respectfully dissent from the remainder of the Court's opinion and the judgment.

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007)

Parents Involved in Community Schools was an organization of parents who had children attending public schools in Seattle, Washington. Seattle had long been plagued with controversy over the racial composition of city schools. Lawsuits led to settlements requiring mandatory busing and race-conscious school assignments to achieve integration. In 1996 the Seattle School Board adopted a new plan to promote integration. Students were allowed to choose which high school they wished to attend. If a high school was oversubscribed, several tiebreakers were used to determine the final assignment. The first was whether a sibling of the applicant was already attending the school. The second was whether assigning an application to a particular school would "serve to bring the school into [racial] balance." At the time three-fifths of the children attending Seattle public schools were children of color. Under the tiebreaker rules, if a high school had fewer than 50 percent students of color, applicants of color would receive preference. If a high school had more than 70 percent students of color, white applicants would receive preference. Parents Involved filed a lawsuit claiming that this policy violated the equal protection clause of the Fourteenth Amendment. The school board responded that race-conscious policies were both a legitimate means for remedying past racial segregation and, if not, that achieving diversity in the public schools was a compelling state interest. The local federal district court sustained the Seattle policy. That decision was reversed by a three-judge panel on the Court of Appeals for the Ninth Circuit. The Ninth Circuit then held an en banc hearing, a hearing in which every justice on the circuit participates, and reinstated the original district court decision sustaining the Seattle law. Parents Involved appealed to the Supreme Court of the United States.

Crystal Meredith was the parent of a school-age child in Louisville, Kentucky. In 2000 the local federal district court declared the Louisville schools fully desegregated. The local federal judge then returned complete control over local decision making to the Board of Education. The next year the Jefferson County Board of Education, in an effort to preserve racial balance in elementary schools, adopted a racial tiebreaker similar to that implemented in Seattle. Meredith sued the school board, claiming that the tiebreaker violated the equal protection clause of the Fourteenth Amendment. Both the local federal district court and the Court of Appeals for the Sixth Circuit sustained the Louisville use of race. Meredith appealed to the Supreme Court of the United States.

Chief Justice Roberts's plurality opinion held that both the Seattle and Louisville plans were unconstitutional. Neither, in his view, served the compelling interest required by Grutter v. Bollinger *(2003). Why does the chief justice reach that conclusion? Why does Justice Breyer disagree? Justice Kennedy filed a concurring opinion. How does his opinion differ from that of the chief justice? Can you outline a policy for integrating schools that Justice Kennedy would think constitutional but the chief justice would not? All the justices claim to be following* Brown v. Board of Education *(1954), but they dispute the core meaning of that case. How do the different justices interpret* Brown*? What is the correct interpretation? How would you apply* Brown *in this case?*

CHIEF JUSTICE ROBERTS announced the judgment of the Court

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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. . . . In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest. . . .

. . . [O]ur prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. . . .Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. . . . Jefferson County accordingly does

not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students. . . .. . .

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter v. Bollinger* (2003). . . .

. . .

In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints" . . . ; race, for some students, is determinative standing alone. . . . It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is the factor. . . .

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. . . . But under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. 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.'" . . .

. . .

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). . . . In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide." . . .

. . .

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." . . . Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved.". . .

. . .

The parties and their amici debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* (1954) was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." . . . What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." . . . There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was "determining admission to the public schools on a nonracial basis." . . . What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis" . . . is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

JUSTICE THOMAS, concurring.

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Even supposing it mattered to the constitutional analysis, the race-based student assignment programs before us are not as benign as the dissent believes. . . . As these programs demonstrate, every time the government uses racial criteria to "bring the races together,". . . someone gets excluded, and the person excluded suffers an injury solely because of his or her race. The petitioner in the Louisville case received a letter from the school board informing her that her kindergartener would not be allowed to attend the school of petitioner's choosing because of the child's race. . . . This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race." . . .

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. . . [I]t is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement. Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. . . . Others have been more circumspect. . . . And some have concluded that there are no demonstrable educational benefits. . . .

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Furthermore, it is unclear whether increased interracial contact improves racial attitudes and relations. One researcher has stated that "the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were . . . [;] virtually all of the reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn." . . . Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools. . . .

Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. . . . The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. . . . But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." . . . And my view was the rallying cry for the lawyers who litigated *Brown*. . . .

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The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected those arguments, today's dissent replicates them to a distressing extent. Thus, the dissent argues that "[e]ach plan embodies the results of local experience and community consultation." . . . Similarly, the segregationists made repeated appeals to societal practice and expectation. . . . The dissent argues that "weight [must be given] to a local school board's knowledge, expertise, and concerns." . . . The dissent argues that today's decision "threatens to substitute for present calm a disruptive round of race-related litigation," . . . and claims that today's decision "risks serious harm to the law and for the Nation." . . . The segregationists also relied upon the likely practical consequences of ending the state-imposed system of racial separation. . . . And foreshadowing today's dissent, the segregationists most heavily relied upon judicial precedent. . . .

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What was wrong in 1954 cannot be right today. Whatever else the Court's rejection of the segregationists' arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards' race-based plans because no contextual detail—or collection of contextual details . . . can "provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." . . .

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JUSTICE KENNEDY, concurring in part and concurring in the judgment.

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. . . The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" . . . is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* . . . should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

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In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. . . . If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. . . . Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

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As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent's rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the dissent's rationale to the context of public schools. The dissent emphasizes local control, . . . the unique history of school desegregation, . . . and the fact that these plans make less use of race than prior plans, . . . but these factors seem more rhetorical than integral to the analytical structure of the opinion.

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JUSTICE STEVENS, dissenting.

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There is a cruel irony in the chief justice's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." . . . This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The chief justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.

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JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

. . . In both Seattle and Louisville, the local school districts began with schools that were highly

segregated in fact. In both cities plaintiffs filed lawsuits claiming unconstitutional segregation. . . . In Louisville, a federal court entered a remedial decree. In Seattle, the parties settled after the school district pledged to undertake a desegregation plan. In both cities, the school boards adopted plans designed to achieve integration by bringing about more racially diverse schools. In each city the school board modified its plan several times in light of, for example, hostility to busing, the threat of resegregation, and the desirability of introducing greater student choice. And in each city, the school boards' plans have evolved over time in ways that progressively diminish the plans' use of explicit race-conscious criteria.

. . .

No one here disputes that Louisville's segregation was de jure. But what about Seattle's? Was it de facto? De jure? A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were de jure segregated, just as in 1956 a memo for the School Board admitted? . . .

A court finding of de jure segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated by law voluntarily desegregated their schools without a court order—just as Seattle did. . . .

Moreover, Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan before the court dissolved the order, but with every intention of following that plan even after dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? . . .

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Compelling Interest

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First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the de facto resegregation of America's public schools. . . .

Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. . . . Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains. . . .

. . .

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. . . . It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation.

. . .

. . . If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.

Narrow Tailoring

First, the race-conscious criteria at issue only help set the outer bounds of broad ranges. . . . They constitute but one part of plans that depend primarily upon other, nonracial elements.

. . .

Indeed, the race-conscious ranges at issue in these cases often have no effect, either because the particular school is not oversubscribed in the year in question, or because the racial makeup of the school falls within the broad range, or because the student is a transfer applicant or has a sibling at the school.

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored . . . than other race-conscious restrictions this Court has previously approved. . . . Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications. Moreover, the

effect of applying race-conscious criteria here affects potentially disadvantaged students less severely, not more severely, than the criteria at issue in *Grutter*. Disappointed students are not rejected from a State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. . . . And, in Seattle, the disadvantaged student loses at most one year at the high school of his choice. . . .

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The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including de facto segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play. The fact that the controlling opinion would make a school district's use of such criteria often unlawful (and the plurality's "colorblind" view would make such use always unlawful) suggests that today's opinion will require setting aside the laws of several States, and many local communities. . . .

Racial Profiling

Over the last two decades constitutional concerns with racial profiling have heightened. African-American motorists complain about being pulled over for "driving while black." Studies demonstrate that police are far more likely to suspect racial minorities than white persons of committing crime. Incidents of famous African-Americans targeted by police for simply being in affluent neighborhoods exacerbate racial tensions. President Obama held a "beer summit" to ease the racial controversy ignited when Massachusetts police officer James Crowley arrested Harvard Professor Henry Gates, an African-American, for disorderly conduct after Crowley responded to a suspected burglary that turned out to be nothing more than Gates breaking into his residence in posh Cambridge, Massachusetts, after accidentally locking himself out.

A general consensus exists that ordinary racial profiling is both wrong and unconstitutional. Most Americans agree with a 2003 Department of Justice report that asserted, "Racial profiling sends the dehumanizing message to our citizens that they are judged by the color of their skin and harms the criminal justice system by eviscerating the trust that is necessary if law enforcement is to effectively protect our communities." Nevertheless, while most Americans oppose racial profiling in ordinary circumstances, many support racial or religious profiling of Muslims and persons from the Middle East during the War on Terror. The Department of Justice report expressed this concern when stating, "Given the incalculably high stakes involved in such investigations, federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, alienage, and other relevant factors," although the administration officials then narrowed the circumstances in which such profiling could be done.

Proving racial profiling is difficult. In *Whren v. United States* (1996) a unanimous Supreme Court ruled that when police officials had objective reasons for searching a criminal suspect, courts should not consider whether the search was actually motivated by such subjective considerations as the race of the person under suspicion. Justice Scalia's unanimous opinion asserted that past precedents

> foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. . . . [T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[81]

Some plaintiffs have successfully raised racial-profiling claims in state court. The Superior Court of New Jersey in *State v. Soto* (NJ 1996) suppressed evidence seized by state police officers after finding that "defendants have proven at least a *de facto* policy on the part of the State Police out of the Moorestown Station of targeting blacks for investigation and arrest between April 1988 and May 1991 both south of exit 3 and between exits 1 and 7A of the [New Jersey] Turnpike."[82] Most allega-

81. For more information on racial profiling, see Kevin R. Johnson, "How Racial Profiling in America Became the Law of the Land: *United States v. Brignoni-Ponce* and *Whren v. United States* and the Need for Truly Rebellious Lawyering," *Georgetown Law Journal* 98 (2010): 1005.

82. *State v. Soto*, 734 A. 2d 350 (N.J., 1996).