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## JUSTICE KENNEDY AND THE DOMAINS OF EQUAL PROTECTION

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### INTRODUCTION

Many have noticed that Justice Kennedy softened his stance on race in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>1</sup> To be sure, he has always been one of the more moderate members of the colorblindness camp, defecting on occasion. But he has nonetheless taken a hard line in cases like *Metro Broadcasting*<sup>2</sup> and *Croson*.<sup>3</sup> Both the substance and the rhetoric of his concurrence in *Parents Involved* were importantly different.

The quickly emerging consensus is that Justice Kennedy's new position on race stems from his new position on the Court.<sup>4</sup> Like his swing-vote predecessors Justices Powell and O'Connor, Kennedy is feeling the pressure associated with being the middle Justice on a divided Court. The deep logic of this middle kingdom, so the story goes, pushes for the kind of compromise that each of these Justices has endorsed. It is something akin to a "don't ask, don't tell"<sup>5</sup> approach to race-conscious decisionmaking: use race, but don't be obvious about it. Indeed, Justice Kennedy's settlement on race closely resembles Powell's and O'Connor's. He deemed obvious and straightforward uses of race illegitimate but left room for schools to pursue their objectives through indirect and general means. He shunned labels and "racial balancing" while lauding the idea that race contributes to diversity. At

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\* Professor of Law, Yale Law School. Given the time constraints involved in writing this Comment, I have plagued a number of colleagues by sending them hastily dashed-off drafts, half-formed ideas, and inchoate arguments, and they have responded with patience, good humor, and intelligence. My heartiest thanks are therefore owed to Bruce Ackerman, Will Baude, Jessica Bulman-Pozen, Guy Charles, Lani Guinier, Michael Kang, Daryl Levinson, Greg Magarian, Martha Minow, Robert Post, Ben Sachs, Reva Siegel, and Damian Williams. Excellent research assistance was provided on short notice by students with full-time summer jobs, including Scott Grinsell, Jill Habig, Marin Levy, Matt McKenzie, Bharat Ramamurti, and Shayna Strom.

<sup>1</sup> 127 S. Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>2</sup> *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631 (1990) (Kennedy, J., dissenting).

<sup>3</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>4</sup> See, e.g., Posting of Lyle Denniston to SCOTUSblog, [http://www.scotusblog.com/movabtype/archives/2007/06/commentary\\_the\\_5.html](http://www.scotusblog.com/movabtype/archives/2007/06/commentary_the_5.html) (June 28, 2007, 2:27 PM).

<sup>5</sup> For a different twist on this phrase, see Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 518 (2007).

first glance, it all seems conventional and pat. The conventional view, in short, is that the story of Justice Kennedy's concurrence begins with *Bakke*<sup>6</sup> and *Grutter*.<sup>7</sup>

I disagree. While Justice Kennedy's new role as a swing vote surely helps explain his opinion in *Parents Involved*, his "settlement" on race is recognizably different from the terrain once occupied by Justices Powell and O'Connor. The "don't ask, don't tell" approach to race is the compromise of a pragmatist. But Justice Kennedy has always been an idealist, and his concurrence in *Parents Involved* is an idealistic opinion. He speaks in the cadence of a constitutional romantic, not a fact-driven realist. Further, Kennedy relies on indirect and general race-conscious strategies for different reasons than Powell and O'Connor do. And while he seems more open to embracing a positive vision of race and thinking about the state's inevitable role in constructing identity, his vision may also be more tied to context and less generalizable across cases.

To identify the precise contours of Kennedy's settlement on race, we should begin not with *Bakke* or *Grutter*, but with *League of United Latin American Citizens (LULAC) v. Perry*,<sup>8</sup> a voting-rights decision issued last year. There Justice Kennedy, long hostile to the use of race in redistricting, objected to the dismantling of a majority-minority district on the rather remarkable ground that the Latinos mobilizing there "had found an efficacious political identity."<sup>9</sup> Following on *LULAC*'s heels was *Parents Involved*, where Justice Kennedy suggested that racially drawn attendance zones and race-conscious school siting decisions — both variants of race-conscious districting — represent appropriate means for local schools to deal with the problem of racial segregation.<sup>10</sup> Both of these positions run directly contrary to Justice Kennedy's prior equal protection jurisprudence.<sup>11</sup>

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<sup>6</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>7</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003). For comparisons between Kennedy's opinion and *Bakke/Grutter*, see, for example, Posting of Jack M. Balkin to Balkinization, <http://balkin.blogspot.com/2007/06/parents-involved-swan-song-or-bakke-for.html> (June 28, 2007, 1:58 PM); and Posting of Pamela S. Karlan to Supreme Court — School Integration, <http://scintegration.blogspot.com/2007/07/guest-blogger-new-four-horsemen.html> (July 2, 2007, 12:00 PM).

<sup>8</sup> 126 S. Ct. 2594 (2006).

<sup>9</sup> *Id.* at 2619.

<sup>10</sup> *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>11</sup> Justice Kennedy has resoundingly rejected race-conscious districting in every voting-rights decision to come before him. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911–14 (1995). And he has been quite clear on the analytic point — it is the decision to use race, not the obviousness of its use, that is the source of the constitutional harm. See *id.*; see also *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting) (arguing that a law school cannot evade strict scrutiny by using "the concept of critical mass . . . to mask" its effort to achieve "racial balance").

These concrete doctrinal reversals were paired with noticeable shifts in Justice Kennedy's views on race. In the electoral context, Justice Kennedy has gone from believing that race is an artificial identity imposed by the state — and a destructive one at that — to insisting that the state must maintain certain racially organized political communities. In the schools context, Justice Kennedy has moved from lauding a colorblind approach to brainstorming about the most useful race-conscious strategies the state can use to construct the educational space in which students learn about race.

The link between these cases is not merely the fact that Justice Kennedy has something new to say about race, but the *reason* that he does. In both cases, it is when Justice Kennedy stops talking directly about race that he says something new about it. The novel elements of Kennedy's equal protection jurisprudence — the bits and pieces that do not follow easily from his prior opinions — have less to do with race than the constitutional domain<sup>12</sup> in which each case arose. In describing the voting-rights claim of Latinos in *LULAC*, Justice Kennedy tells the story he has long associated with the electoral domain, one having to do with political agency and expression rather than equality. He speaks in the cadence of the First Amendment, not the Fourteenth.<sup>13</sup> Similarly, in evaluating the equal protection claims raised in *Parents Involved*, the novel portions of Justice Kennedy's opinion focus not on race, but on a story Kennedy has long associated with the educational domain — the exceptional role that public schools play in inculcating civic morality. It is a story about what students learn in school, not whether they have an equal opportunity to do so. One could eliminate all references to race in the two opinions and the underlying stories would still make sense.

How is it that *not* talking directly about race has helped Justice Kennedy say something new about it? I believe it has to do with the idea of displacement as a source of power, a phrase Shakespeare scholar Stephen Greenblatt once used to explain why writing about *Macbeth* helped him think more clearly about Iraq.<sup>14</sup> It is an idea

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<sup>12</sup> The term, of course, comes from ROBERT C. POST, *CONSTITUTIONAL DOMAINS* (1995). To be sure, the domains I identify are different from Post's. See *id.* at 1–2 (describing three domains: “community, management, and democracy”). Indeed, in some respects the two “domains” I describe here more closely resemble what Michael Walzer would term “spheres,” see MICHAEL WALZER, *SPHERES OF JUSTICE* (1983), as they are tied to a sense of place as well as a particular form of social ordering. See Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1425 (1996) (offering a lucid analysis of the two books and suggesting the notion of “place” as one means of differentiating between them).

<sup>13</sup> It is at least not in the cadence of *Justice Kennedy's* Fourteenth Amendment. One could easily imagine a vision of equal protection that fits the story Justice Kennedy tells.

<sup>14</sup> Stephen Greenblatt, Comments at the Yale Law School Legal Theory Workshop (Feb. 15, 2006).

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with ramifications not only for understanding Kennedy's concurrence, but for thinking about race more generally.

Perhaps we should not be surprised that displacement has served a useful function for Justice Kennedy in the context of race. Lani Guinier has written that race is a "neon light" that can attract our attention away from the real source of a problem.<sup>15</sup> By averting his eyes from the neon light, Justice Kennedy sees something different from the story he has always told about racial essentialism.

In both cases, the story Justice Kennedy associates with the relevant domain — the First Amendment in the electoral context, imparting civic morality in the educational context — serves as a lens. It directs his attention away from his usual narrative about race toward the values he otherwise associates with each domain. Kennedy has long recognized that the political sphere involves robust associational and expressive dimensions, but now he sees how those values connect to racial politics. Kennedy has long thought of schools as institutions for teaching students to be citizens, but now he sees that those lessons extend to interracial relations.

Viewing Kennedy's opinions as domain-centered narratives also exposes an evocative but underdeveloped set of ideas in *LULAC* and *Parents Involved*. Both opinions acknowledge the associational and expressive dimensions of racial identity. Indeed, we see in Kennedy a dawning awareness of the relationship between them — that the choices a state makes in grouping individuals affects the choices individuals make in expressing their identity. A domain-centered narrative, in other words, has brought Kennedy's account of racial identity much closer to the account offered by many scholars.

This Comment will examine this admittedly inchoate but nonetheless intriguing turn Justice Kennedy's jurisprudence has taken. There are dangers, of course, in focusing so heavily on Justice Kennedy's concurrence. Swing Justices tend to spawn a cottage industry purporting to interpret swing opinions but amounting to little more than paeans to the powerful. That is not my intention. I focus on Justice Kennedy simply because, given the state of our judiciary, any new story about race will have to appeal to intellectually open mainstream conservatives. It is thus useful to figure out what has caused Justice Kennedy's thinking to evolve.

It would be foolhardy, however, to suggest that what follows is the only way to read *LULAC* and *Parents Involved* or to wager 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; this is

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<sup>15</sup> See Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 189–90 (2003).

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an interpretive argument, not a psychoanalytic account. My goal is to identify the new developments in Justice Kennedy's race jurisprudence and try to offer the best account of how they fit together. 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.

Part I describes the new stance Justice Kennedy has adopted in his two most recent race decisions. It argues that the easiest constitutional stories for Justice Kennedy to tell in these cases were not stories about race, but narratives he otherwise associates with each domain. Those stories, in turn, nudge Kennedy in interesting new directions, softening his views on race and race neutrality.

Part II reflects on why Justice Kennedy's jurisprudence has taken this new turn and where we should go from here. Specifically, it asks whether the power associated with displacement extends beyond what I view as a welcome shift in Justice Kennedy's views. Most of us think we already know the story of race. We tell the same story no matter what the domain. But every domain — schools, the marketplace, democracy — has an overarching narrative. What if we tried to fit race within that narrative rather than vice versa? The point here is not that we should stop talking about race, but that by dipping into the vocabularies of different constitutional domains, we might find something new to say, just as Justice Kennedy has. This Comment concludes by offering some brief thoughts on the ways in which a domain-centered approach to equal protection might help us both see nuances in the stories we tell about race and identify the overarching themes that connect them.

## I. OF ELECTIONS AND EDUCATION

This Part analyzes the new developments in Justice Kennedy's story about race and provides an account that makes sense of them. Because I believe that the story of Kennedy's concurrence in *Parents Involved* begins with *LULAC*, not *Bakke* or *Grutter*, I will start there.

### A. LULAC

*LULAC*, which involved various challenges to Tom DeLay's mid-decade redistricting in Texas, was widely expected to be a case about partisan gerrymandering. Instead, the decision turned on section 2 of the Voting Rights Act.<sup>16</sup> The Republicans had dismantled a congres-

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<sup>16</sup> 42 U.S.C. § 1973 (2000).

sional district, District 23, that had just attained a Latino majority and created a new Latino-majority district elsewhere in the state by way of an offset.<sup>17</sup> Their reasons for doing so were straightforward. Latinos in District 23 did not support the Republican incumbent, Congressman Henry Bonilla. In the prior election, he had captured just eight percent of the Latino vote,<sup>18</sup> and Republicans were worried that “Latinos would vote Bonilla out of office” if the district were not changed substantially.<sup>19</sup> The Court, per Justice Kennedy, held that the decision to dismantle the district violated the Act. It further held that this violation was not remedied by the creation of the offset district.<sup>20</sup>

*LULAC* is arguably a greater departure from Justice Kennedy’s prior jurisprudence than is his concurrence in *Parents Involved*. Until *LULAC*, Justice Kennedy had never voted to find a violation of the Voting Rights Act and had repeatedly expressed reservations about the Act’s constitutionality because it required the state to engage in race-conscious districting.<sup>21</sup> Justice Kennedy had also consistently signed on to the Court’s *Shaw v. Reno*<sup>22</sup> decisions, which struck down many majority-minority districts prior to *LULAC* and whose anti-essentialist underpinnings were in considerable tension with the Act’s race-conscious mandates. To be sure, in *LULAC* Justice Kennedy complained vehemently about the offset district in language quite similar to that used to condemn many a majority-minority district under *Shaw*.<sup>23</sup> But something about the story of District 23 moved him.

Consider Justice Kennedy’s striking explanation for finding that Texas had violated the Voting Rights Act: “The Latinos in District 23 had found an efficacious political identity . . . .”<sup>24</sup> It is a remarkable phrase coming from a Justice who once compared the majority opinion in *Metro Broadcasting to Plessy v. Ferguson* on the ground that it endorsed “the demeaning notion that [racial minorities] ascribe to certain ‘minority views’ that must be different from those of other citizens.”<sup>25</sup> Even in redistricting cases, when confronted with evidence that whites and racial minorities *in fact* prefer different candidates at the polls,

<sup>17</sup> League of United Latin Am. Citizens (*LULAC*) v. Perry, 126 S. Ct. 2594, 2613 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2615.

<sup>20</sup> *Id.* at 2623.

<sup>21</sup> See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 491–92 (2003) (Kennedy, J., concurring); *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995); *Johnson v. De Grandy*, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>22</sup> 509 U.S. 630 (1993).

<sup>23</sup> Justice Kennedy all but lifted passages of his opinion in *Miller v. Johnson*, 515 U.S. 900, to describe the *LULAC* offset district. See Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. (forthcoming 2007) (manuscript at 14, on file with the Harvard Law School Library).

<sup>24</sup> *LULAC*, 126 S. Ct. at 2619.

<sup>25</sup> *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting).

Kennedy had always emphasized that “[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”<sup>26</sup>

Yet in *LULAC* Justice Kennedy lauded the efforts of Latinos organizing along racial lines and insisted the state could not thwart those efforts. His prior jurisprudence seemed premised on the notion that racial identity is, at best, an artificial construct imposed by the state (and at worst a divisive, destabilizing force). How could a Justice who once doubted whether an authentic racial identity even exists come to the view, let alone celebrate the fact, that the “Latinos in District 23 had found an efficacious political identity”?<sup>27</sup>

Though one should never parse judicial opinions as if they were statutes, I want to dwell a bit on that phrase because I think it offers a clue about the story Justice Kennedy was telling in *LULAC*. If one shears away the sentence’s racial subject, what immediately springs to mind is the First Amendment, which is the dominant story of the electoral domain in Kennedy’s eyes. Justice Kennedy, of course, has long prided himself on his First Amendment commitments, and, rightly or wrongly, the First Amendment pops up repeatedly when Justice Kennedy writes about election law.<sup>28</sup>

If we recast Justice Kennedy’s story about racial politics in Texas as a First Amendment story, the narrative line becomes clear. The Latinos in District 23 had built a political coalition over several years and were just about to reap its fruits, only to find their efforts thwarted by the partisan machinations of Tom DeLay and the Texas Republicans. As Kennedy wrote, “District 23’s Latino voters were poised to elect their candidate of choice. They were becoming more politically active,

<sup>26</sup> *Miller*, 515 U.S. at 911–12 (quoting *Shaw*, 509 U.S. at 647).

<sup>27</sup> Election law scholars are divided as to whether Justice Kennedy’s ruling in *LULAC* represents a departure from his equal protection jurisprudence. Compare Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. (forthcoming 2007) (manuscript at 6, on file with the Harvard Law School Library) (*LULAC* was merely another chapter in the Court’s anti-essentialist jurisprudence), with Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. (forthcoming 2007) (manuscript at 9, on file with the Harvard Law School Library) (*LULAC* represents a departure from the Court’s anti-essentialist position), Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 761 (2007) (Justice Kennedy’s interest in protecting Latinos was genuine), and Ellen D. Katz, *Reviving the Right To Vote*, 68 OHIO ST. L.J. (forthcoming 2007) (manuscript at 3, on file with the Harvard Law School Library) (*LULAC* “necessarily acknowledged that race need not be a problem to overcome but can be a trait that unites people in positive ways and gives rise to communities of value”).

<sup>28</sup> At least since *Burdick v. Takushi*, 504 U.S. 428, 443 (1992) (Kennedy, J., dissenting), Justice Kennedy has had a soft spot for voting claims with expressive dimensions. And he has recently insisted that partisan gerrymandering claims should be framed in First Amendment terms. See *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

with a marked and continuous rise in Spanish-surnamed voter registration. In successive elections Latinos were voting against Bonilla in greater numbers, and in 2002 they almost ousted him.”<sup>29</sup> Justice Kennedy was so angered by the state’s decision to “ma[k]e fruitless the Latinos’ mobilization efforts,” particularly the cynical targeting of “those Latinos who were becoming most politically active,” that he hinted darkly that the state may have engaged in intentional discrimination.<sup>30</sup> “In essence,” Kennedy wrote, “the State took away the Latinos’ opportunity because [they] were about to exercise it.”<sup>31</sup>

Race, to be sure, was the organizing principle for political mobilization in District 23. With or without the overlay of race, however, these mobilization efforts were easily recognizable as cherished First Amendment activities. Latinos in District 23 were united not just by race, but by a vibrant political association.

For a First Amendment romantic like Justice Kennedy, the expressive dimensions of the District 23 story must have been as compelling as its associational elements. As Kennedy himself noted, “a racial group that has been subject to significant voting-related discrimination . . . was becoming increasingly politically active and cohesive.”<sup>32</sup> Further, by trying to vote out a *Latino* incumbent (albeit one who had voted to build a 700-mile fence on the Mexican border<sup>33</sup>), District 23’s Latinos were rejecting a cynical view of racial alignment. They were not just voting out a Latino incumbent, but were coalescing against that candidate based on his substantive positions.<sup>34</sup> Immigration policy, of course, is tied to identity, but it also implicates more mundane sources of political alliances: money, jobs. Put differently, Latinos in District 23, at least in Kennedy’s eyes, had found an “efficacious *political* identity,” not a purely racial one.

A domain-centered First Amendment story might even explain the central puzzle in *LULAC*. Half of Kennedy’s voting-rights discussion censured the state for thwarting the mobilization efforts of Latinos in District 23. The other half condemned the offset district using language that could have been lifted directly from one of Kennedy’s own *Shaw* opinions — a line of cases decidedly hostile toward race-conscious districting and racial politics generally — on the ground that

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<sup>29</sup> *LULAC*, 126 S. Ct. at 2621 (citation omitted).

<sup>30</sup> *See id.* at 2622–23.

<sup>31</sup> *Id.* at 2622.

<sup>32</sup> *Id.* at 2621.

<sup>33</sup> Lianne Hart, *Runoff in Redrawn Texas District Could Be a Tight Race*, L.A. TIMES, Dec. 11, 2006, at A16.

<sup>34</sup> *See LULAC*, 126 S. Ct. at 2622 (“Latinos’ diminishing electoral support for Bonilla indicates their belief he was ‘unresponsive to the particularized needs of the members of the minority group.’” (quoting *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986))).



it was not what Dan Ortiz has astutely termed “culturally compact.”<sup>35</sup> In Kennedy’s view, there was not only “a 300-mile gap between the two Latino communities in District 25,” but a “similarly large gap between the needs and interests of the two groups.”<sup>36</sup> How, then, do we explain what it was about the “efficacious political identity” forged by Latinos in District 23 that differed from the identity of the Latinos in the offset district and the many other racial groups whose districts Justice Kennedy himself had helped to dismantle under *Shaw*?

If we view Justice Kennedy’s story as a First Amendment tale, an underemphasized portion of *LULAC* comes into sharper focus. Kennedy did not stop with the *Shaw* language in condemning the offset district. Instead, he said something quite different from what he had said in any of his *Shaw* opinions by explicitly linking *Shaw* to a worry about political efficacy:

[T]here is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires . . . .

. . . The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals.<sup>37</sup>

In essence, Justice Kennedy concluded that the offset district was a *forum non conveniens* for Latinos seeking an “efficacious political identity.”<sup>38</sup>

One interpretation of *LULAC*, then, is that the story Justice Kennedy felt comfortable telling about race was not a story about race, but a First Amendment story, the dominant narrative of the electoral domain in Kennedy’s eyes. Viewing *LULAC* through this First Amendment lens enabled Kennedy to rethink his own vision of equal protection. For the first time he was able to see an “efficacious political identity” that was also a racial one.

In the next section, I will argue that in *Parents Involved* Kennedy took another step away from the colorblindness camp by acknowledging the state’s inevitable role in constructing the space in which citizens work out questions of identity. Given that his opinion in *Parents Involved* unexpectedly looked to race-conscious districting as a tool for desegregation, one might be tempted to trace that acknowledgement back to *LULAC*. After all, until *LULAC*, whenever Justice Kennedy saw a majority-minority district, he saw bad social engineering, an ef-

<sup>35</sup> Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50 (2006), <http://www.michiganlawreview.org/firstimpressions/vol105/ortiz.pdf>.

<sup>36</sup> *LULAC*, 126 S. Ct. at 2600.

<sup>37</sup> *Id.* at 2618–19.

<sup>38</sup> For other interpretations of this passage, see Charles, *supra* note 27 (manuscript at 12); and Karlan, *supra* note 27, at 760.

fort to pull together “far-flung” members of the same racial group. In District 23, he saw an organic racial and political community coalescing precisely because it was concentrated in the same district. Surely in the back of his mind Justice Kennedy realized that District 23 was the product of some past social engineering — and that its preservation would similarly require a conscious choice. Indeed, on Kennedy’s own account, when the state privileged politics over race in dismantling District 23, it destroyed a political community it ought to have preserved. And when the state privileged race over politics in drawing the offset district, it constructed an artificial political community destined for failure. Didn’t this juxtaposition make clear to Justice Kennedy that, no matter what a state’s intention in drawing districts, it necessarily creates a forum in which racial identity is expressed?

The more modest and defensible read of *LULAC* is that Justice Kennedy did not go that far. In finding that the state could not dismantle a district just as Latinos were about to elect their candidate of choice, Justice Kennedy seemed to be guided by an instinct that the state should “do no harm.” That is, he was simply insisting that when Latinos assert an authentic political identity, even a racialized one, the state cannot prevent its full expression. It is, of course, still noteworthy that Justice Kennedy thought there was *something* here to harm — that a racialized political identity had emerged that was worth preserving. Nonetheless, even if *LULAC* brought Justice Kennedy to the point of recognizing a claim to a racialized identity, there is some distance between forbidding state interference with its full expression and blessing state efforts to create it. It was not until *Parents Involved*, the second part of Kennedy’s journey, that he seemed to shift his views on the idea of neutrality.

### B. Parents Involved

When we read Justice Kennedy’s opinion in *Parents Involved* against the background of *LULAC*, portions of his concurrence emerge in bas-relief. Most obviously, it is easier to make sense of Justice Kennedy’s willingness to place his faith in race-conscious districting and his suggestion at the end of the opinion that the assertion of racial identity is an expressive act. We can also identify more subtle shifts in Justice Kennedy’s views: his new sensitivity to the messiness of the public/private distinction, his refusal to cast *Parents Involved* as yet another case in which race must be kept out of state decisionmaking, his insistence that his conservative colleagues are not thinking hard enough about the ways in which a colorblind approach will interact with social realities. As I argue below, these parts of the opinion suggest a dawning awareness of the complexities that inhere in these debates, and all seem fairly traceable to a domain-centered narrative about public education. To be sure, the dominant narrative of Justice

Kennedy's opinion in *Parents Involved* remains a story about race, one that largely fits with his prior anti-essentialist jurisprudence. But the *novel* elements — the bits and pieces that do not follow easily from his prior jurisprudence — make more sense if we think of them as a narrative about the domain of public education, a story about teaching civic morality rather than guaranteeing equality.

There is, of course, a significant difference between the First Amendment story that Kennedy associates with the electoral domain and the story he tells about the educational one. For conservative judges like Justice Kennedy, one of the main purposes of public schools is to educate future citizens.<sup>39</sup> Precisely because the state's job is to inculcate civic values, judges who subscribe to this view are more than willing to relax constitutional rules so the school may fulfill its educational mission.<sup>40</sup>

It is not hard to imagine why a domain-centered narrative about schools would nudge Justice Kennedy's equal protection jurisprudence in a new direction. To begin, Justice Kennedy might suspect that segregated schools are not the ideal environment for teaching students about the value of race neutrality. Indeed, the hope of *Brown* is that if students from different backgrounds "learn together, . . . [they] will . . . learn to live together."<sup>41</sup> Further, because schools are a context in which conservative judges are accustomed to relaxing constitutional rules so that schools can teach their students civic morality, we might expect Kennedy to be more flexible about race neutrality in this context. If we look to the novel parts of Justice Kennedy's opinion — past the anti-essentialism boilerplate Justice Kennedy trots out when he tells his usual story about race — we see a number of signs that a domain-centered narrative is nudging Kennedy in just these directions.

The way Justice Kennedy frames his opinion provides some evidence that a domain-centered narrative is driving him. Justice Kennedy's fellow travelers in the colorblindness camp largely cast this case as implicating society's aspirations of equality. Chief Justice Roberts, for instance, opens his analysis by invoking general equal protection principles<sup>42</sup> and ends with the aphorism that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis

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<sup>39</sup> See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting) (arguing that when the government acts as "educator" rather than "sovereign," it "is engaged in inculcating social values and knowledge in relatively impressionable young people").

<sup>40</sup> See generally James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000) (analyzing ways in which constitutional principles are applied in schools). To understand the depth of this commitment, one need look no further than another end-of-Term blockbuster, *Morse v. Frederick*, 127 S. Ct. 2618 (2007), better known as the "BONG HiTS 4 JESUS" case.

<sup>41</sup> *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

<sup>42</sup> See *Parents Involved*, 127 S. Ct. at 2751–52.

of race.”<sup>43</sup> Justice Thomas begins his concurrence by characterizing the case as being about “state entities” rather than public schools,<sup>44</sup> and he ends by invoking general language on race from *Dred Scott* and Justice Harlan’s dissent in *Plessy*.<sup>45</sup>

Justice Kennedy, in sharp contrast, anchors his concurrence in the domain of education. He opens his opinion by trumpeting the role that public schools play in teaching civic morality and explicitly linking that role to integration. “The 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,” he writes, and the school defendants “seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community.”<sup>46</sup> While Kennedy disagrees with the means the schools have chosen to pursue that goal, he writes that their concern about integration “should remind us our highest aspirations are yet unfulfilled” and represents “a compelling educational goal.”<sup>47</sup> This opening certainly resonates with parts of *Brown*’s legacy. But its core narrative is less about equal educational opportunity, the dominant note in any equal protection story, than about the role schools play in teaching civic morality.

A domain-centered narrative might also explain some of the more surprising passages in Kennedy’s concurrence — those portions criticizing his colleagues for ignoring the relationship between law and culture and his unexpected legal-realist riff on the public/private distinction. Twice Justice Kennedy pointedly rebukes his conservative colleagues for failing to come to grips with the ways in which the principle of colorblindness interacts with social realities.<sup>48</sup> In an even more striking passage, he concedes that it is impossible to draw a clear line between de jure and de facto discrimination and admits that the distinction is a useful legal fiction:

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

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<sup>43</sup> *Id.* at 2768 (opinion of Roberts, C.J.).

<sup>44</sup> *Id.* at 2768 (Thomas, J., concurring).

<sup>45</sup> *Id.* at 2787–88.

<sup>46</sup> *Id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>47</sup> *Id.* at 2788–89.

<sup>48</sup> *See id.* at 2791 (“The enduring hope is that race should not matter; the reality is that too often it does.”); *id.* at 2792 (“[A]s an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”).

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... It must be conceded [that the] primary function [of the distinction between de jure and de facto segregation] was to delimit the powers of the Judiciary in the fashioning of remedies.<sup>49</sup>

Has Justice Kennedy suddenly started channeling Robert Cover?<sup>50</sup> Though a gesture toward social realities is a conventional response from middle Justices to the colorblindness camp, there is a good distance between a worry about all-white student bodies and the idea that law-affects-culture-affects-law.

These passages are difficult to reconcile with a purely anti-essentialist approach. After all, if the injury at issue is the state's deliberate use of a racial classification, the distinction between de jure and de facto segregation is perfectly sensible. If Kennedy were telling his usual story about race, he should also agree with his colleagues that social realities ought not intrude on the Court's calculus (with the exception of the cultural effects of legally enforced racial classifications).

If we view Kennedy's opinion through the lens of a domain-centered narrative, however, his unexpected interest in social realities and the relationship between law and culture suddenly makes more sense. After all, if Kennedy thinks that integration furthers a school's *educational* mission, he is right to worry about social realities and de facto segregation. And he should also worry about the way that law affects culture — specifically, the way that a rigid mandate of race neutrality would affect the educational culture of our public schools.

A domain-centered narrative might also explain why Justice Kennedy temporarily adopts the vernacular of a critical theorist. Public schools are, of course, a place where the state regulates pervasively, and at least on Kennedy's account, their job is to teach students to be citizens. This combination — pervasive regulation and an identifiable mission — makes it particularly hard to insist upon a race-neutral approach. When the state regulates pervasively, it is hard to claim that any choice the state makes is truly neutral. After all, if you think the goal of public education is to create citizens, you have to know what kind of citizens you want to create. And when the state's regulatory mission is identifiable, we have a baseline for evaluating whether that mission is well served by a race-neutral approach. Indeed, even a judge committed to the colorblind ideal might worry, as Kennedy seems to, that the *value* of colorblindness cannot be learned in a racially segregated school. The narrative of the educational domain, then, may be what focuses Justice Kennedy on the poor fit between his preference for a race-neutral state and his desire for a race-neutral society. Perhaps this is why the question for Kennedy seems to have

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<sup>49</sup> *Id.* at 2795–96.

<sup>50</sup> Or Robert Post and Reva Siegel. Or the critical race theorists. Or the many other academics who write in a critical vein.

changed in the domain of education. It is no longer whether the state can act race consciously, but how.

A domain-centered narrative might also help rationalize what seem like inconsistencies in Kennedy's jurisprudence. For example, Kennedy simultaneously licenses states to engage in certain types of race-conscious decisionmaking while flatly rejecting the dissent's argument that we can use race to get beyond race.<sup>51</sup> If Kennedy is focused on domains, however, it is plausible that he would maintain his strong commitment to colorblindness generally while worrying that in the educational domain a race-neutral approach might not promote a colorblind ideal.

The notion of domains might similarly make sense of Justice Kennedy's apparent reversal of his position in *Grutter*, where he dissented.<sup>52</sup> Whereas Justice Kennedy was unmoved by Justice O'Connor's arguments in *Grutter* about the educational values associated with diversity in law school admissions, he makes a remarkably similar argument in *Parents Involved*, even observing that public schools could use a *Grutter*-like admissions policy as a last resort.<sup>53</sup>

If one thinks in terms of domains, however, Kennedy's position does not seem inconsistent. Perhaps he objected to Justice O'Connor's argument in *Grutter* because it — arguably unlike Powell's in *Bakke*<sup>54</sup> — went well beyond a domain-centered narrative. While she certainly emphasized educational diversity, her arguments extended beyond law schools, as Justice Scalia argued sharply in his dissent.<sup>55</sup> Or perhaps Justice Kennedy sincerely believes what Scalia suggested only sarcastically in *Grutter*: that ““cross-racial understanding”” and “good ‘citizenship’” are lessons to be learned by “people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in . . . public-school kindergartens.”<sup>56</sup> Viewed from a domain-centered perspective, then, Justice Kennedy's newfound embrace of *Grutter* suggests not a doctrinal switch, but a more fine-grained approach to the educational domain than either O'Connor or Scalia offered in that case.<sup>57</sup>

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<sup>51</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>52</sup> *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting); see also J. Harvie Wilkinson III, *The Supreme Court, 2006 Term—Comment: The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 170 (2007) (noting Kennedy's shift).

<sup>53</sup> See *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>54</sup> See, e.g., Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–60 (2003).

<sup>55</sup> *Grutter*, 539 U.S. at 347–48 (Scalia, J., dissenting); see also Post, *supra* note 54, at 60.

<sup>56</sup> *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting) (quoting *id.* at 330–31 (majority opinion)).

<sup>57</sup> Thus, Judge Wilkinson is right to describe Kennedy's “skepticism of racial classifications” as “heartfelt,” Wilkinson, *supra* note 52, at 170, despite Kennedy's embrace of *Grutter* in this

Finally, a domain-centered narrative might help us make sense of the strategies Justice Kennedy licenses schools to use to avoid resegregation. Kennedy is willing to let the state consider race at the wholesale level but not at the retail level. Although he insists that the state may not engage in “a systematic, individual typing by race,”<sup>58</sup> he is perfectly comfortable with what he repeatedly describes as “indirect” and “general” race-conscious strategies: siting schools, drawing attendance zones, allocating resources, recruiting students and faculty, and tracking statistics.<sup>59</sup>

The obvious question, of course, is why one would distinguish between retail and wholesale race consciousness. The tension is particularly acute with regard to Kennedy’s endorsement of race consciousness in siting schools and drawing attendance zones, both variants of race-conscious districting. Many academics — and I count myself among them — find such a distinction extraordinarily frustrating. After all, if one is worried about “allocat[ing] . . . governmental burdens and benefits” on the basis of race,<sup>60</sup> both the school assignment policies challenged in *Parents Involved* and race-conscious districting do so. As Kennedy himself asked, “If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies?”<sup>61</sup>

Justice Kennedy describes the difference between what I am calling his “wholesale” and “retail” strategies using the limited vernacular of intentional discrimination. Having lived for a long time with the Powell/O’Connor compromise, most scholars will presumably do the same. They may think that Justice Kennedy’s wholesale strategies are simply a “less” race-conscious means to achieve the same end or, as Kennedy himself hinted, a strategy for camouflaging the state’s use of race.<sup>62</sup>

I nonetheless think that the notion of domains better captures the distinction Kennedy is trying to draw. What unites Kennedy’s “whole-

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context. Thanks to Jessica Bulman-Pozen and Reva Siegel for pushing me on this line of analysis.

<sup>58</sup> *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>59</sup> *Id.* at 2792, 2796.

<sup>60</sup> *Id.* at 2796.

<sup>61</sup> *Id.*

<sup>62</sup> For arguments that Powell’s and O’Connor’s approaches are designed to render the state’s use of race less transparent, see Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928–29 (1983); Post, *supra* note 54, at 74. For arguments that Kennedy is doing the same, see James E. Ryan, *The Supreme Court, 2006 Term—Comment: The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 138 (2007); and Posting of Lior Strahilevitz to The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com/faculty/2007/06/justice-kennedy.html> (June 28, 2007, 12:11 PM).

sale” proposals is that they license the state to create an appropriate forum for students to learn about race. They license schools to do, in other words, what Justice Kennedy has always thought they were supposed to do when race is not involved: create a learning environment that will teach students to be good citizens.

On this view, then, Kennedy is licensing the state to use race in a holistic, domain-constructing fashion — to create the right kind of space for students to learn about race. Until *Parents Involved*, Kennedy had taken a libertarian view on the construction of identity, insisting that the best thing the state could do was stay out of debates about race. “The moral imperative of racial neutrality,” he wrote in *Croson*, “is the driving force of the Equal Protection Clause.”<sup>63</sup> In *Parents Involved*, the unique nature of the domain seems to soften his libertarian instinct by suggesting a link between integration and the mission of schools. He is thus willing to allow the state to be race-conscious when it is thinking in terms of domain construction.

When the state moves from wholesale to retail, from the domain to the individual, Kennedy’s libertarian instincts reemerge. Perhaps that is because Kennedy thinks that the state is no longer constructing a space in which students choose their own identities. Instead, it is choosing an identity *for* them. “When the government classifies an individual by race,” he wrote in *Parents Involved*, “it must first define what it means to be of a race.”<sup>64</sup>

If we cast Kennedy’s distinction between wholesale and retail race consciousness as a distinction between constructing domains and constructing identity, we can also make more sense of Justice Kennedy’s unexpectedly intense worry about the fact that Jefferson County could not definitively say whether its policies applied to kindergarteners.<sup>65</sup> Kennedy says he is concerned about imprecision.<sup>66</sup> But it is not clear why precision matters in the slightest if Kennedy is concerned with the injury associated with racial classifications (the colorblindness view) or with camouflaging the state’s reliance on them (the Powell/O’Connor view). If Kennedy is thinking in domain-centered terms, however, his

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<sup>63</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>64</sup> 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment). For another explanation of the distinction Kennedy is drawing, see Andrew Carlon, *Racial Adjudication*, 2007 BYU L. REV. (forthcoming) (manuscript at 8–12), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=997875](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997875). For efforts to explore the doctrinal connections between desegregation plans and race-conscious districting, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1684–88 (2001); and Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 301–09 (2007).

<sup>65</sup> *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

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



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irritation is easier to understand. Why should the Court accord schools extra constitutional leeway to construct an educational space if they don't seem to know what they are doing?

Similarly, the distinction between wholesale/domain construction and retail/identity construction helps explain Kennedy's distaste for Seattle's "crude" categorization scheme, which classified students as either "white" or "non-white."<sup>67</sup> Again, if Kennedy were focused on classification or camouflage, fine-grained categories are little different from crude ones. But if one is worried about the state's interfering with individual self-expression, crude categories matter a good deal. Perhaps this is why Kennedy closes his opinion with an echo of *LULAC*, suggesting that the assertion of racial identity is an expressive act: "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin."<sup>68</sup>

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*Parents Involved* thus both echoes *LULAC* and moves a step beyond it. In both cases, Kennedy viewed the assertion of racial identity as an expressive act, one with which the state ought not interfere. In both cases, the anti-essentialist language of his prior opinions morphs into a more positive vision of racial identity. But *Parents Involved* moves beyond *LULAC*. It not only acknowledges race's associational and expressive dimensions, but shows some awareness of the relationship between the two — the possibility that the choices the state makes in grouping individuals will affect the choices individuals make in expressing their identity. That awareness leads Justice Kennedy to do something quite new in *Parents Involved*: brainstorm about the most useful *race-conscious* strategies the state can use to construct the forum in which children learn about race.

These positions represent new developments in Justice Kennedy's jurisprudence. In his prior decisions, he viewed racial categories with nothing but suspicion. By recasting at least parts of these two stories about race in domain-centered terms, he begins to see positive dimensions to the expression of racial identity, whether it is the "efficacious political identity" found by Latinos in *LULAC* or the act of self-definition Kennedy described in *Parents Involved*. Justice Kennedy's overriding impulse in both contexts remains the same — do no harm; never force a racial identity upon anyone — and is thus roughly consonant with his prior jurisprudence. But in *LULAC* the idea of "do no harm" expands to encompass the notion that a state cannot dismantle

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<sup>67</sup> *Id.* at 2790–91.

<sup>68</sup> *Id.* at 2797. I am indebted to Will Baude for suggesting this line of analysis.

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a forum that would allow for the full expression of a racialized political identity. And in *Parents Involved*, the idea of “do no harm” extends to worries about the effects of a *colorblind* approach on schools’ educational mission. The dominant note in both opinions remains a commitment to race neutrality, but their minor theme is a dawning recognition that this commitment translates differently in different domains.

One can also see that the contours of Justice Kennedy’s “settlement” on race are different from those of the “don’t ask, don’t tell” settlement long associated with the Court’s fifth vote. At the level of general atmospherics, the settlement offered by Powell and O’Connor was the compromise of a pragmatist. It treated race as an inconvenient fact — one to be dealt with, to be sure, but with few redeeming features. At the level of specific doctrine, it offered a rather pedestrian sort of compromise between the existing camps, allowing race to be used but not in an obvious way. And at least for Justice O’Connor, it was a settlement that readily translated to other domains.

Even as Justice Kennedy stakes a middle ground in the colorblindness debate, however, he remains an idealist. His settlement does not merely tolerate the idea of racial identity, but acknowledges associational and expressive dimensions to race that are not obviously present in Powell’s or O’Connor’s compromises. Indeed, as I discuss in the next Part, the most striking aspect of both opinions is that Justice Kennedy is starting to think about the relationship *between* the associational and expressive dimensions of racial identity — between how people are grouped and how they understand themselves.

Nonetheless, although Kennedy endorses a more complex, even a sunnier vision of race than his swing-vote predecessors did, his vision is also narrower. It is tied to particular narratives about particular domains, making it difficult to guess whether Justice Kennedy’s willingness to depart from his anti-essentialist script will extend beyond these facts and these contexts. Put more sharply, the stories of *LULAC* and *Parents Involved* may be nothing more than that — stories, told once and not to be repeated.

If we read Justice Kennedy’s opinions in *LULAC* and *Parents Involved*, we can identify the basic ingredients of a new approach — an openness to positive expressions of racial identity, a willingness to think harder about the state’s role in constructing it. But even these simple propositions lead to a myriad of questions well beyond the scope of this Comment. Has Kennedy correctly identified the dominant narratives of these two domains? Does connecting race and association lead us down the road traveled by Hannah Arendt or Herbert

Wechsler?<sup>69</sup> What do we make of the deep tensions embedded in Kennedy's approach, particularly in his distinction between retail and wholesale race consciousness? Can Kennedy's "do no harm" approach — the idea that racial identity should be chosen by individuals and not affixed by the state — hold up when one starts to think about constructing domains? Because neither a judicial opinion nor an academic commentary could possibly address all of these questions, I will simply quote the *Foreword's* author, Martha Nussbaum: "[T]ension within a theory does not necessarily show that it is defective; it may simply show that it is in touch with the difficulty of life."<sup>70</sup>

## II. OF DISPLACEMENT AND DOMAINS

Given the constraints of this format, let me close by offering a few abbreviated reflections on two questions that follow directly from the analysis in Part I. First, is displacement really a source of power? Section II.A considers whether the sort of domain-centered narratives that have led Kennedy to shift his views might be useful strategies for talking about race more generally. Second, will a domain-centered approach produce an equal protection jurisprudence that is so radically contextualized that nothing can be generalized? Section II.B answers this question in the negative, offering one example to show why it may be useful both to acknowledge that the puzzle of race is made up of distinct pieces and to try to figure out how those pieces fit together.

### A. *Displacement as a Source of Power*

One of the most interesting things about the new story that Justice Kennedy tells about race is that it is not really a story about race. The novel portions of both *LULAC* and *Parents Involved* — the departures from Justice Kennedy's usual anti-essentialist arguments — make more sense if we think of them as narratives about domains, not race. In *LULAC's* stirring tale of political agency and expression, we could substitute virtually any other identity category — environmentalist, independent, gay — in place of the word "Latino" and the story would still make sense. Similarly, consider *Parents Involved's* story about school as a forum in which we learn about identity and choose our own. We could insert other adjectives — religious, political, sexual — for the term "racial" and the story would still cohere.

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<sup>69</sup> See Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). For two seminal responses to Wechsler, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); and Charles A. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

<sup>70</sup> Martha C. Nussbaum, *The Future of Feminist Liberalism*, PROC. & ADDRESSES AM. PHIL. ASS'N, Nov. 2000, at 47, 68.

What do we make of the fact that by *not* talking directly about race, Justice Kennedy has found something new to say? Returning to Stephen Greenblatt's evocative notion that displacement can be a source of power — that writing about *Macbeth* helped him think more clearly about Iraq — is it possible that displacement can sometimes be an opportunity for constitutional growth rather than psychological avoidance? It certainly seems true of Kennedy. By shielding his eyes from the “neon light” of race and focusing on the story of the relevant domain, Justice Kennedy is able to see something new. Kennedy has always thought of the political sphere as one involving robust associational and expressive dimensions, but he now sees how those values connect to racial politics. Kennedy has always thought that the school's role was to teach students the lessons of citizenship, but now he sees that those lessons extend to interracial relations.

Indeed, the stories Justice Kennedy tells in these cases bring him closer to the views of many race scholars. To offer a few dreadfully abbreviated examples, Kennedy's story of the Latinos in District 23 bears a passing resemblance to the work of Lani Guinier and Gerald Torres, who emphasize race's associational dimensions and argue that race is “a political, not just a social, construction,” forged through “collective interaction at the individual, group, and institutional level.”<sup>71</sup> In *Parents Involved*, Kennedy argues that individuals choose their own racial identity while acknowledging the state's role in creating the forum in which they do so. Many academics similarly claim that race is a semi-fluid category, shaped by acts of self-expression and external constraints.<sup>72</sup>

Or consider the potentially rich set of ideas embedded in Justice Kennedy's intuition that race has both associational and expressive

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<sup>71</sup> LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 14–15 (2002). Other scholars have explored the associational dimensions of racial identity in the context of voting. See, e.g., James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633 (1996); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003); Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998); cf. *Bush v. Vera*, 517 U.S. 952, 1049 (1996) (Souter, J., dissenting) (noting “the basically associational character of voting rights in a representative democracy”).

<sup>72</sup> See, e.g., MARTHA MINOW, *NOT ONLY FOR MYSELF* 30–58 (1997); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 87–102 (2002); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 42–48 (1990); K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in *COLOR CONSCIOUS* 30, 93–96 (K. Anthony Appiah & Amy Gutman eds., 1996); Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 38, 41 (Wendy Brown & Janet Halley eds., 2002); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875–86 (2002). Interestingly, Yoshino argues that language in Justice Kennedy's opinion in *Hernandez v. New York*, 500 U.S. 352 (1991), suggests a “performative definition of race” similar to that “associated with postmodern theory.” Yoshino, *supra*, at 900.

dimensions and in his dawning awareness of the link between them. Though his opinions in *LULAC* and *Parents Involved* are not explicitly cast in these terms, both describe how association affects identity — how the choices the state makes in grouping individuals influence the choices individuals make in choosing their identity. In *LULAC*, the question was whether the state created a district like District 23, where Latinos can develop an “efficacious political identity,” or a district like the offset district, which Kennedy thought would result in a “troubling blend of politics and race.”<sup>73</sup> In *Parents Involved*, Kennedy concludes that the ways students are grouped will affect how they think about racial identity. To be sure, the types of associations involved in the two cases — civic and political — further quite different ends. But the underlying connection — that *who* is part of our community affects *who* we become — is the same.<sup>74</sup> Here, too, we see a richer story about equal protection than Justice Kennedy has told before.

A critic might be tempted to pounce here. If displacement is a source of power, shouldn’t academics be less dismissive of the Powell/O’Connor settlement on race? After all, their overriding worry is that transparent uses of race will reify racial identity.

It is hard to believe that avoiding the subject of race makes race go away.<sup>75</sup> Indeed, not talking about race in this fashion seems degrading at some level, as if we equate race talk with talking about sex or one’s alcoholic uncle.

There may, however, be a more nuanced way to think about displacement. What if, like Kennedy, we began with the story of the domain rather than with the story of race? Most of us think we already know the story of race. We tell the same story no matter what the domain. Perhaps, like Kennedy, we might see something different if we told the story differently. Every domain has an overarching narrative. What if we tried to fit the story of race within the narrative of the domain rather than vice versa?

Consider a concrete example from my field, election law (presumably one could be drawn from almost any field). As Pam Karlan has observed, one of the dominant stories about race told in the legal profession views racial minorities as “objects of judicial solicitude, rather than as efficacious political actors in their own right.”<sup>76</sup> This is pre-

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<sup>73</sup> League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2623 (2006).

<sup>74</sup> If one is thinking about how a community’s composition affects conceptions of identity, one might think it quite striking that the three people invited to comment on *Parents Involved* are white.

<sup>75</sup> Cf. Bernadette Park & Charles M. Judd, *Rethinking the Link Between Categorization and Prejudice Within the Social Cognition Perspective*, 9 PERS. & SOC. PSYCH. REV. 108, 119–20 (2005) (questioning whether a reduced emphasis on categories will reduce bias).

<sup>76</sup> Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005).

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cisely the story most judges, practitioners, and scholars tell in the electoral domain. For instance, they fold majority-minority districts into whatever variant of the conventional story they prefer. Liberals tend to view majority-minority districts as a race-conscious strategy for integrating the legislature. Conservatives generally see them as yet another example of what they think of as hand-outs, akin to affirmative action or minority business set-asides.

Election law scholars, in sharp contrast, tend to see racial minorities as they see other groups in the political system — as “efficacious political actors” rather than as “objects of judicial solicitude” — and to tell a distinctive story about race and districting. For instance, Sam Issacharoff and Pam Karlan have recently argued that majority-minority districts did more to improve the lives of racial minorities than decades of judicial solicitude because they put blacks and Latinos in a position to advance their own cause:

Whether it be state commitments to affirmative action in education, or minority preferences in contracting, or minority opportunity in state employment, or securing minority representation through redistricting, the steady advancement in the creation of a black middle class has depended on the vigilance of a black political class.

...  
... [T]he Voting Rights Act has given minority citizens the ability ... [to reach] a far higher ground and a far more level playing field than the Supreme Court would have provided.<sup>77</sup>

Election law scholars tell this story precisely because they are so enmeshed in their field. Whereas most scholars cannot help but think of the electoral domain as yet another story about race, election law scholars cannot help but see race as yet another story about the electoral domain. And by focusing on the domain rather than on race per se, they end up telling a distinctive tale about equal protection.

Here, then, is a vision of displacement as a source of power in the context of race. The Powell/O’Connor story is about *not* talking about race (or at least not appearing to talk about it). My vision of displacement involves talking about race but anchoring it within the appropriate constitutional domain. The hope is that if we start the story at a different place, we might end it differently.

### *B. Putting the Puzzle Back Together Again*

It is difficult, of course, to resist calls for more attention to context. Who wants to take a stand against precision? But one might reasonably worry that a domain-centered approach will result in a set of sto-

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<sup>77</sup> Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 49–50 (2003).

ries about race so disjointed that we will miss the overarching themes that unite them. Little good can come from a discourse on race so radically contextualized that nothing is generalizable. Thus, while it is helpful to use domain-centered narratives to break down our monolithic vision of race, there is a difference between envisioning equal protection jurisprudence as pieces in a puzzle and insisting those pieces bear no connection to one another.

This is all a bit abstract, so let me ground it with a concrete example showing why it may be helpful to use domain-centered narratives to break down a monolithic tale about race while still thinking about how those domain-centered stories fit together. Justice Kennedy draws a distinction between electoral districts and school districts. If we think through Kennedy's proposal in terms of domains but with an eye for the broader narrative, we end up with an account that is critical of both camps in the colorblindness debate.<sup>78</sup>

Just as Kennedy tailors his equal protection story to the dominant narrative of each domain, so too he urges a tailored solution. Specifically, Justice Kennedy seems to contemplate the use of different districting strategies when drawing electoral districts and school districts. In *LULAC*, Kennedy held that a state must maintain a majority-minority district to facilitate the representation of a group of Latinos who had found a politically efficacious identity. In *Parents Involved*, in contrast, while Justice Kennedy did not delve into the specifics, he seems to have proposed drawing school districts and attendance zones that roughly mirror the population of the community as a whole.

The fact that Justice Kennedy proposed two different districting solutions in these two cases certainly lends credence to the claim that a domain-centered narrative was driving the opinions. After all, if we look to the colorblindness debate, both sides have long adhered to a one-size-fits-all approach. Members of each camp tend to be either for majority-minority districts or against them, but relatively little thought has been devoted to adapting one's districting strategies to the kind of district being drawn.<sup>79</sup>

It is easy to see how a domain-centered narrative would coincide with Kennedy's intuitions about how districts should be drawn. To offer a few crude distinctions, the common view is that schools are

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<sup>78</sup> Although this Comment draws inspiration from Robert Post's work, in some senses this is a non-Postian undertaking. Though Post emphasizes the messiness and interconnectedness of the domains he identifies, *see, e.g.*, POST, *supra* note 12, at 3, he is skeptical of efforts to develop a unified theory of the First Amendment across domains, *id.* at 16.

<sup>79</sup> Exceptions include Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1121-42 (2005) (distinguishing between levels of governance and types of governing institutions); and Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 221-36 (1989) (exploring alternative voting systems for local elections).

supposed to make people *capable* of making political choices; districts are supposed to ensure people are *able* to do so. The goal of public schools is to train citizens, and the goal of districting is to represent them. In districting, we care about who sits in the legislature. In schools, we care about who sits in the classroom. On this conventional view, majority-minority electoral districts ensure that the legislature looks like the community from which it is drawn. And statistically integrated school districts and attendance zones ensure that the classroom looks like the community from which it is drawn.<sup>80</sup>

Here, then, is a reason to think in domain-centered terms. At the very least, we would avoid the mistake made by the majority in *Shaw v. Reno*, which termed majority-minority districts “an effort to segregate the races.”<sup>81</sup> Whatever one thinks of the state’s use of race to create majority-minority districts, a domain-centered narrative makes clear that their purpose is integrative. If one subscribes to a monolithic view of race, however, it is tempting to term majority-minority districts “segregated.” Indeed, given the talismanic significance of *Brown*, it is all too easy to classify every institution as either “segregated” or “integrated.”<sup>82</sup> A domain-centered narrative suggests that the dissenters in the *Shaw* cases were right to insist that equal protection doctrine is not monolithic and to chastise the *Shaw* majority for terming majority-minority districts segregated.<sup>83</sup>

But the *Shaw* dissenters were wrong, in my view, not to think harder about how the pieces of the equal protection puzzle fit together when they got to *Parents Involved*. By focusing too heavily on the differences between domains and ignoring the potential connections between them, the dissenters in *Parents Involved* may have made the same analytic error as the majority in *Shaw*. Just as the *Shaw* majority termed districts “segregated” simply because they were not statistically integrated, so too the *Parents Involved* dissenters labeled schools “segregated” simply because a majority of the students were racial minorities.<sup>84</sup> In both instances, bodies with a sizeable number of whites got lumped into the same category as the racial enclaves of Jim Crow.

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<sup>80</sup> There are also important practical differences between these domains. For instance, the problem of white flight exists for school districts but not electoral ones because people do not vote with their feet in electoral districts. Further, as James Ryan explains, districting strategies are unlikely to engender a fundamental change in the way our school system works given the size of residentially segregated neighborhoods. Ryan, *supra* note 62, at 144–46.

<sup>81</sup> 509 U.S. 630, 642 (1993).

<sup>82</sup> For a full discussion of these issues, see Gerken, *supra* note 79, at 1106–09. I agree with James Ryan, however, that “meaningful integration requires a nontrivial number of students from different racial or ethnic backgrounds.” Ryan, *supra* note 62, at 145. My quarrel here is with the idea that a school is “segregated” simply because racial minorities are in the majority.

<sup>83</sup> See *Shaw v. Hunt*, 517 U.S. 899, 928 (1996) (Stevens, J., dissenting); see also, e.g., *Bush v. Vera*, 517 U.S. 952, 1055 (1996) (Souter, J., dissenting).

<sup>84</sup> See *Parents Involved*, 127 S. Ct. at 2802–03 (Breyer, J., dissenting).



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The question is whether the Justices who termed majority-minority districts integrated in *Shaw* were too quick to term majority-minority schools segregated in *Parents Involved*.<sup>85</sup> The impulse behind this distinction is easy to grasp: a domain-centered narrative, which suggests that our goals should be integrated legislatures and integrated schools. But if we want an integrated *society* — one in which racial minorities are as much a part of the warp and woof of the polity as any other group is — that answer falls short. We care about statistically integrated schools and statistically integrated legislatures at least in part because we seek *dynamically* integrative institutions, institutions that will move us toward a genuinely integrated society.

To be sure, if we want to design dynamically integrative institutions, we must be attentive to the domain in which each institution sits. Dynamic integration will surely mean different things in different domains. But that attentiveness to context should not prevent us from seeing potential connections between those domain-centered stories. Here, for example, there may be more lessons to be drawn from the electoral domain than the dissenters in *Parents Involved* seemed to recognize. Sometimes a domain-centered narrative can be too tidy.

The domain-centered narratives described above may be too tidy. A central justification for treating electoral districts differently from schools is that districts are supposed to represent citizens whereas schools are supposed to create them. The problem with this neat categorization is that it overlooks the possibility that districts can also be sites for constructing identity. As Michael Kang argues, it is a mistake to think that districting is simply about representing preexisting groups; it is also “about what group alignments emerge and become politically relevant in the first place.”<sup>86</sup> If districts resemble schools in at least this modest way, then we should be careful that a domain-centered narrative does not prevent us from seeing ways in which the race narratives in each domain might ultimately connect.

In what I think of as the most important piece on race and redistricting in the last few years, Michael Kang offers an example of a race narrative in the electoral arena that might translate into other domains. He theorizes that majority-minority districts are useful because they temporarily pull race out of the political discussion and thereby help fracture rather than reify racial categories. Kang points out that

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<sup>85</sup> Justice Thomas certainly thought so, though for different reasons than those suggested here. See, e.g., *id.* at 2769 (Thomas, J., concurring) (“Racial imbalance is not segregation.”). Needless to say, I do not subscribe to his view that the dissenters’ arguments should be equated with those of *Brown*-era segregationists, see *id.* at 2782–88.

<sup>86</sup> Michael S. Kang, *The Politics of Race and Democratic Contestation*, 117 *YALE L.J.* (forthcoming 2008) (manuscript at 27, on file with the Harvard Law School Library); cf. Gerken, *supra* note 79, at 1142–52.

where voting is racially polarized, racial minorities have every incentive to vote monolithically along racial lines because that is their only hope of electing their candidate of choice. The result, writes Kang, is that race becomes a “conversation stopper”: “politics freeze along the axis of race, crowding out room for deliberation and presentation of choices for the public along other dimensions of policy and identity.”<sup>87</sup>

Kang argues that the solution to this problem is majority-minority districts. In such districts, Kang points out, it is all but a given that the minority group’s candidate of choice will win the general election. That means that minority voters can enjoy the luxury of division and debate during the primary.<sup>88</sup> Rather than coalescing behind a single candidate, racial minorities can choose among different platforms and debate the “more optimistic question of who [their] candidate of choice will be.”<sup>89</sup> Racial minorities, in other words, are able to engage in the usual stuff of pluralist politics. They can thus identify themselves as “temporary, contingent members of self-formed groups,”<sup>90</sup> something that would be impossible — or at least unwise — during a general election. On Kang’s view, majority-minority districts temporarily displace race, allowing racial minorities to politick the way any other group politicks.

Note how Kang’s claim connects to the questions raised by *LULAC* and *Parents Involved* about the relationship between association and expression. Kang’s argument is that the state’s choices about how to group voters affect how voters experience and express racial identity. Suggesting yet another variant of displacement as a source of power, Kang argues that one form of association — majority-minority districts — usefully places race in the background for some part of the electoral cycle. He also suggests that other strategies for grouping voters — majority-white districts — may foreground racial concerns in a destructive fashion. If Kang is correct, districts that are not statistically integrated may nonetheless be dynamically integrative for reasons that have little to do with whether they produce a legislature that looks like the polity.

An unduly tidy vision of domains would prevent us from asking whether the dynamic that Michael Kang identifies in majority-minority districts applies to schools as well. Given the limited and sometimes conflicting evidence that exists on this question,<sup>91</sup> all I want

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<sup>87</sup> Kang, *supra* note 86 (manuscript at 30).

<sup>88</sup> *Id.* (manuscript at 32).

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

<sup>90</sup> *Id.* (quoting MINOW, *supra* note 72, at 96) (internal quotation mark omitted).

<sup>91</sup> Both sides of the debate in *Parents Involved* agreed that the extant empirical evidence was mixed. Compare *Parents Involved*, 127 S. Ct. at 2776 (Thomas, J., concurring), with *id.* at 2820–21 (Breyer, J., dissenting). Moreover, these studies have tended to focus on concrete measures, like

to do here is suggest the question's relevance, taking no position on its answer. Perhaps it would be a welcome relief for black and Latino students to inhabit a world in which they were not constantly reminded of their minority status. We are, after all, often most conscious of a particular aspect of our identity when we find ourselves to be an outlier. Or perhaps Justice Kennedy is right. It may be that because of the overlay of socioeconomic conditions or the persistence of racial subordination or the ways in which school kids interact or the prevalence of racially homogenous neighborhoods or the existence of many differences between the electoral and educational domains, statistically integrated schools are the path to genuine integration.<sup>92</sup>

The point here is simply that, as with districting, critical distinctions can get lost when we describe institutions as either "segregated" or "integrated." And that is a lesson that comes both from thinking of domain-centered narratives as parts of a puzzle and from trying to figure out how the pieces fit together. Without access to a domain-centered narrative, we cannot move away from a monolithic tale of race and explain why majority-minority districts should not be condemned as segregated. And without an effort to think about how the pieces in the equal protection puzzle connect, we cannot see that both districts and schools constitute sites for working out racial identity, and will thus close ourselves off to potentially useful lines of inquiry.

#### CONCLUSION

Justice Kennedy's opinions in *LULAC* and *Parents Involved* invite us to abandon our monolithic stories about race and think about equal protection in domain-centered terms. I, for one, welcome the invitation, and that is not merely because I am grateful to Justice Kennedy for declining to join the plurality's deeply mistaken interpretation of *Brown*. The debate between Chief Justice Roberts and Justice Breyer is one we have been having for a very long time. Perhaps it is time to shift the terrain. If Justice Kennedy can find something new to say, maybe so can we.

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academic performance, see Amy S. Wells, *The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771, 772 (2001), and not on the more atmospheric (and thus more difficult to measure) indicia of the type of deep social/political integration I describe here.

<sup>92</sup> For thought-provoking explorations of these and other themes, see Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261 (2006); and Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).