying about constitutional violations; and third, he is apprehensive about the type of legal analysis courts use to scrutinize those policies and practices.

2. *Rezoning and Site Selection Raise the Same Concerns as Classifying Individuals by Race*

A closer look at rezoning and school site selection shows that they could, in many circumstances, have the same deleterious effects that worry Justice Kennedy regarding the classification of individuals by race. As these negative consequences become apparent, Justice Kennedy will find that strict scrutiny is the only means by which courts can ensure that rezoning and site selection do not divide the races.

In *Parents Involved*, Justice Kennedy distinguished between race-conscious decisions that define individual students by race—and let them know they have been so defined—and those that are race conscious but do not lead to different treatment of individuals.⁹⁹ The difference is subtle but important. In the former case, individual students are pitted against individual students, and schools would use race as a factor to distinguish them.¹⁰⁰ In the latter, individual students desiring a seat in a school or class would never see race as a factor that led to their receiving or not receiving that seat. In other words, while a policy maker might be aware of the effects a given practice will have on different racial groups, individual students affected by that practice will not feel as though race directly determined how they were treated.

This concern with individual classifications is consistent with Justice Kennedy's prior opinions and reasoning. As evidenced by his statements in *Croson*¹⁰¹ and *Metro Broadcasting*,¹⁰² he has always harbored trepidations about government actions that provide burdens or benefits to individuals based on their race. Further, in *Adarand*, race determined whether some businesses received federal contracts while others did not—creating the precise type of classification that leads individuals to believe that they are defined by their race and will receive benefits or burdens accordingly.¹⁰³ If an individual is going to receive a preference or benefit from the state, it often follows that someone else will not receive that benefit. Certain benefits, such as seats

99. *Id.*; see also *Palmer v. Thompson*, 403 U.S. 217 (1971) (holding that a city's plan to close all public swimming pools rather than integrate did not violate the Constitution).

100. See *Parents Involved*, 127 S. Ct. at 2738; *Grutter v. Bollinger*, 539 U.S. 306, 394–95 (2003) (Kennedy, J., dissenting).

101. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989).

102. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 633 (1990).

103. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205–08 (1995).

in public schools, are finite, and only a limited number of individuals can receive them. Justice Kennedy's view from previous cases, then, is that individuals who ultimately get those benefits must receive them for reasons other than race, or else strict scrutiny should apply.

While Professor Gerken and others¹⁰⁴ see Justice Kennedy in *Parents Involved* "softening"¹⁰⁵ his racial views, his language suggests he is merely reiterating a long-held belief. His statements simply recognize what the Court had already recognized in *Arlington Heights* and *Washington v. Davis*: that government officials may design programs with a consciousness of the impact on different racial groups but without intent to affect those racial groups; such programs would not trigger strict scrutiny.¹⁰⁶ Justice Kennedy is not changing his views; he is reemphasizing them.

Justice Kennedy's openness to a relaxed review of siting and rezoning plans no doubt stems from his sense that these methods, as with changing voting district lines, do not produce stigmatization, one of his chief concerns.¹⁰⁷ Indeed, he suggests as much in *Parents Involved* when he quotes the following from *Bush v. Vera*, a case dealing with manipulated voting district lines: "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are 'facially race neutral' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classification based explicitly on race.'" ¹⁰⁸ Here, Justice Kennedy seems to equate redrawing voting district lines with changing school attendance boundaries, and he suggests that the effects of each are identical.

The analogy between locating an electoral district and locating a school breaks down, however, when one engages in the "searching inquiry" Justice Kennedy requires.¹⁰⁹ While the former may not have the same effects as explicit racial classifications, the latter does. When those effects are coupled with the state's integrative intent, Justice Kennedy's reasoning requires the application of strict scrutiny. This is because site selection and attendance zones dictate directly where a student may attend, which in turn affects things like how far a student must travel, the type of friends he or she will

104. See Kaufman, *supra* note 5, at 13.

105. Gerken, *supra* note 78, at 108.

106. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

107. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring) (approving of race-conscious mechanisms that do not tell "each student he or she is to be defined by race").

108. *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)).

109. See, e.g., Michael Alison Chandler, *Controversial Ruling May Lead to New Scrutiny*, WASH. POST, Mar. 2, 2008, at C4 (reporting on a redistricting plan in Virginia that has led many parents to promise litigation to stop it). I discuss this plan in more detail below.

have, and the quantity and quality of the academic and athletic programs available to the student. These factors do not arise once every few years during an election cycle. They permeate, daily, every facet of a student's life. They serve as ubiquitous reminders that students are where they are because of the color of their skin.¹¹⁰

The geographic characteristics of school districts also counsel against treating them the same as voting districts. Many urban areas in the United States are divided into distinct racial neighborhoods that do not necessarily lend themselves to attendance zones that will achieve racially diverse schools.¹¹¹ Thus, siting a new school or changing the lines could result in a diverse school for some areas but leave an overcrowded, racially homogeneous school in another area, especially in those situations when a populous suburb in need of a new school does not border a racially different neighborhood. Such a scenario would necessarily leave out various racial groups because the housing patterns do not allow easy diversity-oriented line drawing without forcing students in a given area to attend a lower quality school simply because their racial neighborhood was not easily included in the new diverse school.¹¹² In any of these cases, the students on whom the burden falls would have no choice but to ask why it was placed on them. They need only look at their neighborhood, their peers, and the boundary line itself to realize that the decision was based on race.

One might argue that because site selection and rezoning are facially neutral, affected students and their families would never know that race was a determinative factor, but this argument fails when juxtaposed with the reality on the ground. It is conceivable that students and their families might not have any reason to suspect race as a motivating factor. It is perhaps more plausible that while they will be aware of the use of race when lines are first drawn, that awareness will dissipate over time. This argument is compelling because it raises the possibility that states could achieve diversity in schools while avoiding the negatives of classification that worry Justice Kennedy—stigmatization and “a new divisiveness” among the races.¹¹³ The argument, however, is belied by the experiences of real communities that have attempted rezoning. As a recent example consider Fairfax County, Virginia,

110. While the voting lines cases do deal with the issue of minority mindset—something Justice Kennedy seems deeply concerned about in the school diversity cases—they focus mostly on refuting the notion that any one minority group will share the same mentality and therefore function as a voting bloc.

They do not, however, address the underlying concern Justice Kennedy raises in the school diversity cases—how classifications by race cause individuals to perceive themselves and others. *See Vera*, 517 U.S. at 958.

111. Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidence from a Multiethnic Metropolis*, 47 Soc. PROBS. 379, 380 (2000) (discussing thirty-seven metropolitan areas across the United States that are now multiethnic in that they have significant segregated populations of Whites, Latinos, Blacks, and Asians).

112. Chandler, *supra* note 12 (quoting parents who may move or send their children to private schools in order to escape the effects of a rezoning plan in Virginia).

113. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring).

where the local school board proposed a plan to rezone a school district to achieve more educational and demographic diversity.¹¹⁴ There, the months-long debate over the proposal resulted in “protests, threats of litigation and allegations of collusion, race-baiting and flip-flopping,”¹¹⁵ followed by parents’ wanting to sell their homes in order to avoid the effects of the new boundary lines.¹¹⁶ Indeed, the Fairfax rezoning plan has created just the kind of divisive, racially charged dialogue Justice Kennedy hopes to avoid.

These concerns will inevitably lead to the courts subjecting similar plans to strict scrutiny. We can be sure that boundary changes will not escape public notice, and even those with an integrative purpose can inadvertently lead to racial division and stigmatization—as the experience of Fairfax County makes clear.¹¹⁷ That reality diminishes the power of the analogy to voting districts and suggests the courts will need strict scrutiny to ensure that any given plan will in fact achieve its purpose of integration.

3. *Applying Strict Scrutiny to Race-Motivated Plans Will Not Prevent State Officials from Performing Their Necessary Duties*

Because strict scrutiny will not hinder local officials in their necessary duties, school districts should not interpret Justice Kennedy’s concern regarding how legislative and executive branches function as a statement that strict scrutiny will not apply to rezoning or siting plans designed to manipulate racial groups. Decisions regarding site selection of new schools and drawing attendance zones have always been part of the business of local government, and they always will be.¹¹⁸ Justice Kennedy merely argues that government should be able to make such decisions “with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”¹¹⁹ School districts should be careful not to read too much into these statements. Certainly Justice Kennedy’s concern is legitimate, but it does not “open the door” for school officials to promote diversity without strict judicial review.¹²⁰ Rather, his opinion merely observes that government actors must regularly make decisions regarding new schools and school boundaries.¹²¹ To impose on those actors the fear of a constitutional violation every time they make a decision would increase their transaction

114. Chandler, *supra* note 12.

115. Chandler, *supra* note 109.

116. Chandler, *supra* note 12.

117. Chandler, *supra* note 109 (reporting on parents and administrators who have stated they will be heavily involved in future rezoning plans, as well as moves by parents to oust school board members who supported the rezoning plan in Virginia).

118. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

119. *Id.*

120. Posting of Bryan Fair to Talking Justice, *supra* note 10.

121. See *United States v. Bd. of Sch. Comm’rs*, 573 F.2d 400, 408 (7th Cir. 1978) (discussing the many reasons why a state actor may need to change boundaries).

costs tremendously and perhaps prevent them from taking action necessary for the improvement of public schools.

It should be noted, however, that the decision maker Justice Kennedy wishes to protect and the decision maker that is the subject of the question left open by *Parents Involved* are different in critical ways. The former, as Justice Kennedy states, merely “considers the impact a given approach might have on students of different races.”¹²² This decision maker would not use race as the “predominate” motive, but would simply be mindful of it.¹²³ The latter, on the other hand, adopts an approach specifically because of the effect it will have on students of different races. Indeed, the question left open in *Parents Involved* explicitly assumes an actor whose primary purpose is to bring “together students of diverse backgrounds and races.”¹²⁴ This actor does not merely consider the impact an approach may have on students of different races; it wants to create that impact.

Adopting a rule that would apply strict scrutiny when integrative decisions are made does not cripple executive and legislative branches when all they do is consider race; rather, it warns them that if they intend to make decisions that will affect students precisely because of their race, courts will review those choices with strict scrutiny. Otherwise, they may operate freely. Case law supports this proposition. In the post-*Brown* era, courts have consistently upheld decisions by officials who have acted in “good faith” without the intent to affect students because of race.¹²⁵ The Supreme Court itself has remarked that “official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”¹²⁶ It has further made clear that discriminatory intent “implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹²⁷ Rezoning and site selection plans, however, relate not to mere consciousness of racial impact but to school districts’ intent to manipulate students based on

122. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

123. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (stating that simply because legislatures were aware of race in the redistricting process, it does not follow that race predominated in that process).

124. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

125. *See, e.g., United States v. Georgia*, 171 F.3d 1333 (11th Cir. 1999) (holding that a facilities plan that rejected a consolidated high school and instead provided for construction of two high schools did not violate the desegregation order because, inter alia, the school board was not racially motivated and acted in good faith); *Dowell v. Bd. of Educ.*, 778 F. Supp. 1144, 1179 (W.D. Okla. 1991) (“Once a school system has been declared unitary, in order to establish a violation of equal protection principles, a plaintiff must prove racially discriminatory intent or purpose.”).

126. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 264–65 (1977); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) (“But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

127. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted).

their race. That *intent* to affect students because of their race is what triggers strict scrutiny in Justice Kennedy's way of thinking.

4. *Justice Kennedy Is Not Calling for a More Lenient Standard*

Justice Kennedy's statement that the "legal analysis" should change "accordingly" when school officials act with intent does not mean that he embraces a more lenient standard for school site selection or rezoning designed to affect students because of their race.¹²⁸ He states that the "legal analysis changes" when school officials leave the realm of making the same types of decisions they have made for "generations" and begin classifying individuals by race.¹²⁹ This is not a substantive shift in the law, and school officials and others should not interpret it as calling for a more lenient standard. Whereas Justice Breyer's dissent calls for a more lenient standard,¹³⁰ Justice Kennedy is merely maintaining a long-held position.

Justice Breyer's approach is based on the difference between inclusive and exclusive intent.¹³¹ His analysis is not concerned with the everyday decisions officials must make in order to keep a school system running, but with the design of those officials to affect race relations.¹³² In other words, Justice Breyer assumes that the state's decision had racial diversity as one of its driving motives, and in that scenario he calls for a less-than-strict standard of review.¹³³

Justice Kennedy, however, is talking about decisions that are on a continuum, and he is concerned only about a portion of those decisions. On one end are those that do not consider race at all but are driven by a multitude of other concerns, such as economics, natural resources, overcrowding, availability of land, and transportation routes. At the other end lie those decisions that are specifically designed to affect students of different racial groups. Somewhere in between are those choices that are based on nonracial criteria but are still conscious of the effect they may have on students of different races. Justice Kennedy seems most concerned about this last category. His language suggests that these decisions are a practical necessity for any school district to run properly, and that too much interference from the courts will create a great hindrance. Thus, he is merely acknowledging the long-standing principle that a lesser standard of review would be required should lawsuits arise. School officials should be wary to interpret his statements as an endorsement of a lesser standard for intentional integrative measures.

128. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

129. *Id.*

130. *See id.* at 2816–20 (Breyer, J., dissenting).

131. *Id.*

132. *Id.*

133. *Id.*

Justice Kennedy, unlike Justice Breyer, engages in a discussion of strict scrutiny the instant decisions by officials enter the realm of intentionally affecting students because of their race. Until then, he seems focused on practicality more than racial equality. Because of this, when he and Justice Breyer separately argue for a less stringent standard of review, they are talking about different things. Justice Breyer would engage in a less stringent review if, after finding that the state intends to affect students because of race, he believes the state's purpose is inclusive. Justice Kennedy would engage in a less stringent review only when a state's action is not motivated by race, because he believes practicality-based decisions demand less judicial review.

Justice Kennedy's concern with stigmatization and affording leeway only to decisions that are necessarily race conscious but not race driven demonstrates that he would apply strict scrutiny when school officials *intend* to affect students on the basis of race. At that juncture, school officials may be operating under pretext, or they may be choosing a method that is not narrowly tailored to meet their stated compelling interest. As Justice O'Connor—with Justice Kennedy joining—reasoned in *Croson*:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race¹³⁴

For Justice Kennedy, "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."¹³⁵ Justice Kennedy's comment that rezoning and site selection plans would be unlikely to demand strict scrutiny merely shows that these programs appeared to him, at first glance, not to have the same deleterious effects as explicit racial classifications. As Justice Kennedy no doubt would discover upon a more "searching inquiry,"¹³⁶ that is not always the case. Accordingly, application of Justice Kennedy's broader jurisprudence will lead to strict scrutiny for such plans.

CONCLUSION

Parents Involved left many school districts across the country reeling, unsure as to whether their school assignment plans would pass constitutional muster, but Justice Kennedy has provided some hope, even if only a sliver.¹³⁷ Embedded among all the rhetoric and sniping between the Justices was a call from the Court's swing vote for government leaders to "bring to

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

135. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *Drew S. Days III, Fullilove*, 96 YALE L.J. 453, 485 (1987)).

136. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

137. *See Godoy, supra* note 6.

bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve” the compelling interest of a diverse student body.¹³⁸ In issuing that call, Justice Kennedy listed some possibilities, but those possibilities probably will face strict scrutiny. Indeed, they must, for they raise the very concerns that have troubled the Court for decades. Still, even with strict scrutiny as the applicable standard, Justice Kennedy’s message is hopeful: school districts should continue to strive to prepare America’s children for living in a pluralistic society, even if they must find a narrowly tailored way to do it.

138. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring).

