

CASE NOTE

Race-Based Decision Making—Narrowly Tailored or Narrow Minded? Breaking Open Our Definition of Diversity

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“The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”¹

I. Introduction

Is diversity in the public school system compelling enough to justify governmental intrusion upon individual freedoms? The United States Supreme Court has repeatedly struggled, since *Brown v. Board of Education*,² with deciding how much authority school districts should be given in terms of creating plans which aim to avoid segregation in the public schools. In *Brown*, the Supreme Court ruled that race could no longer determine a child’s right to attend any particular public school. The sentiment of *Brown*, “that the Constitution is color blind is our dedicated belief,”³ continues to appeal to a nation still healing from the effects of mandated segregation. Yet, in attempts to embody this idealistic tenet and support the school systems in insuring integration, courts have vehemently disagreed regarding the methods school districts should use to get there.

The Supreme Court made a forward reaching decision in *Parents Involved in Community Schools v. Seattle School District No. 1 et. al.*,⁴ argued in tandem with *Meredith v. Jefferson County Board of Education*.⁵

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1. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2768 (2007).

2. *Brown v. Board of Education*, 349 U.S. 294 (1955).

3. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2782 (2007) (quoting Brief for Appellants, *Brown v. Board of Education*, 349 U.S. 294 (1955) (note 1, at 5)).

4. *Parents*, 127 S. Ct. at 2738.

5. *Id.*

The majority opinion sought to embody *Brown's* message in their response to the legal issue presented by the school districts: "Whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."⁶ After subjecting this question to strict scrutiny, the *Parents* majority ultimately determined that in both cases, the school districts could not continue their systems of race-based admissions. The plans, while presumably implemented with good intentions, were not narrowly tailored enough to specifically target the goals the districts had set out to accomplish. Furthermore, the goals, as they were presented, did not qualify as compelling state interests according to relevant case history. Without meeting both of the above standards, the *Parents* majority held, school districts may not use racial classifications in making decisions about student enrollment.

II. The School Districts' Plans and the Standard of Review

While both cases in the *Parents* opinion were examined under the same legal framework, the facts of each differed significantly in some respects.⁷ The school districts devised a system that sought to integrate the schools to a predetermined racial balance based on percentages of designated ethnic groups.⁸ Both relied on race as a factor in determining the placement of individual students, thereby subjecting those students to a racial classification. This similarity meant the plans had to be subjected to the same legal analysis. "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."⁹ "Strict scrutiny" is a two-part analysis. In order to withstand this critical standard of review, the government must establish that the interest it seeks to achieve is "compelling" and that the plan being implemented is "narrowly tailored" to meet that interest.¹⁰ The rationale being, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."¹¹

Where the school districts differed most noticeably was in their backgrounds and in the type of segregation they sought to avoid. Seattle School District No. 1 operates ten public high schools, among which entering

6. *Id.* at 2746.

7. *Id.*

8. *Id.*

9. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2751 (2007) (citing *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand v. Peña*, 515 U.S. 200, 244 (1995)).

10. *Parents*, 127 S. Ct. at 2752.

11. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2752 (2007) (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) and *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)).

freshman were allowed to state their order of preference.¹² In 1998, the district adopted the plan at issue.¹³ When too many students chose any one school, three “tiebreakers” were used to determine how to fill the oversubscribed slots.¹⁴ The first tiebreaker was whether or not the student had a sibling at that particular school.¹⁵ Second, the district considered the racial composition of the school and the race of the individual student.¹⁶ If another tiebreaker was needed, the geographic proximity of the student’s home to the school was considered.¹⁷ The racial classifications used by Seattle for assignment purposes were “white,” comprising 41 percent of the district, and “nonwhite,” comprising 59 percent. The “nonwhite” students were made up of Asian-Americans, African-Americans, Latinos, and Native-Americans.¹⁸ The tiebreakers were employed to address the effects of housing patterns on school assignments—most white students live in northern Seattle, and most students of other racial backgrounds live in the southern part.¹⁹ While this housing pattern affected the racial composition of the schools, Seattle had never operated legally segregated schools.²⁰

Jefferson County Public Schools, on the other hand, had operated legally segregated schools for years.²¹ In 1975 the District Court subjected the school district to a desegregation decree, which it operated under until the year 2000.²² In 2000, the decree was dissolved when the school district was found to have reached “unitary status by eliminating ‘to the greatest extent practicable’ the vestiges of its prior policy of segregation.”²³ Jefferson County Public Schools had a population of approximately 34% black; most of the remaining 66% were white.²⁴ The students were classified by the district as “black” and “other.”²⁵ After the dissolution, Jefferson County adopted the plan at issue here, which required all nonmagnet schools to maintain enrollment of black students between a minimum of 15% and a maximum of 50%.²⁶ In order to preserve this racial quota, the

12. *Parents*, 127 S. Ct. at 2746-47.

13. *Id.* at 2746-47.

14. *Id.* at 2747.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 2749.

22. *Id.*

23. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2749 (2007) (citing *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358, 360 (2000); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991); *Green v. School Board of New Kent County*, 391 U.S. 430, 435-436 (1968)).

24. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2749 (2007) (citing *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 839-40 (2004)).

25. *Parents*, 127 S. Ct. at 2757.

26. *Id.* at 2749.

district would assign students to a “cluster” of schools within which they could state their preferences.²⁷ Clusters were designated based on available space within the schools and the racial makeup of the schools.²⁸ Once assigned, students could apply to transfer between schools.²⁹ These requests could be granted or denied, based on available space or on the basis of the established racial guidelines.³⁰ Once a school reached the extreme end of a racial guideline, “a student whose race would contribute to that imbalance would not be assigned there.”³¹

Petitioners in both cases alleged that the plans as they were set up violated the Equal Protection Clause of the Fourteenth Amendment.³² Both asserted that their children were denied access to the schools of their choice based on racial classification. The respective district courts initially approved the plans, finding that the districts were implementing plans that were “narrowly tailored to serve a compelling government interest.”³³ After a particularly complicated appellate history in Seattle, the U.S. Supreme Court granted certiorari in both cases, recognizing the delicacy and importance of the issues raised by race-based decision making, and the need to subject the plans in both districts to the searching review of strict scrutiny.

The dissent in *Parents*, written by Justice Breyer, argues against such a thorough examination, contending that “the law requires application here of a standard of review that is not ‘strict’ in the traditional sense of that word.”³⁴ This opinion is based on the reasoning that programs such as the ones at issue are not aimed at oppression, nor do they “seek to give one racial group an edge over another.”³⁵ Because the plans are “far from the original evils at which the Fourteenth Amendment was addressed,” the dissent would rely on Justice Kozinski’s suggested standard of review in the 9th Circuit Court of Appeals opinion of *Parents*—a “robust and realistic rational basis review.”³⁶ However, as the majority points out, this argument is adverse both to Supreme Court precedent and to the Constitution.³⁷

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 2750.

31. *Id.*

32. U.S. CONST, amend. XIV, § 1. (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”)

33. *Parents*, 127 S. Ct. at 2748-50.

34. *Id.* at 2774.

35. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2774 (2007) (citing *Comfort v. Lynn School Committee*, 418 F.3d 1, 27 (2005) (Boudin, C. J., concurring)).

36. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2774 (2007) (citing *Comfort v. Lynn School Committee*, 418 F.3d 1, 29 (2005) and *Parents Involved in Community Schools v. Seattle School District, No. 1 et al.*, 426 F.3d 1162, 1195 (2005)).

37. *Parents*, 127 S. Ct. at 2774.

The United States Supreme Court has insisted on strict scrutiny in every context where racial classifications are used, even those that are seemingly benign.³⁸ Indeed, “as far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”³⁹ Even where racial criteria is used to “bring races together,” someone inevitably ends up getting excluded on a racial basis; this type of exclusion is the type of governmental action that “pits the races against one another, exacerbates racial tension, and ‘provokes resentment among those who believe that they have been wronged by the government’s use of race.’”⁴⁰

III. Racial Balancing: A Compelling State Interest?

Parents clarifies the important distinction between “segregation” and “racial imbalance.” Relying on *Swann v. Charlotte-Mecklenburg Board of Education*,⁴¹ “segregation” is defined as the deliberate operation of a school system to “carry out a governmental policy to separate pupils in schools solely on the basis of race.”⁴² On the contrary, “racial imbalance” is “the failure of a school district’s individual schools to match or approximate the demographic makeup of the student population at large.”⁴³ The crucial distinction for the case at hand is that, “because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself.”⁴⁴

Justice Breyer’s dissent argues vigorously that racial balancing in the schools *is* a compelling state interest, and he supports this contention in three elements.⁴⁵ The first is referred to as the “historical and remedial element.”⁴⁶ This is an interest in striving to right the consequences of segregation’s prior conditions and working to prevent a gradual *de facto*

38. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2774 (2007) (citing *Adarand v. Peña*, 515 U.S. 200, 227 (1995) and *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

39. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2774 (2007) (citing *Adarand v. Peña*, 515 U.S. 200, 240 (1995)).

40. *Parents*, 127 S. Ct. at 2775.

41. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6 (1971).

42. *Brown v. Board of Education*, 349 U.S. 294 (1955) (This definition was based on the ruling which outlawed such segregation).

43. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2769 (2007) (citing *Washington v. Seattle School District No. 1*, 458 U.S. 457, 460 (1982)).

44. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2769 (2007) (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31-32 (1971); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 531, n. 5 (1979); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)). (“Racial imbalance . . . is not per se a constitutional violation”).

45. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2780 (2007).

46. *Id.*

resegregation in the schools.⁴⁷ The next element is the “educational element,” or the interest in overcoming the adverse educational effects produced by and associated with highly segregated schools.⁴⁸ Lastly, there is a “democratic element,” in that it is desirable to educate our children in an environment that reflects the “pluralistic society” in which we live.⁴⁹ Although these interests sound appealing, the majority found that even when viewed as a whole, none of these elements qualified as compelling.⁵⁰

Remedying the effects of past segregation is regarded as irrelevant in this context, because Seattle never operated legally segregated schools and Jefferson County was already deemed “unitary.” School boards cannot remedy the “broad and unrelated societal ills” of segregated housing patterns that may or may not have resulted from past segregation.⁵¹ Further, studies are inconsistent as far as the actual effects of racial mixing on academic achievement. The Seattle school board in fact operates an “African-American Academy” for K-8 students, with a “non-white” enrollment of 99%, at which test scores have been “higher across all grade levels in reading, writing and math.”⁵² Data such as this is directly contrary to the dissent’s insistence that diversity leads directly and automatically to measurable, educational benefits.⁵³ Finally, the “democratic element” is proposed here for the first time, having thus little to no basis in a precedent that has carefully delineated the interests which qualify as “compelling.”⁵⁴

In evaluating the use of racial classifications in the school context, the Supreme Court has identified only two specific interests to be “compelling.” The first addresses past intentional discrimination, and the second has to do with the value of diversity at the university level.

A. Remedying the Effects of Past Segregation

Race-based decision making, even to correct a racial imbalance, is “categorically prohibited unless narrowly tailored to serve a compelling state interest.”⁵⁵ The decision to correct racial imbalance through government action hinges on whether it is a result of *de jure* or *de facto* segregation. *De jure* refers to historically mandated segregation, which requires a governmental remedy in order to achieve integration. The *Parents* majority acknowledged that race-based decision making might be necessary “for cases in which a school district has a history of maintaining two sets of

47. *Id.*

48. *Id.*

49. *Id.* at 2821.

50. *Id.* at 2775.

51. *Id.*

52. *Id.* at 2778.

53. *Id.*

54. *Id.* at 2779.

55. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2770 (2007) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race.”⁵⁶ *De facto* segregation, on the other hand, results from housing patterns or generalized social discrimination. The resulting racial imbalance is not unconstitutional; it has not been produced through government mandated action.⁵⁷ Although segregation within society is distasteful, the government is not required to provide a remedy. “A governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster.”⁵⁸

Jefferson County defended its plans to racially balance its schools by pointing out that it was,

incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next. But what was constitutionally required of the district prior to 2000 was the elimination of the vestiges of prior segregation—NOT RACIAL PROPORTIONALITY IN ITS OWN RIGHT. Once those vestiges were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds.⁵⁹

In other words, once school districts that have previously been subjected to a desegregation program reach unitary status, they must expand their strategies. The definition of what constitutes diversity must be broadened to include other factors, and the plans to maintain diversity must reflect that shift.⁶⁰

Parents states that diversity in the schools *can* be a compelling state interest, but only if the definition of diversity can be expanded to view race as merely one component of a larger whole. Other demographic factors must be taken into account as well, along with special talents and needs. “What the government is not permitted to do. . . is to classify every student on the basis of race and to assign each of them to schools based on their classification.”⁶¹ These methods are nothing more than, in Justice Roberts’ words, “crude measures. . . [that] reduce children to racial chits valued and traded according to one school’s supply and another’s demand.”⁶² Because Seattle had never operated schools which were legally segregated, and Jefferson County had already been deemed “unitary,” neither school was oper-

56. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2771 (2007) (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5-6 (1971)).

57. *Dayton*, 433 U.S. 406.

58. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2758 (2007) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986)).

59. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2755 (2007) (citing also *Freeman v. Pitts*, 503 U.S. 467 (1992) (emphasis added)).

60. *Grutter*, 539 U.S. 306, 337.

61. *Parents*, 127 S. Ct. at 2797.

62. *Id.*

ating towards remedying the effects of past segregation—one of only two recognized compelling state interests in this context.

B. Diversity in Higher Education

Diversity in the university environment has also been recognized as a compelling state interest by the Supreme Court. In *Grutter v. Bollinger*,⁶³ a law school's narrowly tailored use of race in decisions regarding admissions was upheld because the educational benefits of diversity at the university level was found to be a compelling state interest. However, race was not the sole determining factor for admission. Rather, the school gave each applicant truly individualized consideration, causing race to be used in a "flexible, nonmechanical way."⁶⁴ Before *Grutter*, the court of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue in *Parents*—in primary and secondary schools.⁶⁵ *Grutter's* holding articulated key limitations—it defined a specific type of broad based diversity and noted the unique context of higher education. These limitations were largely disregarded by the lower courts, many of which extended *Grutter* to uphold race-based assignments in elementary and secondary schools.⁶⁶

Grutter's holding does not govern *Parents*, not only because the decision in *Grutter* was specifically aimed at institutes of higher education, but also because the stated goal in *Grutter* was to view diversity more broadly than race alone. In *Parents*, however, race was in many cases the sole determinative factor. Limiting diversity to race alone was rejected by the *Grutter* court. Thus, even if *Grutter* were to apply to elementary and secondary schools, its holding would not support the plans as they were designed and implemented in *Parents*.

IV. Were the Racial Quota Systems Narrowly Tailored Enough to Meet the Stated Goals?

To pass the test of strict scrutiny, not only must the plan be aimed at a compelling state interest, it must also be narrowly tailored to accomplish that interest. "[T]he court's narrow tailoring inquiry must be carefully calibrated to fit the distinct issues raised by the use of race in the case."⁶⁷ In determining a plan's effectiveness, the court considers its actual impact in furtherance of a stated goal, and whether there are less restrictive alterna-

63. *Grutter*, 539 U.S. 306.

64. *Id.* at 334.

65. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2754 (2007). *See also* *Eisenberg ex rel. Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 133 (1999); *Tuttle by Tuttle v. Arlington County School Board*, 195 F.3d 698, 701 (1999); *Wessmann v. Gittens*, 160 F.3d 790, 809 (1998).

66. *Parents*, 127 S. Ct. at 2754.

67. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 855 (2004).

tives. In Seattle, the plans were tailored to “the goal established by the school board of attaining a level of diversity within the schools that approximates the district’s overall demographics.”⁶⁸ Seattle had identified additional, specific goals: promoting the educational benefits of diverse school enrollments, reducing the harmful effects of racial isolation, and insuring that segregated housing patterns did not prevent non-white students from having equal access to quality schools.⁶⁹

A. Actual Impact

The school districts’ methods of classification led to surprising consequences given the stated goal of “diversity.” For example, the data from Seattle showed that under the plan as it stood, a school which was half Asian-American and half white would qualify as “balanced,” while a school with 30% Asian-American, 25% African-American, 25% Latino, and 20% white students would not.⁷⁰ In fact, when the actual racial breakdown was examined, enrolling students without regard to their race produced a substantially diverse student body.⁷¹ When evaluated against the district’s stated goals, this data sheds no light on how the chosen racial classifications furthered those aspirations. “It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse.’”⁷² The minimal effect on actual student enrollment suggests that there were probably less restrictive means of achieving the goal.⁷³

B. Least Restrictive Means

Narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives.”⁷⁴ Racial classifications must be subjected to the strictest level of scrutiny, and in order to justify their use, all alternatives must be examined. According to the *Parents* majority, the school districts failed to establish that they had adequately considered workable methods other than explicit racial classifications.⁷⁵ The dissent argues that race-based decision making is unavoidable if integration is to be successful. Allowing school districts to use these methods without considering alternatives, however, places what is perhaps a naive trust in their motives. As Justice Thomas points out, “[u]nlike the dissenters, I am unwilling to delegate my constitutional responsibilities to local school boards and allow

68. *Parents*, 127 S. Ct. at 2756.

69. *Id.* at 2791.

70. *Id.*

71. *Id.* at 2756-57.

72. *Id.* at 2754.

73. *Id.* at 2760.

74. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2760 (2007) (citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

75. *Parents*, 127 S. Ct. at 2738.

them to experiment with race-based decision making on the assumption that their intentions will forever remain as good as Justice Breyer's."⁷⁶

Many alternative means have been suggested in past case law for implementing plans aimed at increasing diversity without relying on racial classifications. *Bush v. Vera*, 517 U.S. 952 (1996) listed numerous suggestions, including strategic site selection of new schools, drawing attendance zones with general recognition of neighborhood demographics, allocating resources more evenly among the schools, and recruiting students and faculty in a targeted fashion.⁷⁷ Each idea is race conscious, but does not lead to differential treatment based on race. Alternative plans such as these would be more likely to withstand the test of strict scrutiny, therefore being more likely to succeed.⁷⁸

Despite the availability of alternative assignment plans that did not use express racial classifications, both Seattle and Jefferson County rejected many of them with little or no consideration.⁷⁹ The districts thus failed to provide any support for their proposition that using racial classifications to avoid racial isolation in their schools was the only alternative.

V. Conclusion

The goals presented by the school districts sound appealing at first glance. Educating children in a diverse environment, insuring equality education for all children regardless of demographic status, and remedying the effects of past segregation are all legitimate goals. As proposed and executed in *Parents*, however, the plans failed to generate the desired results. Achieving a predetermined notion of diversity through means that inevitably implicate personal freedoms of individual citizens is a delicate balancing act. Ultimately, the strategies used by the two school districts in *Parents* were found to be directed squarely at racial balancing, "an objective this court has repeatedly condemned as illegitimate."⁸⁰

In the words of the Supreme Court of the United States, "[a]llowing racial balancing as a compelling end in itself would 'effectively assure that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision making such irrelevant factors as a human being's race' will never be achieved.'"⁸¹ To embrace the message of the "color-blind Constitution" envisioned by *Brown v.*

76. *Id.* at 2788, n30.

77. *Bush v. Vera*, 517 U.S. 952 (1996).

78. *Id.*

79. *Parents*, 127 S. Ct. at 2760.

80. *Parents*, 127 S. Ct. at 2755.

81. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738, 2758 (2007), *citing* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion of O'Connor, J.), *quoting* *Wygant v. Jackson Bd. of Ed.* 476 U.S. 267, 320 (1986) (Stevens, J., dissenting), *in turn quoting* *Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980) (Stevens, J., dissenting).

Board of Education, perhaps the solution is to change the way we envision diversity by seeing beyond mere skin color. Using racial classifications to overcome racial segregation may more closely resemble the original problem than an innovative solution. In other words, “to make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.”⁸²

82. *Parents*, 127 S. Ct. at 2788.