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## THE SUPREME COURT AND VOLUNTARY INTEGRATION

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This past Term, the Supreme Court wrote the latest chapter on school desegregation. In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>1</sup> a fractured Court struck down two voluntary school integration plans, one from Seattle and the other from Jefferson County, Kentucky.<sup>2</sup> The Court found neither plan sufficiently narrowly tailored to survive strict scrutiny.<sup>3</sup> A four-Justice plurality, in an opinion by Chief Justice Roberts, seemed inclined to go further and rule that voluntary integration does not advance a compelling interest, thus completely prohibiting the use of race in student assignments.<sup>4</sup> But the opinion only hinted in that direction. Justice Thomas, who joined the plurality's opinion in full but wrote a separate concurrence, would have taken that extra step and prohibited most if not all attempts to achieve racially integrated schools, which he described as an elitist fad.<sup>5</sup>

Justice Kennedy provided the proverbial fifth vote, joining the Court's opinion but not the plurality's. He also wrote a separate concurrence to make clear that he would approve some consideration of race to achieve some measure of integration under some circumstances.<sup>6</sup> Justice Breyer wrote a lengthy and passionate dissent, joined by Justices Stevens, Souter, and Ginsburg, which focused almost exclusively on the plurality's opinion.<sup>7</sup> Justice Stevens wrote a separate dissent, which asserted that the decision was a radical break from precedent.<sup>8</sup> All of the Justices who wrote, like the parties and amici in the

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

<sup>2</sup> *Id.* at 2746.

<sup>3</sup> *See id.* at 2759–61.

<sup>4</sup> *See id.* at 2755–59, 2767–68 (opinion of Roberts, C.J.).

<sup>5</sup> *See id.* at 2787 (Thomas, J., concurring).

<sup>6</sup> *Id.* at 2791–93 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>7</sup> *See id.* at 2800–37 (Breyer, J., dissenting).

<sup>8</sup> *See id.* at 2797–800 (Stevens, J., dissenting).

case, fought over who was more faithful to *Brown*<sup>9</sup> and whether that decision today requires colorblindness or permits affirmative steps to assist and protect minority students.<sup>10</sup>

There are many things one could say about this case, and undoubtedly much will be said in the months and years to come. Some will focus on doctrine and methodology, others on what the decision suggests about the direction of the Roberts Court, and still others on the views of individual Justices. Tempting as it might be, I cannot cover all of these topics in depth in one brief essay. Instead, I would like to discuss how this case fits within the broader context of school desegregation and education reform, and I would like to concentrate on a seemingly simple question: is this decision important and, if so, why?

My answer is mixed. On the one hand, this decision does not change much on the ground. The truth is that racial integration is not on the agenda of most school districts and has not been for over twenty years. Modern education reform efforts might still share the goal of equalizing educational opportunities for minority students, which the Court in *Brown* embraced. But integration is not generally the means of choice to achieve that goal, nor is the Supreme Court the key arena. Advocates and reformers have turned their attention elsewhere, and today battles are waged in legislatures and in state courts over school funding, school choice, standards and testing, and access to preschool. The dominant question, moreover, is which of these reforms will improve academic achievement as measured primarily, if not exclusively, by standardized test scores. The idea that schools should also teach students from diverse backgrounds how to cooperate in preparation for citizenship, like the idea of integration, has been pushed into the background.<sup>11</sup>

One reason why integration has faded from view is the Court itself. Beginning with *Brown II*<sup>12</sup> and continuing through *Parents Involved*, the Court has managed — despite some good intentions — to make meaningful integration harder rather than easier to achieve. And it has failed, throughout the entire half-century of desegregation cases, to confront the primary contemporary cause of single-race schools: residential segregation. Partly as a result of the Court's decisions and partly as a result of its evasions, most school districts today could not

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<sup>9</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>10</sup> See, e.g., *Parents Involved*, 127 S. Ct. at 2767 (opinion of Roberts, C.J.) (mentioning, while debating the meaning of *Brown*, that “[t]he parties and their *amici* debate which side is more faithful to the heritage of *Brown*”).

<sup>11</sup> For more detailed discussion and support, see *infra* section II.B, pp. 142–44.

<sup>12</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

integrate, even if they wanted to, because their students are primarily if not exclusively of one race or ethnicity.<sup>13</sup>

There are, of course, some districts that remain willing and able to pursue racially integrated schools. Even in these districts, however, the impact of *Parents Involved* might very well be slight, as the Court left open some avenues by which racial integration could be achieved. It is not entirely clear whether the tools left to them will be sufficient to the task, but Justice Kennedy, whose lone opinion is effectively controlling on this issue, does leave the door ajar for districts interested in racial integration.<sup>14</sup>

If that were all there was to the decision, one might conclude that the case is insignificant. Indeed, its only importance would lie in making clear how *unimportant* both integration and the Court are in modern education law and policy. Yet many who believe in the goal of integration, including myself, cannot help but feel a sense of loss and betrayal. In part this is a reaction to the plurality's astonishing attempt to rewrite the history of desegregation and to use *Brown* as a justification for blocking efforts to integrate schools.

But it goes deeper than that. The Court certainly has not done all it could to encourage integration in practice, but in the past it seemed to support the *goal* of integration. At the very least, it was not hostile. In *Parents Involved*, however, the Court seems to have changed its mind. Instead of encouraging the pursuit of a worthwhile goal, four Justices make the goal itself seem dastardly,<sup>15</sup> while Justice Kennedy accepts the goal but voices intense distaste over the most straightforward means of achieving it.

To be sure, the Court's decision does not take away much that is tangible, as it will not affect many current student assignment plans. But it takes away some hope. Hope that the Court would stand firmly on the side of school integration. Hope that, despite past disappointments, new ways could be found to integrate schools, ways that were acceptable to local citizens of every color and ethnicity. Hope that schools would be places where students go not just to improve their test scores but also to become better citizens and better people. Hope that integrated schools would lead, slowly but finally, to an integrated society. So, yes, the decision is in one sense not terribly significant. But it is no small thing to dash hope.

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<sup>13</sup> For precise figures, see *infra* p. 145.

<sup>14</sup> See *infra* section I.B.3, pp. 138–39; *infra* Part III, pp. 144–49.

<sup>15</sup> See *Parents Involved*, 127 S. Ct. at 2755 (opinion of Roberts, C.J.) (equating racial integration with unconstitutional racial balancing); *id.* at 2767–68 (arguing that the plans at issue were inconsistent with *Brown*).

## I. THE RHETORIC AND THE RULES

A. *The Rhetoric*

On a first read, one is struck by the dramatic rhetoric, heightened emotion, sharp disagreement, and accusations of bad faith coursing through this 185-page collection of opinions. Chief Justice Roberts calls the use of race in student assignments an “extreme measure,”<sup>16</sup> accuses Justice Breyer of lawlessness,<sup>17</sup> claims that voluntary integration is inconsistent with the “heritage of *Brown*,”<sup>18</sup> and states boldly that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>19</sup> Justice Thomas equates Justice Breyer’s dissent with arguments made by white racists who supported school segregation,<sup>20</sup> and claims that voluntary school integration is justified by “[n]othing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities.”<sup>21</sup> Justice Kennedy, whose opinion has the serene tone of a speech by someone in charge, nonetheless manages to call the plurality opinion “profoundly mistaken” insofar as it “suggests” that the Constitution mandates acceptance of racial isolation in public schools.<sup>22</sup>

In his short dissent, Justice Stevens calls the Chief Justice’s reliance on *Brown* “a cruel irony,”<sup>23</sup> and states his “firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”<sup>24</sup> In his long dissent, much of which he read from the Bench, Justice Breyer returns the Chief Justice’s favor by calling *his* opinion lawless, claiming that “it distorts precedent [and] misapplies the relevant constitutional principles.”<sup>25</sup> He accuses the plurality of breaking “*Brown*’s promise of integrated primary and secondary education.”<sup>26</sup> And he chastises the plurality for being both radical and reckless, claiming that “the plurality’s approach risks serious harm to the law and for the Nation.”<sup>27</sup>

This is the language of momentous decision. One seeking to understand the case, however, would do well to begin with a basic question: what was actually decided? Given the rhetoric, the answer “relatively

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<sup>16</sup> *Id.* at 2756.

<sup>17</sup> *See id.* at 2761.

<sup>18</sup> *Id.* at 2767.

<sup>19</sup> *Id.* at 2768.

<sup>20</sup> *See id.* at 2784–88 (Thomas, J., concurring).

<sup>21</sup> *Id.* at 2770 n.3.

<sup>22</sup> *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>23</sup> *Id.* at 2797 (Stevens, J., dissenting).

<sup>24</sup> *Id.* at 2800.

<sup>25</sup> *Id.* (Breyer, J., dissenting).

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

<sup>27</sup> *Id.* at 2835.

little” may seem hard to believe, but it happens to be true. Whether it is also somewhat beside the point is an issue to which I will return.

### B. The Rules

1. *The Court’s Opinion.* — The opinion for the Court is relatively brief (a mere 20 pages) and fairly straightforward. The Court applied strict scrutiny and held that the plans at issue were not narrowly tailored because neither school district had shown that classifying individual students by race was needed to achieve integrated schools. Relatively few students in Seattle and Jefferson County were affected by the consideration of race, which suggested to the Court that relying on race was unnecessary.<sup>28</sup> The Court also believed that neither district gave sufficient consideration to whether race-neutral measures would suffice.<sup>29</sup> That’s it. That’s all the Court decided.

The Court did not decide whether these plans furthered a compelling interest. On this question, the Court simply identified the two interests already recognized as compelling — remedying past discrimination and achieving diversity in colleges and universities — and concluded that neither was at issue here.<sup>30</sup> The Court left open whether these plans might satisfy some different, not-yet-recognized compelling interest.<sup>31</sup>

2. *Justice Kennedy’s Concurrence.* — This is why Justice Kennedy’s concurring opinion is potentially so important: it answers some of the questions left open by the Court’s opinion. Justice Kennedy would recognize a compelling interest in achieving “a diverse student body, one aspect of which is its racial composition.”<sup>32</sup> He would also recognize a potentially inconsistent compelling interest in “avoiding racial isolation.”<sup>33</sup> Justice Kennedy likewise offers some thoughts on which means are permissible to achieve these ends. He endorses facially race-neutral but race-conscious measures, which are designed to achieve integration without specifically classifying individual students based on race. These include steps like “strategic

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<sup>28</sup> See *id.* at 2759–60 (majority opinion).

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* at 2751–54.

<sup>31</sup> This makes the point of this part of the Court’s opinion hard to fathom. Why discuss two compelling interests that are not relevant, refuse to say anything more, and then strike down the plans because they are not narrowly tailored? The Court should have said either more or less.

<sup>32</sup> *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>33</sup> *Id.* at 2797. This interest is potentially inconsistent with an interest in broad-based diversity because of the relevant narrow tailoring criteria. One would think a school pursuing a broadly diverse student body would have to consider other factors than race when assigning students, whereas a school seeking to overcome racial isolation would be able to focus more directly (and exclusively) on race. For further discussion, see *infra* p. 138.

site selection of new schools” and “drawing attendance zones with general recognition of the demographics of neighborhoods.”<sup>34</sup> Such measures, Justice Kennedy opines, are “unlikely” even to require strict scrutiny.<sup>35</sup>

If, but only if, race-neutral measures are unavailing, Justice Kennedy would also allow districts to consider the race of individual students when assigning them to schools. In the passage of his opinion that is perhaps both most important and most opaque, Justice Kennedy writes:

[School officials,] if necessary, [can conduct] a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.<sup>36</sup>

The reference to *Grutter v. Bollinger*<sup>37</sup> is to the narrow tailoring criteria used in that decision to determine whether the University of Michigan Law School’s affirmative action program was constitutional.<sup>38</sup> Those criteria included the requirement that students be evaluated on an “individualized, holistic” basis, which entailed consideration of all of the ways in which they might contribute to a diverse student body.<sup>39</sup> When *Parents Involved* was decided, a big question looming over voluntary integration plans at the K-12 level, if not *the* question, was which if any of the narrow tailoring criteria from *Grutter* would apply.<sup>40</sup> In the passage quoted above, Justice Kennedy sidesteps this crucial question. The analysis, he says, will be “informed by *Grutter*,” but the “criteria relevant to student placement would differ.” The rest is left to the imagination.

Technically, Justice Kennedy’s entire opinion is dictum. The Court’s opinion, which Justice Kennedy joined, was sufficient to dispose of these cases. Whether voluntary integration plans serve a compelling interest, while an important issue, did not need to be addressed; the same is true regarding the various ways in which race might be considered in a constitutional fashion. The Court’s opinion is quite narrow, but it is wide enough to decide the cases at hand.

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<sup>34</sup> *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2793.

<sup>37</sup> 539 U.S. 306 (2003).

<sup>38</sup> *See id.* at 334-43.

<sup>39</sup> *Id.* at 337.

<sup>40</sup> *See* James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 335-45 (2006).

If one switches from a technical distinction between holdings and dicta to Holmes's law-as-prediction perspective,<sup>41</sup> Kennedy's opinion appears controlling. This is because the four dissenters would uphold the Seattle and Jefferson County plans and would apply looser criteria to assess voluntary integration plans than would Justice Kennedy. A fortiori, they would uphold any plan that Justice Kennedy would approve. There are thus five votes for upholding some uses of race to achieve integration, but the only vote that really counts is Justice Kennedy's. In this respect, his lone concurring opinion is much like Justice Powell's opinion in the analogous decision in *Regents of the University of California v. Bakke*.<sup>42</sup>

Separating holdings from dicta is an exercise conducted most often by courts looking to distinguish prior cases rather than follow them; in the real world, most people count to five. This decision illustrates the point. The plurality opinion by Chief Justice Roberts argues that the Court's statement in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>43</sup> which clearly endorsed the proposition that school officials have the authority to seek racial integration voluntarily, was dictum and therefore of no precedential value.<sup>44</sup> As a technical matter, he may be correct.<sup>45</sup> But the argument seems hollow, and is maddening to Justice Breyer, because at the time of *Swann* anyone trying to describe the "law" would have concluded with a great deal of confidence that voluntarily seeking to achieve a racial balance in schools was perfectly constitutional.<sup>46</sup> Similarly, one could — as some lower courts did — describe much of Justice Powell's opinion in *Bakke* as pure dicta,<sup>47</sup> but from the law-as-prediction perspective, it was clearly controlling.

Some lower courts might ignore Justice Kennedy's concurring opinion for whatever purpose suits them. But school officials interested in racial integration, as well as their attorneys, are rightly poring over the

<sup>41</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>42</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 10 ("Even though no one shared Powell's position, it nevertheless ended up defining the kind of affirmative action that a majority of the Court was prepared to uphold.")

<sup>43</sup> 402 U.S. 1 (1971).

<sup>44</sup> See *Parents Involved*, 127 S. Ct. at 2752 n.10. The Court in *Swann* indicated that "school authorities" have "broad discretionary powers" to determine that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Swann*, 402 U.S. at 16.

<sup>45</sup> On whether the statement has precedential weight, compare *Parents Involved*, 127 S. Ct. at 2762 (opinion of Roberts, C.J.), with *id.* at 2811–17 (Breyer, J., dissenting).

<sup>46</sup> See, e.g., *id.* at 2811–17 (Breyer, J., dissenting) (documenting widespread reliance on *Swann*'s endorsement of voluntary integration, including an in-chambers opinion by then-Justice Rehnquist).

<sup>47</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996).

opinion for guidance going forward.<sup>48</sup> The exercise is likely to produce some frustration.

3. *What It All Means.* — School officials can be confident that they can take race-neutral steps to try to achieve racial integration, and that they can take race explicitly into account only if race-neutral measures are ineffective. Beyond that, it gets sketchy. To begin, it is not clear how much proof is required to demonstrate that race-neutral measures will not work, a task made harder by virtue of the fact that at some point this involves proving a negative. Even if sufficient proof is at hand and districts therefore can consider an individual student's race, precisely how they can do so is not at all clear.

Justice Kennedy suggests at some points that such consideration should be part of a broader assessment that includes "other demographic factors, plus special talents and needs."<sup>49</sup> But he does not provide any details or offer examples of the sort of special talents or needs that might be relevant. Tossing more mud in the water, he also acknowledges that considering special talents may be inappropriate depending on the "age of the students," an oblique recognition of the fact that few first-graders are going to have long resumes describing their special talents.<sup>50</sup> So it is unclear if, when, and how special talents (or special "needs") must be considered. Equally unclear is why these various other factors need to be considered at all if school districts are trying to overcome "racial isolation" as opposed to pursuing broad-based diversity, both of which Kennedy considers compelling interests.<sup>51</sup>

What seems clearly impermissible, absent some truly extraordinary (impossible?) showing of necessity, is "to classify every student on the basis of race and to assign each of them to schools based on that classification."<sup>52</sup> This does not, in reality, describe either of the plans at issue in this case, as they hardly assigned every student based on a racial classification. Indeed, at other points in his opinion, Justice Kennedy echoes the Court's argument that because *so few* students were affected by the plan, it is possible that race need not have been considered at all.<sup>53</sup> What Justice Kennedy actually seems to dislike, therefore, is *any*

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<sup>48</sup> See, e.g., Tamar Lewin, *Across U.S., a New Look at School Integration Efforts*, N.Y. TIMES, June 29, 2007, at A25.

<sup>49</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>50</sup> See *id.* at 2793.

<sup>51</sup> See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) ("If reducing racial isolation is — standing alone — a constitutionally permissible goal . . . then there is no more effective means of achieving that goal than to base decisions on race.").

<sup>52</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>53</sup> See *id.* at 2792–93.

overt use of race not simultaneously accompanied by consideration of other factors. Although there is little if any practical difference between considering race as one of a number of factors and using race as a tiebreaker — under both approaches, race will certainly be dispositive in some cases — Justice Kennedy prefers the consideration of race to be obscured as much as possible. Thus, after chastising Jefferson County for not being more precise in explaining how race is used in student assignments,<sup>54</sup> Justice Kennedy seems ultimately to invite obfuscation by endorsing the use of race-neutral proxies or the consideration of race along with a *mélange* of other, vaguely described factors.

## II. CONTEXT

### A. *Looking Back*

To understand the significance of this decision, it is crucial to understand what preceded it. Describing the entirety of the Court's involvement with school desegregation is difficult in a short space, but suffice it to say that the Court over the last half-century has sent mixed signals about school integration. *Brown* and *Brown II* were famously ambiguous in their messages to school districts about the measures needed to remedy prior segregation; the Court left unclear whether districts simply had to stop segregating or also had to achieve some level of integration.<sup>55</sup>

In fact, the Court left this question dangling for more than a decade. As Judge Wilkinson described so well in *From Brown to Bakke*, the Court remained mostly silent about desegregation from 1955 until *Green v. County School Board*<sup>56</sup> in 1968. It did not tolerate outright defiance, but it allowed more subtle forms of resistance — pupil placement laws and freedom of choice plans — to continue.<sup>57</sup> Finally, in *Green*, the Court made clear that school districts had to integrate in order to remedy *de jure* school segregation.<sup>58</sup>

The Court added force to *Green* with its decision in *Swann* in 1971, where it approved the use of busing to integrate previously segregated school districts.<sup>59</sup> *Keyes v. School District No. 1*<sup>60</sup> followed two years later, and there the Court brought school desegregation to the North and West, making clear that districts that intentionally segregated schools by policy rather than statutory or constitutional command

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<sup>54</sup> See *id.* at 2790.

<sup>55</sup> See, e.g., J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE* 61–82 (1979).

<sup>56</sup> 391 U.S. 430 (1968).

<sup>57</sup> See WILKINSON, *supra* note 55, at 78–114.

<sup>58</sup> 391 U.S. at 441–42.

<sup>59</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29–31 (1971).

<sup>60</sup> 413 U.S. 189 (1973).

were also guilty of de jure segregation and had a remedial duty to integrate.<sup>61</sup>

There were two problems with the Court's new commitment to integration: it came late, and it was short-lived. By the time the Court became serious about integration in *Green*, *Swann*, and *Keyes*, many urban school districts in and outside of the South had become predominantly black, which obviously made integration harder if not impossible to achieve.<sup>62</sup> In many metropolitan areas, meaningful integration would have required that suburban schools participate in desegregation plans. Yet the Court effectively prevented this in *Milliken v. Bradley*,<sup>63</sup> in 1974, when it ruled that cross-district busing could not be ordered absent proof of district gerrymandering.<sup>64</sup> Such proof was hard to come by, in part because housing discrimination kept most African-Americans out of the suburbs, so there was no need to play around with school district boundaries in order to keep suburban schools mostly white.<sup>65</sup> *Milliken* effectively halted the progress of desegregation just a few short years after the Court became serious about it.

The upshot is that urban districts were typically required to engage in all-out busing because of *Swann*, while *Milliken* ensured that the suburbs remained off limits. The combination was deadly. Extensive busing within cities gave those with economic means a reason to flee to the suburbs, and *Milliken* promised them that they would be safe upon arrival.<sup>66</sup>

All along the way, the Court never really confronted the primary cause of most school segregation in the country: residential segregation. This is the gaping hole in the Court's desegregation jurisprudence. It has been true for at least forty years that the chief cause of school segregation is residential segregation. The causes of residential segregation are many and tangled, and include economics, preferences, and private discrimination among realtors and individual homeowners. But every level of government — local, state, and federal — has also played an integral and underappreciated role in fostering residential

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<sup>61</sup> *Id.* at 200.

<sup>62</sup> See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 275–84 (1999); Franklin D. Wilson & Karl E. Taeuber, *Residential and School Segregation: Some Tests of Their Association*, in THE DEMOGRAPHY OF RACIAL AND ETHNIC GROUPS 51, 57–58 (Frank D. Bean & W. Parker Frisbie eds., 1978).

<sup>63</sup> 418 U.S. 717 (1974).

<sup>64</sup> *Id.* at 745.

<sup>65</sup> For a good example of this dynamic and an insightful discussion, see *Bradley v. Richmond School Board*, 338 F. Supp. 67, 81–110 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973).

<sup>66</sup> See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 318 (1994).

segregation by race, and there has never been a concerted effort by courts or legislatures to remedy past housing discrimination.<sup>67</sup>

In school desegregation cases, the Court elided the issue of housing discrimination, and most lower courts followed suit.<sup>68</sup> In *Swann*, for example, the Court sidestepped the issue with the pithy aphorism that one school case, like a vehicle, “can carry only a limited amount of baggage.”<sup>69</sup> In *Milliken*, the Court dodged the issue again, despite the district court’s finding that local and state governments had engaged in housing discrimination, which helped create segregated housing patterns in metropolitan Detroit.<sup>70</sup> By the 1990s, when the Court began to encourage district courts to dismantle desegregation decrees, the Court was willing to explain housing choices as purely private decisions and thus beyond reach.<sup>71</sup>

Because of the Court’s decisions as well as its dodges, many modern school “desegregation” decisions focused more on money than on moving students. In *Milliken II*,<sup>72</sup> decided in 1977, the Court approved compensatory relief for previously segregated school districts and required the state to share the costs of such relief.<sup>73</sup> School districts with predominantly or overwhelmingly minority student populations thus used desegregation cases as a way to secure additional funding from the state. This is one of the reasons why school districts are not always eager to have desegregation decrees lifted; terminating the decree means turning off the spigot.<sup>74</sup>

School desegregation received little attention from the Court during the 1980s, but in a trio of cases in the 1990s, the Court returned to the scene. In *Board of Education v. Dowell*,<sup>75</sup> *Freeman v. Pitts*,<sup>76</sup> and *Missouri v. Jenkins*,<sup>77</sup> the Court established criteria that district courts should use to determine when to release school districts from supervision.<sup>78</sup> In so doing, the Court sent the unmistakable message that dis-

<sup>67</sup> For further discussion of the points raised in this paragraph, see, for example, *id.* at 289–318; WILKINSON, *supra* note 55, at 140–46, 240–43; and Ryan, *supra* note 62, at 275–84.

<sup>68</sup> *But see* United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987) (finding that the city’s segregative housing practices contributed to school segregation). Nonetheless, “*Yonkers* represents the first and only case in which a district court has held *municipal* officials liable for intentionally segregating local schools, and required them to cure school segregation.” Michael H. Sussman, *Discrimination: A Unitary Concept*, 80 MINN. L. REV. 875, 877 (1996).

<sup>69</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971).

<sup>70</sup> *See Milliken v. Bradley*, 418 U.S. 717, 724, 728 n.7 (1974).

<sup>71</sup> *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 495–97 (1992).

<sup>72</sup> *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

<sup>73</sup> *Id.* at 279–90.

<sup>74</sup> For elaboration and examples of the points made in this paragraph, see Ryan, *supra* note 62, at 261–66.

<sup>75</sup> 498 U.S. 237 (1991).

<sup>76</sup> 503 U.S. 467 (1992).

<sup>77</sup> 515 U.S. 70 (1995).

<sup>78</sup> *See Dowell*, 498 U.S. at 248–51; *Freeman*, 503 U.S. at 485–500; *Jenkins*, 515 U.S. at 98–103.

strict courts should get out of the business of school desegregation and return school districts to local control.

However disappointing the current decision might be, the reality is that the Court has not issued a significant, favorable opinion regarding school desegregation in about thirty years. With the arguable exception of *Milliken II*, which is really more about money than integration, the Court has instead sought to limit both the scope and duration of desegregation decrees. From this perspective, the current decision is a fitting capstone to the Court's desegregation jurisprudence, which has generally — though not always intentionally — made meaningful integration fairly difficult to achieve.

### B. Modern Education Law and Policy

Given this history, it is unsurprising that integration has not been seriously pursued in most districts for over two decades. Debate continues to rage over the educational and social benefits of integration, but education law and policy have not paused to wait for a definitive answer. Most school districts, as well as advocates for poor and minority students, have moved onto different battles, including fights over school funding, public school choice, charter schools, vouchers, standards and testing, and universal access to preschool.<sup>79</sup> Other districts are pursuing integration, but along socioeconomic rather than racial lines.<sup>80</sup>

What is ironic about modern education law and policy is that they remain concerned, at least in part, with the same goal identified in *Brown*: equal educational opportunity for minority students.<sup>81</sup> Integration, however, is generally no longer seen as the means to achieve that goal. In part this is because integration is not a realistic option in many districts. But in part it is because the goal of education itself seems to have narrowed to a focus on academic achievement.

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<sup>79</sup> See, e.g., James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 49–56 (2006) (discussing access to publicly provided preschools); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937–44 (2004) (discussing the standards and testing movement); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2058–78 (2002) (discussing school finance reform and various public and private school choice programs).

<sup>80</sup> RICHARD D. KAHLBERG, THE CENTURY FOUND., RESCUING *BROWN V. BOARD OF EDUCATION*: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION (2007), available at <http://www.tcf.org/publications/education/districtprofiles.pdf>.

<sup>81</sup> The No Child Left Behind Act of 2001, for example, states as its purpose “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education” and specifically includes as a goal “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.” 20 U.S.C. § 6301 (Supp. IV 2004).

Cause and effect are hard to disentangle here, so it is unclear whether fights over integration propelled the shift or were affected by it. What is clear, however, is that most modern education reform efforts have little to say about the civic mission of public schools, which for over a century was a key part of public education. From the birth of the common school movement through early desegregation cases, schools were seen not simply as places where students learned how to read and write but also as places where they learned how to become better citizens.<sup>82</sup> Indeed, for a long time, the socializing or civic mission of schools was considered by many to be just as important as the academic mission.<sup>83</sup> This mission was not always accomplished, of course, but it was valued nonetheless.

Over the last several decades, education reforms have focused primarily on academic achievement, pure and simple. Battles over school funding, charter schools, vouchers, the No Child Left Behind Act, and access to preschool share a common denominator: the key question is whether these reforms will boost academic achievement, primarily as measured by standardized test scores.<sup>84</sup> Whether any of these reforms will also enhance the civic or socializing mission of schools is never really asked.

In this context, it is not altogether surprising that integration has been left aside. Integration has always been hard to defend on purely academic grounds. The consensus among social scientists seems to be that integration leads to some moderate achievement gains for black students and does not harm white students,<sup>85</sup> which is hardly a ringing endorsement for integration as a method to boost test scores. The defense of integration has always been on surer footing when one also considers its social benefits — the ways in which integration can break down or prevent stereotypes and prejudice, lead to long-term relation-

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<sup>82</sup> See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 45–54 (2000); John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 316–18 (2001).

<sup>83</sup> See MACEDO, *supra* note 82, at 45–54, 88–94; DIANE RAVITCH, *THE TROUBLED CRUSADE* 43–81 (1983).

<sup>84</sup> See, e.g., James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 550–52 (2007) (describing a shift in rationale for vouchers away from values-based claims to claims about academic achievement); cf. Martha Minow, *Surprising Legacies of Brown v. Board*, in LEGACIES OF BROWN: MULTIRACIAL EQUITY IN AMERICAN EDUCATION (Dorinda J. Carter, Stella M. Flores & Richard J. Reddick eds., 2004) (describing how modern education reforms, such as those involving gender equity, language minorities, and special education, do not automatically equate integration with equal educational opportunity).

<sup>85</sup> See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 7–8, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915), 2006 WL 2927079; Brief of the National Education Association et al. as Amicus Curiae in Support of Respondents at 25–30, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915), 2006 WL 2927085.

ships across racial and ethnic boundaries, and increase the possibility that students will continue to seek out integrated colleges, workplaces, and neighborhoods.<sup>86</sup> But these sort of social goals are no longer included in most conversations about the mission of public schools.

As integration has faded from view in modern education law and policy, so, too, has the Supreme Court. Of the major modern education reforms, from school funding to school choice to standards and testing, the Court has said almost nothing, the sole exception being the Court's approval of the use of publicly funded vouchers at private religious schools.<sup>87</sup> The Court has moved from a central to a bit player in education reform, making decisions around the fringes of school policy. Some important fights are still fought in state courts, especially battles over school funding, while others are waged in state legislatures and in Congress. Federal courts, by contrast, have relatively little to say of importance about the shape of public education.<sup>88</sup>

### III. IMPACT

With the past understood, it is easier to see into the future, at least the near future. The short-term impact of *Parents Involved* will likely be slight, for two reasons. First, as already suggested, not many districts consider race in student assignment. Second, those that would like to pursue racial integration still have some options, although the boundaries of their authority are blurry because Justice Kennedy's opinion is blurry. It is harder to predict the long-term consequences of the decision because it is difficult to know how much this decision will discourage districts from pursuing racial integration.

#### A. Some Numbers

The first point to recognize, and perhaps the most important, is that the vast majority of school districts do not take race into account when assigning students. Estimates vary quite a bit, from about one hundred to one thousand, and no one has been able to come up with a precise figure as to how many districts consider race in student assignments.<sup>89</sup> The lack of precision is due in part to the fact that the

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<sup>86</sup> See Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 85, at 5–9; Brief of National Education Association et al. as Amicus Curiae in Support of Respondents, *supra* note 85, at 15–25.

<sup>87</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>88</sup> For example, the Court's latest foray into the realm of school policy involved a student banner reading "BONG HiTS 4 JESUS." See *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (concluding that student could be suspended for holding such a banner at a school-sponsored event).

<sup>89</sup> See, e.g., Tamar Lewin, *Across U.S., A New Look at School Integration Efforts*, N.Y. TIMES, June 29, 2007, at A25 (hundreds); Nancy Zuckerbrod, *Schools To Re-examine Racial Integration*, ASSOCIATED PRESS, June 29, 2007, available at <http://www.usatoday.com/news/>

ways in which race is considered, and the number of students who are affected, vary a great deal. Some districts might use racial guidelines to structure school choice, as Seattle and Jefferson County did. Others might have a magnet school or two in which race is a factor in admissions, while the remaining traditional schools do not take race into account. Still others might have taken race into account when locating a new school or defining an attendance boundary. Not all studies will necessarily include all of these uses of race (and not all of these districts are equally vulnerable after this decision, as I explain below).

For now, even if we accept the highest estimate — that roughly 1,000 school districts make some use of race when assigning students — that still leaves approximately 15,000 school districts that do not.<sup>90</sup> It is impossible to know how many of these 15,000 or so districts would like to pursue racial integration, but there is one thing we do know: racial integration is an implausible if not impossible goal in thousands of school districts that are predominantly or exclusively white or predominantly or exclusively minority. Of the nearly 16,000 school districts in the country, more than half have a student enrollment that is greater than ninety percent white or ninety percent minority.<sup>91</sup> There is little consensus, and surprisingly little discussion, of what makes a school “integrated.” But it stands to reason that meaningful integration requires a nontrivial number of students from different racial or ethnic backgrounds. In countless districts, whether urban, suburban, or rural, this crucial ingredient for meaningful integration — genuine ethnic or racial diversity — is simply missing. Of the ten largest school districts in the country, for example, only two have more than thirty percent white enrollment; the rest have a white enrollment of between three and fourteen percent.<sup>92</sup>

In fact, as numerous sources have documented, most racial segregation exists between rather than within districts.<sup>93</sup> In many metropoli-

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washington/2007-06-28-69791304\_x.htm (one thousand); NAACP, Briefing Points: Supreme Court School Desegregation Cases, <http://www.naacp.org/advocacy/education/Information/> (last visited Sept. 16, 2007) (more than one thousand).

<sup>90</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., COMMON CORE OF DATA, PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSE SURVEY, 2004–05 (2007).

<sup>91</sup> THOMAS D. SNYDER, U.S. DEP'T OF EDUC., NUMBER OF PUBLIC SCHOOL DISTRICTS BY PERCENT MINORITY ENROLLMENT OF DISTRICT (2004) (on file with the Harvard Law School library). Three out of four districts have an enrollment that is at least 75% white or 75% minority, in a national public school population that is 57% white and 42% minority. *Id.*

<sup>92</sup> The only two districts in the largest ten school districts are Broward County, Florida, and Clark County, Nevada, with white populations of 32.6% and 39.5%, respectively. See BROWARD COUNTY PUBLIC SCHOOLS FACT SHEETS (2006), [http://www.broward.k12.fl.us/research\\_evaluation/memo/BCPSFACTSheet0506.pdf](http://www.broward.k12.fl.us/research_evaluation/memo/BCPSFACTSheet0506.pdf); CLARK COUNTY SCH. DIST., ACCOUNTABILITY REPORTS 3 (2006), [http://ccsd.net/schools/acc\\_pdfs\\_2006/districtAcc2006.pdf](http://ccsd.net/schools/acc_pdfs_2006/districtAcc2006.pdf).

<sup>93</sup> See, e.g., Charles T. Clotfelter, *Public School Segregation in Metropolitan Areas*, 75 LAND ECON. 487, 502 (1999); Sean F. Reardon, John T. Yun & Tamela McNulty Eitle, *The Changing*

tan areas, therefore, racial integration would only be a plausible goal if students could attend school outside of their home districts. But opportunities to do so are rare. Most states allow students, at least in theory, some opportunity to attend school in a neighboring district, but choices are constrained in various ways — school districts might not have to accept students; if participation is mandatory, districts can typically reject transfers because of space limitations; other states allow or require tuition payments; and transportation across district lines is rarely provided.<sup>94</sup> A few metropolitan areas, including Milwaukee and Boston, have interdistrict choice plans that are guided by racial considerations, and these plans may now be vulnerable.<sup>95</sup> But relatively few students participate in these plans in any event, which is consistent with the broader trend: less than one percent of all public school students attend schools outside of their home districts.<sup>96</sup> The unfortunate truth is that interdistrict choice plans are fairly anemic, and there is little sign that states are gearing up to expand them. As a result, it is hard to say that this decision will have much of an impact on interdistrict school choice — again, at least in the short run.

### B. Remaining Options

As for the hundreds of school districts that are currently pursuing racial integration, the decision's impact depends on *how* they take race into account when assigning students. To begin, very few districts employ broad-based, voluntary integration plans like the ones at issue in these cases. Truly reliable data on this question are hard to find, but the few districts that structure school choice to achieve racial integration are fairly well known, and it is unlikely that there are many more districts across the country engaged in similar plans but receiving no attention whatsoever. Looking across various accounts of race-based student assignment plans, I count fewer than thirty districts that have plans similar to those in effect in Seattle and Louisville, where students are given a broad choice among regular public schools and

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*Structure of School Segregation*, 37 DEMOGRAPHY 351, 362 (2000); Steven G. Rivkin, *Residential Segregation and School Integration*, 67 SOC. EDUC. 279, 291 (1994).

<sup>94</sup> See, e.g., EDUC. COMM'N OF THE STATES, OPEN ENROLLMENT: 50-STATE REPORT (2007), available at <http://mb2.ecs.org/reports/Report.aspx?id=268>.

<sup>95</sup> See Alan J. Borsuk, *Integration Plans Rejected*, MILWAUKEE J. SENTINEL, June 29, 2007, at 1, available at <http://www.jsonline.com/story/index.aspx?id=626155>; Laura Crimaldi, *Metco Fate Unclear as Foe Mulls Legal Fight*, BOSTON HERALD, July 8, 2007, at 4, available at <http://townonline.com/cambridge/education/x1569923221>.

<sup>96</sup> See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2066 (2002). Massachusetts, for example, a state with a much-heralded and comparatively successful interdistrict choice plan, specifically caps transfers at two percent of students. MASS. GEN. LAWS ch. 76, § 12B (2006).

where that choice is constrained by racial guidelines.<sup>97</sup> The number may be as low as ten.<sup>98</sup>

Those few districts with broad-based school choice plans that rely explicitly on race will be most directly affected by the Court's decision. But even these districts are not without recourse. Race-neutral alternatives remain available for consideration and have already been used in places like Seattle with some success. When asked what impact the Court's decision would have on the district, it is thus not surprising that Seattle's Superintendent said: "In reality, none."<sup>99</sup> Similarly, school board members in Jefferson County, who remain committed to integrated schools, are already studying whether socioeconomic status might be an effective proxy for race.<sup>100</sup> Race-neutral measures may not always be plausible or politically popular, especially if they are more coercive than school choice plans,<sup>101</sup> but they are far from useless.

Other school districts that take race into account when assigning students are less vulnerable because of the origins or structure of their assignment plans. Roughly 300 school districts remain under desegregation decrees,<sup>102</sup> and this decision does not affect the validity of student assignments made in accordance with court orders. Not all of these court orders involve much in the way of student assignment; many have more to do with compensatory funding, as already discussed.<sup>103</sup> But in those districts where students are assigned by race because of court order, this decision may, if anything, have the paradoxical effect of making it less likely that district courts will release school districts from supervision. If a school district that is assigning students by race because of a court order would like to continue doing so, and if the local district court agrees that racial integration remains a worthwhile goal, both the school district and the court will have an

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<sup>97</sup> For a discussion of estimates and examples of school districts with choice plans, see Lewin, *supra* note 89 (referencing Seattle, Louisville, Lynn (Mass.), Rochester (N.Y.), Los Angeles, Berkeley, and "about 20 districts" in Massachusetts).

<sup>98</sup> This is because it is not clear how robust or widespread the consideration of race is in the twenty or so unnamed districts in Massachusetts that take race into account when assigning students. *See id.*

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

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

<sup>101</sup> One of the ironies of Justice Kennedy's opinion is that he endorses race-neutral measures, like changing attendance zone boundaries, which are more intrusive and coercive than school choice plans that take some (explicit) account of race. *See Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>102</sup> *See* EDUC. OPPORTUNITIES SECTION, DEP'T OF JUSTICE, PENDING SCHOOL DISTRICTS AND STATES OPERATING UNDER DESEGREGATION CASES TO WHICH THE UNITED STATES IS A PARTY (2007).

<sup>103</sup> *See supra* p. 141.

incentive to keep the court order in place.<sup>104</sup> These districts may “voluntarily” integrate by leaving in place an order that they do so.<sup>105</sup>

Other districts that are not under court order but nonetheless consider race in student assignments typically do so in a more limited fashion, often in structuring admission to one or more magnet schools. To the extent that some of these districts classify students explicitly by race and use that criterion alone to determine admission, their plans are certainly vulnerable to attack. But not all admissions programs rely exclusively on race, and those that do presumably could be altered to meet Justice Kennedy’s vague criteria without changing enrollment patterns significantly. Some schools might be able to use proxies for race, relying, for example, on the socioeconomic status of students or the neighborhoods in which they live. Other schools, and this is especially true for magnet high schools, might be able to take a more “holistic” look at applicants and consider race as one factor among others. Indeed, some magnet schools have competitive admissions processes,<sup>106</sup> and it should not be too difficult for these schools to mimic the affirmative action programs of colleges and universities.

More generally, for those districts that do not currently pursue racial integration but become interested in doing so, this decision takes one means of accomplishing that goal off of the table, but it does not foreclose all options. Race-neutral measures might be sufficient in some districts to achieve racial integration; in others a “nuanced” individualized assessment might be plausible. A lot would depend on the size of the district, the degree of residential segregation, the amount of economic diversity and the degree to which income and race correlate in that district, and the scope of the student assignment plan. The details would thus vary from place to place, but the bottom line would remain the same: districts that would like to have racially integrated schools have tools available to make that happen.

### C. Long-Term Effects

That said, the inevitable threat of litigation, which is made more credible because Justice Kennedy’s opinion is so unclear, may derail efforts in some districts that would otherwise have pursued racial inte-

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<sup>104</sup> See *Parents Involved*, 127 S. Ct. 2738, 2830 (Breyer, J., dissenting) (suggesting that “federal courts would rightly hesitate to find unitary status if the consequences of the ruling were so dramatically disruptive”).

<sup>105</sup> Court decrees do not seem subject to the same narrow tailoring requirements as voluntary integration plans; none of the Justices suggests, for example, that courts remedying de jure segregation must first employ race-neutral means. Why courts need not narrowly tailor their plans in order to achieve a compelling interest, while legislatures must, is never explained.

<sup>106</sup> See, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 792–94 (1st Cir. 1998) (discussing the competitive admissions process for Boston’s three “examination” public high schools, including the famous Boston Latin School).

gration. Roger Clegg, a high-profile lawyer who advocates against affirmative action and voluntary racial integration plans, had a telling reaction to the Court's decision. He acknowledged that Justice Kennedy left the door open for districts to consider race, but he then argued that prudent school districts should shy away from *any* use of race in assigning students for fear of costly and disruptive litigation.<sup>107</sup> This message will surely be repeated in school districts that are contemplating voluntary integration plans. In districts where such plans do not have strong political support, fear of litigation may prove to be a real deterrent or a convenient excuse for inaction.

How many districts fall into this category is impossible to say, which leads to the issue of the decision's long-term impact. Although it seems clear that the immediate impact of the decision will be relatively slight, predictions about the long-term impact are harder to make. It depends on whether racial integration is really dead or merely dormant. If not already dead, the effect of this decision also depends on whether the hurdles placed in front of school integration, combined with the threat of litigation, are enough to prevent integration's resuscitation. It may be plausible to conclude from current trends that most districts have forever turned their backs on racial integration, either out of choice or necessity, and therefore that the long-term impact of this decision will be just as minimal as the short-term impact.

But the truth is that we don't really know. In that uncertainty lay the hope of some, hope that more districts — and perhaps states, through interdistrict choice plans — could have been persuaded to make efforts to integrate their schools. And it is that very possibility, however remote, that helps explain the bitter reaction of some to this decision, which is the final topic of this essay.

#### IV. BETRAYAL?

Based on what I have described so far, one could conclude that this decision is of little significance. So why all the heated rhetoric in the dissenting opinions? Why the expression of sadness and outrage by lawyers who worked on *Brown* and later desegregation cases?<sup>108</sup> It is tempting to dismiss these comments as simple overreactions based on wishful thinking about the past and future. But there is more to it than that, and understanding why the bitter reaction and sense of be-

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<sup>107</sup> Adam Liptak, *The Same Words, But Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

<sup>108</sup> See, e.g., *id.* (quoting lawyers who worked on *Brown*, including Jack Greenberg, who suggested that *Parents Involved* represents “the rebirth of massive resistance in more acceptable form”).

trayal are legitimate helps illustrate why this case is important after all.

### A. Methodology

Part of the disappointment, if not anger, among some stems from methodology. Politically conservative judges have professed a commitment to democratic decisionmaking,<sup>109</sup> federalism,<sup>110</sup> and judicial restraint.<sup>111</sup> In the context of school desegregation, the conservative Justices have also strongly endorsed the notion of local control, beginning in *Milliken*<sup>112</sup> and continuing through *Dowell*,<sup>113</sup> *Freeman*,<sup>114</sup> and *Jenkins*.<sup>115</sup> Indeed, the Court relied on local control to justify limiting the scope of desegregation in *Milliken* and its duration in *Dowell*, *Freeman*, and *Jenkins*. *Parents Involved*, as Justice Breyer's dissenting opinion describes, is hard to square with a commitment to local control, just as it is hard to square with respect for democratic decision-making, federalism, and judicial restraint.<sup>116</sup>

It is also hard to square with originalism, the method of constitutional interpretation closely associated with conservative Justices, especially Justices Scalia and Thomas.<sup>117</sup> Whatever else one might say about the Court's opinion, it is not originalist. Nor does Justice Thomas's concurring opinion rely, more than fleetingly and vaguely, on originalism.<sup>118</sup> In another school case decided this Term, Justice Thomas wrote separately to argue that students have no right to free speech while in school.<sup>119</sup> The basis for his conclusion was a narrow form of originalism. Justice Thomas essentially asked whether those alive at the time that the Fourteenth Amendment was ratified would have thought that students had free speech rights, and he answered no.<sup>120</sup> Putting aside whether that answer was correct, neither Justice

<sup>109</sup> See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 500–07 (1992) (Scalia, J., concurring).

<sup>110</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>111</sup> See, e.g., Posting of William McKenzie to Dallas Morning Views, [http://dallasmorningviews.beloblog.com/archives/2007/03/john\\_roberts\\_da.html](http://dallasmorningviews.beloblog.com/archives/2007/03/john_roberts_da.html) (March 8, 2007, 17:29 CST) (describing a speech by Chief Justice Roberts in which he extolled the virtues of judicial restraint).

<sup>112</sup> See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974).

<sup>113</sup> See *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 248 (1991).

<sup>114</sup> See *Freeman*, 503 U.S. at 489–90 (1992).

<sup>115</sup> See *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995).

<sup>116</sup> See *Parents Involved*, 127 S. Ct. at 2824 (Breyer, J., dissenting).

<sup>117</sup> See, e.g., Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 9, 14 (2006).

<sup>118</sup> See *Parents Involved*, 127 S. Ct. at 2782 n.19 (Thomas, J., concurring) (criticizing, in a brief footnote, the dissent's "half-hearted[]" critique of the "historical underpinnings of the color-blind Constitution").

<sup>119</sup> See *Morse v. Frederick*, 127 S. Ct. 2618, 2629–36 (2007) (Thomas, J., concurring).

<sup>120</sup> *Id.* at 2630 (arguing that because 19th-century school teachers did not respect a student's right to speak, the First Amendment should not apply to public school students).

Thomas nor Justice Scalia, who occasionally likes to practice the same form of “expectations” originalism,<sup>121</sup> asks a similar question here.

By jettisoning principles and methods of interpretation used in other cases, the Court appears to be reaching out to curtail a practice — integration — that it simply dislikes as a policy matter. This is why the fight over the principle of colorblindness, and ultimately the meaning of *Brown*, matters so much. The plurality clings to the principle of colorblindness to justify its conclusions, as do Justice Thomas in his concurring opinion and Justice Kennedy, though to a lesser extent, in his. But this principle itself is on shaky legal grounds, as none of the usual sources for constitutional decisionmaking — text, history, and precedent — command colorblindness. The principle certainly cannot be traced to the vague text of the Equal Protection Clause. Few historians, moreover, would contend that the framers of the Fourteenth Amendment thought it precluded any and all consideration of race in governmental decisionmaking;<sup>122</sup> among other pieces of evidence, the Fifteenth Amendment would have been unnecessary if the framers and ratifiers of the Fourteenth Amendment thought it required colorblindness all across the line. Of the usual sources for constitutional decisionmaking, this leaves precedent. And it is here, in the fight over the meaning of *Brown*, that the significance of the Court’s opinion starts to become clear.

### B. *The Meaning of Brown*

The Chief Justice argues strenuously that colorblindness is most consistent with *Brown* and requires severely restricting, if not prohibiting, racial considerations regardless of the overall goal — whether to include or exclude, segregate or integrate.<sup>123</sup> Justice Thomas’s concurring opinion adds a large exclamation point to the argument.<sup>124</sup> Chief Justice Roberts and Justice Thomas cite not only to the *Brown* opinions, but also to the plaintiffs’ briefs and oral arguments in those cases to support their claim that *Brown* endorsed the simple and straightforward principle of colorblindness.<sup>125</sup> The central meaning of *Brown*, they claim, is that students should never be assigned to school on the basis of race, period. Racially explicit voluntary integration plans are inconsistent with this basic principle. As the Chief Justice asks: “What

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<sup>121</sup> On “expectations” originalism and its alternatives, see, for example, James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1628–31 (2006).

<sup>122</sup> See, e.g., Brief of Historians as Amici Curiae in Support of Respondents at 3–4, 21–24, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915).

<sup>123</sup> See *Parents Involved*, 127 S. Ct. at 2767–68 (opinion of Roberts, C.J.).

<sup>124</sup> See *id.* at 2782–88 (Thomas, J., concurring).

<sup>125</sup> See *id.* at 2767 (opinion of Roberts, C.J.); *id.* at 2782 (Thomas, J., concurring).

do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?"<sup>126</sup> In his eyes, to prohibit the use of race, even for voluntary integration, is to remain faithful to the legacy of *Brown*.

This description of *Brown*, however, is radically incomplete. It ignores the assumption that underlay the advocates' arguments as well as the Court's desegregation decisions after *Brown*. The assumption of those who argued for and supported *Brown* was that prohibiting segregation would lead to integration.<sup>127</sup> The somewhat crude slogan of "green follows white," meant to capture the idea that black students would benefit from desegregation,<sup>128</sup> makes no sense if advocates believed that black students would remain in separate schools.

The belief that *Brown* would lead to integration was perhaps naïve and certainly mistaken.<sup>129</sup> But it is a form of "gotcha" jurisprudence — or "dirty pool," as William Coleman, one of the lawyers in *Brown*, called it<sup>130</sup> — to claim now that all that counts is that at one point these advocates, like the Court in *Brown*, argued that race should not determine student assignments. To detach the underlying goal — school integration — from the arguments made in advance of that goal is to distort history. It also, ironically enough, ignores the line between holdings and dicta. After all, the holding in *Brown* was only that race could not be used to segregate students; whether it could be used to integrate students simply was not presented. How strange, then, that the plurality would insist on a narrow reading of *Swann* while claiming that the "heritage" of *Brown* requires colorblindness.<sup>131</sup>

The plurality also ignores the remainder of the desegregation story. Simply outlawing segregation did not lead to integration, or even desegregation. Instead, it led to more than a decade of defiance and token compliance, as southern states first directly resisted and then tried to evade the Court's ruling in *Brown*.<sup>132</sup> The Court finally responded to these shenanigans in *Green* and *Swann* by requiring integration.

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<sup>126</sup> *Id.* at 2768 (opinion of Roberts, C.J.).

<sup>127</sup> See, e.g., Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 HARV. C.R.-C.L. L. REV. 615, 616–17 (1979); Liptak, *supra* note 107, at A24.

<sup>128</sup> See, e.g., Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 395–96 (1991) (describing the predicate of early NAACP work as the principle that "green follows white: money for schooling follows the white students").

<sup>129</sup> See Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 885 (1993).

<sup>130</sup> Liptak, *supra* note 107, at A24 (quoting Coleman).

<sup>131</sup> Compare *Parents Involved*, 127 S. Ct. at 2762 (opinion of Roberts, C.J.) (criticizing dissent for relying on dicta from *Swann*), with *id.* at 2767 (arguing that the "heritage" of *Brown* requires colorblindness in student assignments).

<sup>132</sup> See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 324–43, 389–421 (2004).

(The Court did so, it bears noting, over cries by whites opposed to busing, who argued that the Justices were violating the principle of colorblindness enshrined in *Brown*.<sup>133</sup>) Race-neutral student assignments, after *Green* and *Swann*, were not sufficient to comply with *Brown*.

The post-*Brown* desegregation decisions therefore reject the very premise of the plurality's position, namely that the "heritage" of *Brown* requires colorblindness. Quite clearly, the Court that decided *Green*, *Swann*, and then *Keyes* believed that implementing *Brown* required assigning students by race. To put the point into contemporary terms, the Court approved the explicit use of race in student assignments in order to achieve a compelling interest. To put the point in the plurality's terms, the Court certainly did *not* endorse the notion that the way to stop race discrimination was to stop classifying students on the basis of race. Quite the contrary.

Indeed, the Court clearly endorsed voluntary integration in *Swann*.<sup>134</sup> The plurality attempts to sidestep *Swann* by calling the relevant language in that opinion dicta.<sup>135</sup> Calling it dicta, however, does not change the clear import of the Court's statement. Indeed, the Court there endorsed not just an amorphous idea of integration but also the dreaded racial balancing condemned by the plurality — or, as Chief Justice Burger put it, "a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."<sup>136</sup> A hundred clever ways of distinguishing *Swann* do not change the fact that, had the Court been faced with the question of voluntary integration in the early 1970s, or indeed at the time of *Brown*, they surely would have approved of it. Indeed, given the recalcitrance of states that segregated their schools, it probably would have come as something of a relief to be faced with such a case.

To be sure, the Court's affirmative action jurisprudence, beginning with *Croson*<sup>137</sup> and continuing in *Adarand*,<sup>138</sup> cast doubt on the continued legitimacy of the idea that school officials had free reign to create racially balanced schools. The Court never formally disavowed the language in *Swann*, however, and it is not obvious that voluntary inte-

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<sup>133</sup> See, e.g., MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH 148–49 (2006).

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

<sup>135</sup> *Parents Involved*, 127 S. Ct. at 2762 (opinion of Roberts, C.J.).

<sup>136</sup> *Swann*, 402 U.S. at 16. The plurality opinion also suggests that the Court in *Swann* endorsed the *objective* of voluntary integration but did not endorse the explicit use of race as the *means* to achieve that objective. See *Parents Involved*, 127 S. Ct. at 2762 (opinion of Roberts, C.J.). Given that Chief Justice Burger endorsed the objective of a "prescribed ratio" of white and black students that reflects "the proportion of the district as a whole," the notion that the Court would only have allowed school officials to use race-neutral means to achieve this precise outcome is, depending on one's mood or perspective, hilarious, preposterous, or Orwellian.

<sup>137</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>138</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

gration ought to be equated with affirmative action. Indeed, Judge Kozinski, not generally known as a politically liberal judge, thought the two so different that he argued below that voluntary integration plans should not be subject to strict scrutiny.<sup>139</sup> As he put it: “When it comes to a plan such as [Seattle’s] — a plan that gives the American melting pot a healthy stir without benefiting or burdening any particular group — I would leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable.”<sup>140</sup>

The plurality, in any event, does not rest its argument solely on the notion that the recent affirmative action decisions made the language in *Swann* irrelevant. Instead, the plurality wants to prove that colorblindness has been the guiding principle all along and that voluntary integration was never thought to be constitutional outside of a narrow remedial context. The only way to do that, however, is to deny reality — the reality that the Court in 1971, just like the Court in 1954, would undoubtedly have approved voluntary integration. The Chief Justice might confidently proclaim that the way to stop discrimination on the basis of race is to stop discriminating on the basis of race, by which he means ceasing racial classifications. But whatever else might be said about that view, it was not the Court’s view thirty-six years ago.

### C. *Dashing Hope*

Here we come, finally, to understand the grievance of those who believe in school integration and have worked to make it a reality. It is an exaggeration to say that the Court has always been a friend to integration. The relationship has been more fraught and complicated than that. But the Court has never actively opposed *voluntary* school integration or sought to interfere with school officials — as opposed to courts — trying to reach that end. It does so here, and that matters.

It matters because the Court is not simply telling school officials and citizens interested in racial integration that their pursuit might be difficult. They knew that already. Anyone who has tried to persuade parents and citizens to promote or even accept integration knows that it is an uphill battle. Instead, the Court is telling them that their pursuit is wrong or, at best, distasteful. The plurality comes close to condemning voluntary integration altogether,<sup>141</sup> whereas Justice Kennedy accepts the goal but holds his nose at the thought of how it might be

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<sup>139</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193–96 (9th Cir. 2005) (Kozinski, J., concurring), *rev’d*, 127 S. Ct. 2738.

<sup>140</sup> *Id.* at 1196; *accord* *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27–29 (1st Cir. 2005) (Boudin, C.J., concurring).

<sup>141</sup> See *Parents Involved*, 127 S. Ct. at 2755–59 (opinion of Roberts, C.J.) (equating voluntary integration with racial balancing, which the plurality concludes is always an impermissible goal).

achieved.<sup>142</sup> Along the way, both the plurality and Justice Kennedy chastise the local officials who crafted and implemented these plans for their clumsiness and crudeness.<sup>143</sup> They forget, or perhaps ignore, that these officials are doing what courts did for decades and that courts surely encountered the same difficulties when it came to details about classifying and assigning students. Instead of acknowledging the good faith of these officials and the fact that they were acting democratically, which is more than one can say of the Court, the plurality and Justice Kennedy treat them like incompetent or devious interlopers.

At bottom, the plurality opinion, and to a lesser extent Justice Kennedy's concurrence, is insulting. By pretending that desegregation was never really about integrating schools but instead only about color-blindness and remedies, the Justices in the plurality insult the memory of those advocates who risked injury and death to integrate public schools, and they insult those school officials and ordinary citizens who are trying to continue what heroic figures like Charles Hamilton Houston and Thurgood Marshall began before them. They insult the courageous and pioneering black students who attended formerly all-white schools, treating their experience as an exercise in remedial formality, the importance of which magically disappeared once a court waved its wand and declared "unitary status." The injury that past Court decisions inflicted on the cause of integration, to be sure, was significant if at times unintentional. This decision adds an insult large enough to match that injury.

There is more. Those school officials, advocates, and citizens who continued to believe in and work toward integration were and remain in the minority. The rest of the country appears to have turned its back on integration. There was always hope, however, that more districts could be persuaded to pursue racial integration. There was hope that these districts would come to understand what military and business leaders, who supported affirmative action in university admissions, already knew<sup>144</sup>: that the strength and future of our country depend on diversity in public and private institutions; that they depend on citizens of different racial and ethnic backgrounds learning how to cooperate with rather than avoid each other. To succeed, great attention would have to be paid to the mechanisms used to integrate schools, and plans would have to confront, better than the Seattle plan did, the reality that school populations are not just black and white. It would take some effort, moreover, to persuade parents to look beyond

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<sup>142</sup> See *id.* at 2792–97 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>143</sup> See *id.* at 2755–59 (opinion of Roberts, C.J.); *id.* at 2789–92 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>144</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003) (citing views of military and business leaders regarding the importance of diversity).

test scores in judging schools and to convince them that integration, at the very least, would not harm their children.

The danger and significance of *Parents Involved* is that it will make that already remarkably difficult struggle even harder, if not impossible. The legitimate fear is that school districts will interpret this opinion as a signal that they should not bother with school integration. Some districts might conclude that there is now something vaguely illicit about the whole enterprise, that pursuing integration requires indirection and duplicity rather than the overt use of race. Other districts might reason that pursuing integration will only lead to litigation. Clearly, not many districts now seem interested in racial integration, but this decision increases the odds that fewer of them will be interested in the future.

What was lost by this decision, therefore, was the opportunity for the Court not simply to tolerate voluntary integration but to champion it as a way to make the promise of *Brown* a reality in the twenty-first century. With that lost opportunity, some hope was lost as well. And not just any hope, but one that for a time helped to define this country's identity and its ideals: the hope that black and white students across the country would routinely enter through the same schoolhouse doors to a world of truly equal educational opportunity. An idealistic hope, perhaps overly so, but one whose passing is nonetheless worth mourning.

#### CONCLUSION

At the end of the day, Justice Thomas may well be right in calling school integration an elitist fad, but he is right for reasons different from those he suggests. It has been as evanescent as a fad in part because elite Justices never fully committed themselves to the goal of racially integrated schools. From the delay after *Brown* to the decision in *Milliken*, through the trio of decisions in the 1990s encouraging the dismantling of desegregation decrees, and through its failure to address housing discrimination, the Court has sent mixed signals at best about integration. Its insistence that integration plans were supposed to be temporary and its uneven application of remedial principles, especially the limitation in *Milliken* on the scope of remedies, encouraged evasion rather than commitment. School integration became something to avoid if possible or endure for a while, but it remained an aberration.

Justice Thomas undoubtedly views himself as fighting against the "elites" who want to perpetuate the fad of school integration, but it is a vain gesture. He *is* the elite and is doing his part, along with his colleagues, to yank the rug from under elected school officials who have decided to continue what the Court itself pushed for a while: school integration. It is quintessentially elitist for four Supreme Court Justices, five if one includes Justice Kennedy, to say that we know how to

end race discrimination in this country and you, who are closer to the issue than we will ever be and have been working in good faith toward the same end, do not.<sup>145</sup> Legal niceties about the proper use of race notwithstanding, the Court as an institution appears arrogant and fickle. After decades of requiring racially explicit steps toward school integration and castigating school officials who did not listen, the Court now largely forbids those steps and would castigate those school officials who listened all too well. In this case, Chief Justice Roberts wrote, “history will be heard.”<sup>146</sup> If only.

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<sup>145</sup> Cf. *Parents Involved*, 426 F.3d at 1196 (Kozinski, J., concurring) (noting that although “it’s tempting to adopt rules of law that give us the ultimate say on hotly contested political questions,” elected school officials “understand the realities of the situation far better than we can”).

<sup>146</sup> *Parents Involved*, 127 S. Ct. at 2767 (opinion of Roberts, C.J.).