Civilian Exclusion Order No. 5

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WESTERN DEFENSE COMMAND AND FOURTH ARMY
WARTIME CIVIL CONTROL ADMINISTRATION
Presidio of San Francisco, California
April 1, 1942

INSTRUCTIONS
TO ALL PERSONS OF
JAPANESE
ANCESTRY
LIVING IN THE FOLLOWING AREA:

All that portion of the City and County of San Francisco, State of California, lying generally west of the north-south line established by Junipero Serra Boulevard, Worchester Avenue, and Nineteenth Avenue, and lying generally north of the east-west line established by California Street, to the intersection of Market Street, and thence on Market Street to San Francisco Bay.

All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon, Tuesday, April 7, 1942.

No Japanese person will be permitted to enter or leave the above described area after 8:00 a. m., Thursday, April 2, 1942, without obtaining special permission from the Provost Marshal at the Civil Control Station located at:

1701 Van Ness Avenue
San Francisco, California

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence, as specified below.

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THE FOLLOWING INSTRUCTIONS MUST BE OBSERVED:

1. Responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942.

2. Evacuees must carry with them on departure for the Reception Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions received at the Civil Control Station.

The size and number of packages is limited to that which can be carried by the individual or family group.

No contraband items as described in paragraph 6, Public Proclamation No. 3, Headquarters Western Defense Command and Fourth Army, dated March 24, 1942, will be carried.

3. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

4. Each family, and individual living alone, will be furnished transportation to the Reception Center. Private means of transportation will not be utilized. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station at 1701 Van Ness Avenue, San Francisco, California, between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942, to receive further instructions.

J. L. DeWITT
Lieutenant General, U. S. Army

The New York Times

December 25, 2005
Fred Korematsu | b. 1919

He Said No to Internment

By MATT BAI

In February 1942, a little more than two months after the attack on Pearl Harbor, Franklin Roosevelt signed Executive Order 9066, which effectively decreed that West Coast residents of Japanese ancestry - whether American citizens or not - were now "enemy aliens." More than 100,000 Japanese-Americans reported to government staging areas, where they were processed and taken off to 10 internment camps. Fred Korematsu, the son of Japanese immigrants, was at the time a 23-year-old welder at Bay Area shipyards. His parents left their home and reported to a racetrack south of San Francisco, but Korematsu chose not to follow them. He stayed behind in Oakland with his Italian-American girlfriend and then fled, even having plastic surgery on his eyes to avoid recognition. In May 1942, he was arrested and branded a spy in the newspapers.

In search of a test case, Ernest Besig, then the executive director of the American Civil Liberties Union for Northern California, went to see Korematsu in jail and asked if he would be willing to challenge the internment policy in court. Korematsu said he would. Besig posted $5,000 bail, but instead of freeing him, federal authorities sent him to the internment camp at Topaz, Utah. He and Besig sued the government, appealing their case all the way to the Supreme Court, which, in a 6-to-3 decision that stands as one of the most ignoble in its history, rejected his argument and upheld the government's right to intern its citizens.

After the war, Korematsu married, returned to the Bay Area and found work as a draftsman. He might have been celebrated in his community, the Rosa Parks of Japanese-American life; in fact, he was shunned. Even during his time in Topaz, other prisoners refused to talk to him. "All of them turned their backs on me at that time because they thought I was a troublemaker," he later recalled. His ostracism didn't end with the war. The overwhelming majority of Japanese-Americans had reacted to the internment by acquiescing to the government's order, hoping to prove their loyalty as Americans. To them, Korematsu's opposition was treacherous to both his country and his community.

In the years after the war, details of the internment were lost behind a wall of repression. It was common for Japanese-American families not to talk about the experience, or to talk about it only obliquely. Korematsu, too, remained silent, but for different reasons. "He felt responsible for the internment in a sort of backhanded way, because his case had been lost in the Supreme Court," Peter Irons, a legal historian, recalled in a PBS documentary. Korematsu's own daughter has said she didn't learn of his wartime role until she was a junior in high school.

Korematsu might have faded into obscurity had it not been for Irons, who in 1981 asked the Justice Department for the original documents in the Korematsu case. Irons found a memo in which a government lawyer had accused the solicitor general of lying to the Supreme Court about the danger posed by Japanese-Americans. Irons tracked down Korematsu and asked if he would be willing, once again, to go to court.

Perhaps Korematsu had been waiting all those years for a chance to clear his name. Or maybe he saw, in Irons's entreaty, an opportunity to vindicate himself with other Japanese-Americans. Whatever his thinking, not only did Korematsu agree to return to court but he also became an ardent public critic of the internment.

When government lawyers offered Korematsu a pardon, he refused. "As long as my record stands in federal court," Korematsu, then 64, said in an emotional courtroom oration, "any American citizen can be held in prison or concentration camps without a trial or a hearing." The judge agreed, ruling from the bench that Korematsu had been innocent. Just like that, the legality of the internment was struck down forever.

In the last decade of his life, Korematsu became, for some Americans, a symbol of principled resistance. President Clinton awarded Korematsu the Presidential Medal of Freedom in 1998. Six years later, outraged by the prolonged detention of prisoners at Guantánamo Bay, Korematsu filed an amicus brief with the Supreme Court, warning that the mistakes of the internment were being repeated. Still, Korematsu's place among contemporaries in his own community remained obscured by lingering resentments and a reluctance to revisit the past. When he died from a respiratory illness in March, not a single public building or landmark bore his name. It wasn't until last month that officials in Davis, Calif., dedicated the Fred Korematsu Elementary School. It was an especially fitting tribute for Korematsu, whose legacy rested with a generation of Japanese-Americans who were beginning to remember, at long last, what their parents had labored to forget.

Zelma Henderson, Who Aided Desegregation, Dies at 88

By MARGALIT FOX

The New York Times
May 22, 2008

Zelma Henderson, a Kansas beautician who was the sole surviving plaintiff in Brown v. Board of Education of Topeka, the landmark federal desegregation case of 1954, died on Tuesday in Topeka. She was 88 and had lived in Topeka all her adult life.

The cause was pancreatic cancer, her son, Donald, said.

The Brown case, which began as a Kansas class-action suit in 1951, was known formally as Oliver L. Brown et al. v. the Board of Education of Topeka et al. Mrs. Henderson was the last of the "et al." on the complainants' side in the original case. In the decades since, she appeared often at events commemorating the decision and was widely interviewed in the news media.

Considered one of the United States Supreme Court's most seminal decisions, Brown outlawed segregation in the nation's public schools. A cornerstone of the emerging civil rights movement, it paved the way for the Civil Rights Act of 1964, which outlawed segregation in other public facilities.

Zelma Cleota Hurst was born on Feb. 29, 1920, in Colby, a rural community in western Kansas. The Hursts were one of two black families in town; Zelma's parents raised cattle and wheat. When she was a girl, the family moved to Oakley, Kan., a bigger town with more black people, though still largely white.

At the time, Kansas law provided for the segregation of elementary schools only, and only those in towns of 15,000 or more. (Junior and senior high schools in the state were integrated.)

Colby and Oakley were too small for the law to apply, and Zelma and her siblings were educated alongside all the other children in town. Though the schools they attended were overwhelmingly white, Donald Henderson said in an interview on Wednesday that his mother "never had a problem out there."

That changed when she moved to Topeka in 1940. There, she studied cosmetology at the Kansas Vocational School, a segregated institution. She was also a skilled typist, but found that whenever she applied for a clerical job, she was offered work as a domestic instead. In 1943, she married Andrew Henderson and opened a beauty salon in her home.

As young children, Donald Henderson and his sister, Vicki, were bused to an all-black school across town. This set Mrs. Henderson's teeth on edge. As she told The Boston Globe in 2004, "I knew what integration was and how well it worked and couldn't understand why we were separated here in Topeka."

In 1950, the Topeka chapter of the National Association for the Advancement of Colored People began organizing the class-action suit. They asked 13 local black parents — Mr. Brown and 12 women — to serve as plaintiffs. Mrs. Henderson quickly agreed.

In 1951, the suit was brought before the United States District Court in Kansas. The court ruled against the plaintiffs, citing the Supreme Court's finding in Plessy v. Ferguson in 1896 that "separate but equal" accommodations for blacks and whites were constitutional.

Before being appealed to the Supreme Court, the case was combined with four similar ones from Delaware, South Carolina, Virginia and the District of Columbia under the general rubric Brown v. Board of Education. On May 17, 1954, the Supreme Court issued its unanimous decision.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place," Chief Justice Earl Warren wrote in the court's opinion. "Separate educational facilities are inherently unequal."

Besides her son, Donald, of Topeka, Mrs. Henderson is survived by a sister, Mary Catherine Ponds, of Everett, Wash.; five grandchildren; and 15 great-grandchildren. Her husband, Andrew, died in 1971; their daughter, Vicki, died in 1984.

In an interview with The Dallas Morning News in 1994, Mrs. Henderson reflected on Brown 40 years later. "None of us knew that this case would be so important and come to the magnitude it has," she said. "What little bit I did, I feel I helped the whole nation."

http://www.nytimes.com/2008/05/22/us/22henderson.html?ei=5124&en=56a6422db15fb247&ex=1369195200&adxnnl=1&partner=permalink&exprod=permalink&adxnnlx=1211469088-8pSy76J9cI55xO/TQswTrw&pagewanted=print

https://www.nytimes.com/2012/01/04/nyregion/robert-l-carter-judge-and-desegregation-strategist-dies-at-94.html?hpw=&pagewanted=all

January 3, 2012

Robert L. Carter, an Architect of School Desegregation, Dies at 94

By ROY REED

Robert L. Carter, a former federal judge in New York who, as a lawyer, was a leading strategist and a persuasive voice in the legal assault on racial segregation in 20th-century America, died on Tuesday morning in Manhattan. He was 94.

The cause was complications of a stroke, his son John said.

As a member of the NAACP Legal Defense and Educational Fund Inc., led by Thurgood Marshall, Mr. Carter often toiled behind the scenes, but he had a significant hand in many historic legal challenges to racial discrimination in the postwar years. None was more momentous than Brown v. Board of Education, the landmark case that led in 1954 to a United States Supreme Court decision abolishing legal segregation in the public schools.

Mr. Carter's well-honed argument that the segregation of public schools was unconstitutional on its face became the Supreme Court's own conclusion in Brown. The decision swept away half a century of legal precedent that the South had used to justify its "separate but equal" doctrine.

Mr. Carter and his underpaid, overworked colleagues at the Legal Defense and Educational Fund argued before the court that the South's schools rarely offered anything like equal opportunities to African-American children. But that was beside the point in any case, they said. Segregation itself, they argued, was so damaging to black children that it should be abolished, on the ground that it was contrary to the 14th Amendment, which guarantees equal rights to all citizens.

Mr. Carter spent years doing research in law and history to construct that legal theory before it reached the Supreme Court. Though aspects of segregation law had been struck down before World War II, Mr. Carter's task was still daunting. His challenge was to persuade the Supreme Court to overturn, finally, a looming obstacle to equal rights, the court's 1896 decision in Plessy v. Ferguson. That ruling upheld a Louisiana law requiring racial separation on railroad cars. The South used that decision to justify a wide range of discriminatory practices for years to come.

"We have one fundamental contention," Mr. Carter told the court. "No state has any authority under the equal protection clause of the 14th Amendment to use race as a factor in affording educational opportunities among its citizens."

Mr. Carter insisted on using the research of the psychologist Kenneth B. Clark to attack

segregated schools, a daring courtroom tactic in the eyes of some civil rights lawyers. Experiments by Mr. Clark and his wife, Mamie, showed that black children suffered in their learning and development by being segregated. Mr. Clark's testimony proved crucial in persuading the court, Mr. Carter wrote in a 2004 book, "A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights."

As chief deputy to the imposing Judge Marshall, who was to become the first black Supreme Court justice, Mr. Carter labored for years in his shadow. In the privacy of legal conferences, Mr. Carter was seen as the house radical, always urging his colleagues to push legal and constitutional positions to the limits.

He recalled that Judge Marshall had encouraged him to play the gadfly: "I was younger and more radical than many of the people Thurgood would have in, I guess. But he'd never let them shut me up."

Robert Lee Carter was born in Caryville, in the Florida Panhandle, on March 17, 1917, the youngest of nine children. His family moved to New Jersey when he was 6 weeks old; his father, Robert L. Carter, died when the baby was a year old. His mother, Annie Martin Carter, took in laundry for white people for 25 years.

Mr. Carter recalled experiencing racial discrimination as a 16-year-old in East Orange, N.J. The high school he attended allowed black students to use its pool only on Fridays, after classes were over. After he read in the newspaper that the State Supreme Court had outlawed such restrictions, he entered the pool with white students and stood up to a teacher's threat to have him expelled from school. It was his first taste of activism, he said.

He got his higher education at two predominantly black institutions: Lincoln University in Pennsylvania, where he enrolled at 16, and Howard University School of Law in Washington. He then went to Columbia University as a graduate student and wrote his master's thesis on the First Amendment. He used parts of the thesis in preparing for the school segregation cases in the 1950s.

Mr. Carter joined the Army a few months before the United States entered World War II. His military experience made a militant of him, he said, starting with the day a white captain welcomed Mr. Carter's unit of the Army Air Corps at Augusta, Ga. The captain, Mr. Carter said in his memoir, "wanted to inform us right away that he did not believe in educating niggers."

"He was not going to tolerate our putting on airs or acting uppity," Mr. Carter said.

In spite of repeated antagonisms, Mr. Carter completed Officer Candidate School and became a second lieutenant. He was the only black officer at Harding Field in Baton Rouge, La., and promptly integrated the officers' club, arousing new anger. He was soon transferred to a training base in Columbus, Ohio, where he continued to face racial hostility.

He left the service in 1944 and got a job as a lawyer at the Legal Defense and Educational Fund, then the legal arm of the National Association for the Advancement of Colored People. (It later became an independent organization.) He had become Marshall's chief deputy by 1948, and soon became active in school segregation cases, notably Sweatt v. Painter, in which the Supreme Court ruled in 1950 that the University of Texas Law School had acted illegally in denying admission to a black applicant.

Mr. Carter was also involved in housing discrimination cases, the dismantling of all-white political primaries in several Southern states and ending de facto school segregation in the North.

Mr. Carter was disappointed when Marshall passed him over and chose a white staff lawyer, Jack Greenberg, to succeed him as director-counsel of the fund in 1961. Mr. Carter moved to the N.A.A.C.P. — by then a separate entity — as its general counsel. He considered that a demotion, and resented what he saw as Mr. Greenberg's undercutting him.

Mr. Carter resigned in protest from the N.A.A.C.P. in 1968 when its board fired a white staff member, Lewis M. Steel, who had written an article in The New York Times Magazine critical of the Supreme Court. After a year at the Urban Center at Columbia, he joined the New York law firm of Poletti, Freidin, Prashker, Feldman & Gartner. President Richard M. Nixon nominated him to the federal bench for the Southern District of New York in 1972 at the recommendation of Senator Jacob K. Javits, Republican of New York.

On the bench, Judge Carter became known for his strong hand in cases involving professional basketball. He oversaw the merger of the National Basketball Association and the American Basketball Association in the 1970s, the settlement of a class-action antitrust suit against the N.B.A. brought by Oscar Robertson and other players, and a number of high-profile free-agent arbitration disputes involving players like Marvin Webster and Bill Walton.

In 1979, his findings of bias shown against black and Hispanic applicants for police jobs in New York City led to significant changes in police hiring policies and an increase in minority representation on the force.

Mr. Carter, who lived in Manhattan and died in a hospital there, married Gloria Spencer of New York in 1946. She died in 1971. Besides his son John, Judge Carter is survived by another son, David; a daughter, Sharon Lockhart; and a grandson.

Well into advanced age, Judge Carter retained the fire of a civil rights agitator who believed that much remained to be done in the pursuit of racial equality.

"Black children aren't getting equal education in the cities," he said in an interview in The Times in 2004. "The schools that are 100 percent black are still as bad as they were before Brown. Integration seems to be out, at least for this generation."

But, he said, "I have hope."

"In the United States, we make progress in two or three steps, then we step back," he added. "And blacks are more militant now and will not accept second-class citizenship as before."

Dennis Hevesi contributed reporting.

May 6, 2008
Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68
By DOUGLAS MARTIN

Mildred Loving, a black woman whose anger over being banished from Virginia for marrying a white man led to a landmark Supreme Court ruling overturning state miscegenation laws, died on May 2 at her home in Central Point, Va. She was 68.

Peggy Fortune, her daughter, said the cause was pneumonia.

The Supreme Court ruling, in 1967, struck down the last group of segregation laws to remain on the books — those requiring separation of the races in marriage. The ruling was unanimous, its opinion written by Chief Justice Earl Warren, who in 1954 wrote the court's opinion in Brown v. Board of Education, declaring segregated public schools unconstitutional.

In Loving v. Virginia, Warren wrote that miscegenation laws violated the Constitution's equal protection clause. "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race," he said.

By their own widely reported accounts, Mrs. Loving and her husband, Richard, were in bed in their modest house in Central Point in the early morning of July 11, 1958, five weeks after their wedding, when the county sheriff and two deputies, acting on an anonymous tip, burst into their bedroom and shined flashlights in their eyes. A threatening voice demanded, "Who is this woman you're sleeping with?"

Mrs. Loving answered, "I'm his wife."

Mr. Loving pointed to the couple's marriage certificate hung on the bedroom wall. The sheriff responded, "That's no good here."

The certificate was from Washington, D.C., and under Virginia law, a marriage between people of different races performed outside Virginia was as invalid as one done in Virginia. At the time, it was one of 16 states that barred marriages between races.

After Mr. Loving spent a night in jail and his wife several more, the couple pleaded guilty to violating the Virginia law, the Racial Integrity Act. Under a plea bargain, their one-year prison sentences were suspended on the condition that they leave Virginia and not return together or at the same time for 25 years.

Judge Leon M. Bazile, in language Chief Justice Warren would recall, said that if God had meant for whites and blacks to mix, he would have not placed them on different continents. Judge Bazile reminded the defendants that "as long as you live you will be known as a felon."

They paid court fees of $36.29 each, moved to Washington and had three children. They returned home occasionally, never together. But times were tough financially, and the Lovings missed family, friends and their easy country lifestyle in the rolling Virginia hills.

By 1963, Mrs. Loving could stand the ostracism no longer. Inspired by the civil rights movement and its march on Washington, she wrote Attorney General Robert F. Kennedy and asked for help. He wrote her back, and referred her to the American Civil Liberties Union.

The A.C.L.U. took the case. Its lawyers, Bernard S. Cohen and Philip J. Hirschkop, faced an immediate problem: the Lovings had pleaded guilty and had no right to appeal. So they asked Judge Bazile to set aside his original verdict. When he refused, they appealed. The Virginia Supreme Court of Appeals upheld the lower court, and the case went to the United States Supreme Court.

Mr. Cohen recounted telling Mr. Loving about various legal theories applying to the case. Mr. Loving replied, "Mr. Cohen, tell the court I love my wife, and it is just unfair that I can't live with her in Virginia."

Mildred Delores Jeter's family had lived in Caroline County, Va., for generations, as had the family of Richard Perry Loving. The area was known for friendly relations between races, even though marriages were forbidden. Many people were visibly of mixed race, with Ebony magazine reporting in 1967 that black "youngsters easily passed for white in neighboring towns."

Mildred's mother was part Rappahannock Indian, and her father was part Cherokee. She preferred to think of herself as Indian rather than black.

Mildred and Richard began spending time together when he was a rugged-looking 17 and she was a skinny 11-year-old known as Bean. He attended an all-white high school for a year, and she reached 11th grade at an all-black school.

When Mildred became pregnant at 18, they decided to do what was elsewhere deemed the right thing and get married. They both said their initial motive was not to challenge Virginia law.

"We have thought about other people," Mr. Loving said in an interview with Life magazine in 1966, "but we are not doing it just because somebody had to do it and we wanted to be the ones. We are doing it for us."

In his classic study of segregation, "An American Dilemma," Gunnar Myrdal wrote that "the whole system of segregation and discrimination is designed to prevent eventual inbreeding of the races."

But miscegenation laws struck deeper than other segregation acts, and the theory behind them leads to chaos in other facets of law. This is because they make any affected marriage void from

its inception. Thus, all children are illegitimate; spouses have no inheritance rights; and heirs cannot receive death benefits.

"When any society says that I cannot marry a certain person, that society has cut off a segment of my freedom," the Rev. Dr. Martin Luther King Jr. said in 1958.

Virginia's law had been on the books since 1662, adopted a year after Maryland enacted the first such statute. At one time or another, 38 states had miscegenation laws. State and federal courts consistently upheld the prohibitions, until 1948, when the California Supreme Court overturned California's law.

Though the Supreme Court's 1967 decision in the Loving case struck down miscegenation laws, Southern states were sometimes slow to change their constitutions; Alabama became the last state to do so, in 2000.

Mr. Loving died in a car accident in 1975, and the Lovings' son Donald died in 2000. In addition to her daughter, Peggy Fortune, who lives in Milford, Va., Mrs. Loving is survived by her son, Sidney, of Tappahannock, Va.; eight grandchildren; and 11 great-grandchildren.

Mrs. Loving stopped giving interviews, but last year issued a statement on the 40th anniversary of the announcement of the Supreme Court ruling, urging that gay men and lesbians be allowed to marry.

http://www.nytimes.com/2008/05/06/us/06loving.html?ei=5124%26en=dd818b21f6a5044a%26ex=1367812800%26partner=permalink%26exprod=permalink%26adxnnlx=1210090091-%20L/qylc8o9altMkp0ncsokw%26pagewanted=print

Interracial Couple Denied Marriage License By Louisiana Judge

<http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html>

October 15, 2009

NEW ORLEANS -- A Louisiana justice of the peace said he refused to issue a marriage license to an interracial couple out of concern for any children the couple might have. Keith Bardwell, justice of the peace in Tangipahoa Parish, says it is his experience that most interracial marriages do not last long.

"I'm not a racist. I just don't believe in mixing the races that way," Bardwell told the Associated Press on Thursday. "I have piles and piles of black friends. They come to my home, I marry them, they use my bathroom. I treat them just like everyone else."

Bardwell said he asks everyone who calls about marriage if they are a mixed race couple. If they are, he does not marry them, he said.

Bardwell said he has discussed the topic with blacks and whites, along with witnessing some interracial marriages. He came to the conclusion that most of black society does not readily accept offspring of such relationships, and neither does white society, he said.

"There is a problem with both groups accepting a child from such a marriage," Bardwell said. "I think those children suffer and I won't help put them through it."

If he did an interracial marriage for one couple, he must do the same for all, he said.

"I try to treat everyone equally," he said.

Bardwell estimates that he has refused to marry about four couples during his career, all in the past 2 1/2 years.Beth Humphrey, 30, and 32-year-old Terence McKay, both of Hammond, say they will consult the U.S. Justice Department about filing a discrimination complaint.

Humphrey, an account manager for a marketing firm, said she and McKay, a welder, just returned to Louisiana. She plans to enroll in the University of New Orleans to pursue a masters degree in minority politics.

"That was one thing that made this so unbelievable," she said. "It's not something you expect in this day and age."

Humphrey said she called Bardwell on Oct. 6 to inquire about getting a marriage license signed. She says Bardwell's wife told her that Bardwell will not sign marriage licenses for interracial couples. Bardwell suggested the couple go to another justice of the peace in the parish who agreed to marry them.

"We are looking forward to having children," Humphrey said. "And all our friends and co-workers have been very supportive. Except for this, we're typical happy newlyweds."

"It is really astonishing and disappointing to see this come up in 2009," said American Civil Liberties Union of Louisiana attorney Katie Schwartzmann. "The Supreme Court ruled as far back as 1963 that the

government cannot tell people who they can and cannot marry."

The ACLU sent a letter to the Louisiana Judiciary Committee, which oversees the state justices of the peace, asking them to investigate Bardwell and recommending "the most severe sanctions available, because such blatant bigotry poses a substantial threat of serious harm to the administration of justice."

"He knew he was breaking the law, but continued to do it," Schwartzmann said.

According to the clerk of court's office, application for a marriage license must be made three days before the ceremony because there is a 72-hour waiting period. The applicants are asked if they have previously been married. If so, they must show how the marriage ended, such as divorce.

Other than that, all they need is a birth certificate and Social Security card.

The license fee is $35, and the license must be signed by a Louisiana minister, justice of the peace or judge. The original is returned to the clerk's office.

"I've been a justice of the peace for 34 years and I don't think I've mistreated anybody," Bardwell said. "I've made some mistakes, but you have too. I didn't tell this couple they couldn't get married. I just told them I wouldn't do it."

Keys to the Success of the Civil Rights Movement

1. Coalition-building, assisted by
   A. Moral Argument (Public Virtue)
      (I) Historical good luck
   B. Economics (Private Self-interest)
2. Press
3. Grassroots Organizing

Washington v. Seattle School District No. 1

458 U.S. 457 (1982)

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

[In 1978, the Seattle School Board voluntarily adopted a plan to alleviate racial isolation in the schools. The plan made extensive use of busing and mandatory reassignment. Opponents of the plan responded by drafting a statewide initiative designed to terminate use of mandatory busing for purposes of racial integration. The proposal, known as Initiative 350, prohibited school boards from requiring students to attend schools not nearest or next nearest to their place of residence. The initiative included a series of exceptions, however, which permitted such assignments for a variety of nonracial reasons, such as overcrowding or special education needs. It also permitted racial reassignments when a court found that they were constitutionally required.

[The initiative was adopted by a substantial statewide majority, including a majority of Seattle voters. The Seattle School Board thereupon initiated this litigation challenging the constitutionality of the initiative under the equal protection clause of the fourteenth amendment. The district court held that the initiative was unconstitutional, and the court of appeals affirmed.]

II

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring in the judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expression in Hunter v. Erickson, [393 U.S. 385 (1969)], a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron city council, pursuant to its ordinary legislative

processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, amended the city charter to provide that ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the city council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the city council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." But it did differentiate "between those groups who sought the law's protection against racial . . . discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," thus "disadvantag[ing] those who would benefit from laws barring racial . . . discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." . . .

[This case yields] a simple but central principle. [The] political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process. . . ."

III

In our view, Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle." Hunter v. Erickson. Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.

A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. [It] is beyond reasonable dispute, then, that the initiative was enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. Personnel Administrator of Massachusetts v. Feeney. . . .

[It] undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." Columbus Board of Education v. Penick, 443 U.S. 449 (1979) (Powell, J., dissenting). But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance.

In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose. . . .

B

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests. . . .

The state appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative amounts to nothing more than an unexceptional example of a State's intervention in its own school system. . . .

But "insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." [It] is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter*. And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. . . .

[Before] adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs — including programs involving student assignment and desegregation — was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power

over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."[23]...

C

To be sure, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter*, has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation....

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court. As they read it, *Hunter* applied a simple "disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate impact approach to equal protection, in [Washington v. Davis]....

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as [Washington v. Davis] considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue

23. Throughout his dissent, Justice Powell insists that the Court has created a "vested constitutional right to local decisionmaking," that under our holding "the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a School District *previously has adopted one of its own*," and that today's decision somehow raises doubts about "the authority of a State to abolish school boards altogether." These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process — that is, the racial nature of the way in which it structures the process of decisionmaking. It is evident, then, that the horribles paraded by the dissent — which have nothing to do with the ability of minorities to participate in the process of self-government — are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.

gives rise to an impermissible racial classification. But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation — and only such legislation — is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'"[29] And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." [*Carolene Products.*] In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." . . .

Accordingly, the judgment of the Court of Appeals is affirmed.

JUSTICE POWELL, with whom [CHIEF JUSTICE BURGER], JUSTICE REHNQUIST, and JUSTICE O'CONNOR *join, dissenting*. . . .

[In] the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the State level. . . .

Application of these settled principles demonstrates the serious error of today's decision — an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government. In this case, by Initiative 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of State or Federal Courts to remedy constitutional violations. And if such a policy had been adopted by any of the school districts in this litigation there could have been no question that the policy was constitutional.

The issue here arises only because the Seattle School District — in the absence of a then established State policy — chose to adopt race specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature nor the people of the State of Washington could alter what the District had decided.

The Court argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme State authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful State policy. And in the State of Washington, a neighborhood school policy would have been lawful.

29. Thus we do not hold, as the dissent implies, that the State's attempt to repeal a desegregation program creates a racial classification, while "identical action" by the Seattle School Board does not. It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board — or indeed any other state board or local instrumentality — adopts a race specific program that arguably benefits racial minorities. Once such a program is adopted, *only* the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion — alien to our system — that local governmental bodies can forever preempt the ability of a State — the sovereign power — to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result. . . .

[Initiative] 350 places no "special burdens on racial minorities within the governmental process," [*Hunter*], such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race — or with integration in the schools — must henceforth be submitted to a referendum of the people. Cf. Hunter v. Erickson, supra. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation.

The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the State legislature or the people of the State for redress. It permits the people of a State to preempt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no Constitutional violation. . . .

Nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority. [In] this case, unlike in *Hunter*, the political system has *not* been redrawn or altered. The authority of the State over the public school system, acting through Initiative or the legislature, is plenary. Thus, the State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school [districts.]

Hunter, therefore, is simply irrelevant. It *is* the *Court* that by its decision today disrupts the normal course of State government. Under its unprecedented theory of a vested constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multi-racial society where, as in this case, the local school board has acted first.[16] . . .

16. Responding to this dissent, the Court denies that its opinion limits the authority of the people of the State of Washington and the Legislature to control or regulate school boards. It further states that "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." These are puzzling statements that seem entirely at odds with much of the text of the Court's opinion. It will be surprising if officials of the State of Washington — with the one exception mentioned below — will have any clear idea as to what the State now lawfully may do.

The Court does say that "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle plan." Apparently the Court is

Note: Strict Scrutiny for "Neutral" Race-Specific Classifications

1. *Why strict scrutiny?* Compare Chief Justice Warren's opinion in *Loving* with his opinion in Brown v. Board of Education (*Brown I*), page 446 supra. Does *Loving* provide a more satisfactory account of why neutral race-specific laws are strictly scrutinized?

What class of people was disadvantaged by the statute invalidated in *Loving*? Since the class necessarily includes an equal number of blacks and whites (for every black/white marriage, there must be one black and one white who wish to marry each other), how can the Court say that the statute constitutes "invidious racial discrimination"? Is the point that in a culture dominated by whites, blacks are harmed more than whites by laws separating the races or suggesting that race is a relevant factor in decisionmaking? That because there are fewer blacks than whites, a higher percentage of the total black community will be prospective partners in mixed-race marriages? Why should these disproportionate impact arguments trigger strict scrutiny when the disproportionate impact shown in Washington v. Davis did not?

Is the point that race-specific classifications, even when facially neutral, are particularly likely to be motivated by race prejudice? See Palmore v. Sidoti, page 513 supra: "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."

Compare Justice Scalia's dissenting opinion in Powers v. Ohio, 499 U.S. 400 (1991), criticizing the Court's invalidation of racially based peremptory challenges:

> [When a] group, like all others, has been made subject to peremptory challenge on the basis of its group characteristic, its members have been treated not differently but the same. In fact, it would constitute discrimination to exempt them from the peremptory-strike exposure to which all others are subject. . . .
>
> Unlike the categorical exclusion of a group from jury service, which implies that all its members are incompetent or untrustworthy, a peremptory strike on the basis of group membership implies nothing more than the undeniable reality [that] all groups tend to have particular sympathies and hostilities. [Since] that reality is acknowledged as to all groups, and forms the basis for peremptory strikes as to all of them, there is no implied criticism or dishonor to a strike.

In his opinion for the Court, Justice Kennedy responded as follows:

> We reject [the] view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which

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saying that, despite what else may be said in its opinion, the people of the State — or the State legislature — may repeal the *Seattle plan*, even though neither the people nor the legislature validly may prescribe statewide standards. I perceive no logic in — and certainly no constitutional basis for — a distinction between repealing the Seattle plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for purpose of integration than in the plan of a single school board.

advanced the theorem, Plessy v. Ferguson. This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. Loving v. Virginia.

2. *What makes a neutral statute race-specific?* The antimiscegenation statute invalidated in *Loving* was race-specific in the sense that the legal consequence of a marriage turned on the races of the married couple. But the statute invalidated in *Seattle* nowhere mentioned race. What made it race-specific and therefore subject to strict scrutiny?

Compare *Seattle* with James v. Valtierra, 402 U.S. 137 (1971), where the Court upheld a provision of the California Constitution prohibiting state entities from constructing low-rent housing projects unless approved by a majority of those voting in a community election. The Court held that the provision was not a racial classification, since it "[required] referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." Can this language be reconciled with the *Seattle* Court's holding that Initiative 350 was race-specific because school desegregation "inures primarily to the benefit of the minority," and because, "[i]n 'reality,' the burden imposed by [the Initiative] necessarily 'falls on the minority'" (quoting from Hunter v. Erickson). Is *Seattle* consistent with Washington v. Davis, where the Court treated state actions disproportionately burdening blacks as facially neutral? Note that the Court in *Seattle* distinguishes *Davis* on the ground that it "considered classifications facially unrelated to race." Does this distinction beg the very question the Court is attempting to answer?

3. Seattle *and* Crawford. In Crawford v. Board of Education, 458 U.S. 527 (1982), decided on the same day as *Seattle*, the Court upheld an amendment to the California Constitution prohibiting state courts from ordering mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the federal equal protection clause. The amendment followed a decision by the California Supreme Court interpreting the state constitution as prohibiting de facto segregation and ordering "reasonable steps" to alleviate it. Can the results in *Seattle* and *Crawford* be reconciled? (In fact, five of the nine justices thought that the cases were indistinguishable; the Court reached different results only because this majority was divided between four justices who thought that both measures were constitutional and one justice who thought that both were unconstitutional.) The majority opinion in *Crawford* was written by Justice Powell, a *Seattle* dissenter. He argued that the California measure did not embody a racial classification:

> It neither says nor implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer — neighborhood schooling — is made available regardless of race in the discretion of school [boards].

Nor did the provision distort the political process: "[Having] gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States."

Justice Blackmun, the author of *Seattle*, concurred, emphasizing the "critical distinctions" between the two cases:

> State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the States' political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted [the amendment], it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy.

Does this distinction make sense?

4. *The source of the difficulty.* Consider the possibility that *Seattle* and *Crawford* are hard cases because they force the court to reconcile two lines of authority that are ultimately inconsistent. On the one hand, Washington v. Davis and its progeny suggest an approach to the race problem that eschews an effort to guarantee any substantive position for blacks in U.S. society. Rather than focusing on the substantive content of statutes affecting blacks, it directs attention to the process by which the statutes are enacted. Thus, facially neutral statutes that have an adverse impact on blacks are subject only to rational basis review, so long as the process by which they are enacted is not infected by an illegitimate purpose. These precedents inevitably channeled the Court's *Seattle* and *Crawford* opinions into a discussion of whether the political process had been unfairly restructured. On the other hand, *Loving*, as well as its lineal antecedent Brown v. Board of Education, are fundamentally inconsistent with this process approach. These cases can be read as outlawing certain outcomes of even a "fair" process when those outcomes disadvantage blacks in certain ways. They suggest that race-specific classifications are evil because their effect, at least in our culture, is to leave blacks in a permanently subservient position. In *Seattle* and *Crawford*, the analogy to *Brown* and *Loving* was too close for the Court to ignore. Yet it is hardly surprising that the Court failed to pursue the logic of these precedents. To do so would require the justices to articulate and justify a substantive theory about the distribution of resources among groups in our society, and the Court is simply not prepared to undertake that task.

Race Discrimination - a Few Basic Points

In class I will be asking you what the rationale is for the rules italicized below.

I. The Constitutional Standard

1. *To prove that a state action was racially discriminatory in violation of the Constitution the plaintiff must demonstrate a racially discriminatory intent ("invidious intent"), not effect.* (Washington v. Davis)

A. Mere awareness that the enactment will have a racially disparate effect does not make out a showing of intent; the practice must be adopted because of, not despite of, that effect. (Feeney)

2. Since there is rarely direct evidence of intent (i.e. "If we draw the districts this way no black will ever get elected"), a key question is when racially discriminatory intent may be inferred from racially discriminatory effects.

A. *When an administrative officer has discretion over distribution of the benefit, a court will be readier to infer intent from effects.* (Yick Wo, Castaneda). *This applies particularly where the structure of the system is such as to facilitate discrimination by a person minded to discriminate.* (E.g. Mississippi registrar of voters)

B. *The more fundamental the right at issue, the readier a court will be to infer intent from effects.* (Gomillion, Hunter)

C. *On the other hand, discretionary executive decisions tend to get more deferential scrutiny.* (Mayor of Philadelphia)

II. Statutes

1. The foregoing describes Constitutional standards. Statutes may set higher ones, e.g. provide that an employer may not adopt a job qualification test having a racially disparate impact unless it can demonstrate the validity of the test. Griggs v. Duke Power, 401 US 424 (1971).

A. A large number of murky constitutional questions in the race area remain unresolved because as a practical matter a very large number of cases (e.g. housing discrimination, voting rights) are governed by statutes of this type.

III. One More Factor

1. This could be listed as I (2)(D) above, but I have broken it out separately because we will also find it returning in fields other than race and I want you to remember it at that time. *When the effect of a legal alteration is to impose structural barriers to change that did not previously exist, a court will evaluate the alteration more skeptically.* (Compare Crawford with Seattle School District)

NY Times, October 11, 2002

Mary Maxine Reed, Winner Of Sex Discrimination Suit, By PAUL LEWIS

Mary Maxine Reed, who in 1971 won a landmark Supreme Court case that struck down dozens of state laws discriminating against women, died on Sept. 26 near Boise, Idaho.

She was believed to be about 93, though she would not tell her age, her lawyer Allen Derr said.

On Nov. 22, 1971, the Supreme Court unanimously ruled that an Idaho law that automatically gave Mrs. Reed's former husband preference over her as administrator of their dead son's estate violated the 14th Amendment's guarantee of equal protection under the law.

The Supreme Court called the Idaho law "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."

It was the first time the Supreme Court had declared a state law unconstitutional because it discriminated against one sex.

The ruling overturned many similar laws around the country, including another Idaho law declaring the husband the head of the family, with the right to determine where it lives, as well as a 1948 Michigan law prohibiting women from serving alcoholic drinks in bars. Previous challenges to such laws before the Supreme Court had failed.

The case came about in 1967 after the Reeds' 16-year-old son, Richard Lynn Reed, shot himself. Mrs. Reed and her former husband, Cecil, from whom she was divorced in 1958, applied to a court to administer their son's small estate, which consisted chiefly of a clarinet, phonograph records, clothes and $495 in a savings account.

Mrs. Reed lost the first court battle because Idaho law said that when two people were equally qualified to be administrators, preference must be given to a man.

Saying she was angry that "women could be stepped on like that," Mrs. Reed then appealed to the District Court and won.

But the Idaho Supreme Court reversed that decision on appeal. Mrs. Reed took her case to the Supreme Court.

Mary Maxine Reed, known as Sally, was probably born in Nebraska around 1909. Orphaned early, she was adopted by George and Nettie Kelso, who moved to Cambridge, Idaho, where they farmed. She graduated from Cambridge High School in 1929 under the name Mary Kelso.

In 1931 she married Cecil R. Reed in Ontario, Ore. They eventually moved to Boise, where her husband worked for the Idaho Highways Department. They adopted Richard Lynn, their only child.

After their divorce, Mrs. Reed earned her living by ironing, baking, baby-sitting and looking after disabled people in her Boise home. She retired in 1998.

In a widely reported legal battle that contrasted with the rest of her quiet life, Mrs. Reed was assisted by Mr. Derr, her Boise lawyer, and two lawyers from the American Civil Liberties Union, Mel Wulf and Ruth Bader Ginsburg, who is now a Supreme Court Justice.

In a letter to Mr. Derr read at Mrs. Reed's funeral on Oct. 5, Justice Ginsburg said, "Sally Reed lived to see the good that came from her brave decision to challenge an unjust law."

Sex, Reality and the Supreme Court

In prior years I have been asked at the podium after our class on sex discrimination to list some "real" and "not real" differences between men and women. Some examples are set forth below. In reviewing them please keep in mind the critical fact that once the statutory line is determined to be based on a real difference, the statute is upheld *whether the classification benefits or disadvantages women.* If, on the other hand the difference is not real, then the statute may be invalidated at the behest of any litigant with standing, whether male or female. See Wengler v. Druggists Mutual Insurance, CB 670 n.1.

1. It is a real difference between men and women that women have suffered from a history of wage discrimination. (Califano v. Webster , CB 669 [therefore a discrimination in favor of women is permissible]; Accord: Kahn v. Shevin, CB 639 n.4).
2. It is a real difference between men and women that the mother is necessarily present at the birth of her child. (Nguyen, CB 658 [therefore a discrimination against men is permissible]).
3. It is a real difference between men and women that only women can become pregnant (Geduldig v. Aiello (CB 635 n. 5 [therefore a discrimination against women is permissible])*; Michael M. (657 n. b [therefore a discrimination against men is permissible])).
4. It is not a real difference between men and women that they display differential drinking behavior (Craig v. Boren , CB 637 [therefore a discrimination against men is not permissible]).
5. It is not a real difference between men and women that they would benefit differentially from adversative military training (U.S. v. VA , CB 647 [therefore a discrimination against women is not permissible]).
6. It is a real difference between men and women that only men can serve in combat roles in the military (Rotsker, CB 657 n. 4(a) [therefore a discrimination against men is permissible]). (The Court has not yet decided whether that difference has subsequently become unreal).
7. It is not a real difference between men and women that they would sympathize differentially as between the defendant man and plaintiff woman in a paternity action (J.E.B. v. Alabama, CB 656 [therefore a discrimination against men is impermissible (and a discrimination against women would be as well)]).

E.M.F.

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*As of 2012 four Justices had called for this case to be overruled but had not yet found a fifth vote. Coleman v. Maryland Court of Appeals (CB 636) (dissenting opinion of Ginsburg, J., joined by Breyer, Sotomayor and Kagan, JJ.)

127 S. Ct. 2738, *; 168 L. Ed. 2d 508, **;
2007 U.S. LEXIS 8670, ***; 75 U.S.L.W. 4577

1 of 1 DOCUMENT

PARENTS INVOLVED IN COMMUNITY SCHOOLS, PETITIONER v. SEATTLE SCHOOL DISTRICT NO. 1 ET AL.; CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD, PETITIONER v. JEFFERSON COUNTY BOARD OF EDUCATION ET AL.

Nos. 05-908 and 05-915

SUPREME COURT OF THE UNITED STATES

127 S. Ct. 2738; 168 L. Ed. 2d 508; 2007 U.S. LEXIS 8670; 75 U.S.L.W. 4577; 20 Fla. L. Weekly Fed. S 490

December 4, 2006, Argued
June 28, 2007, Decided

* Together with No. 05-915, Meredith, Custodial Parent and Next Friend of McDonald v. Jefferson County Bd. of Ed et al., on certiorari to the United States Court of Appeals for the Sixth Circuit.

SYLLABUS

Respondent school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and [***2] used the racial classifications as a "tiebreaker" to allocate slots in particular high schools. The Jefferson County, Ky., district was subject to a desegregation decree until 2000, when the District Court dissolved the decree after finding that the district had eliminated the vestiges of prior segregation to the greatest extent practicable. In 2001, the district adopted its plan classifying students as black or "other" in order to make certain elementary school assignments and to rule on transfer requests.

Petitioners, an organization of Seattle parents (Parents Involved) and the mother of a Jefferson County student (Joshua), whose children were or could be assigned under the foregoing plans, filed these suits contending, *inter alia,* that allocating children to different public schools based solely on their race violates the *Fourteenth Amendment's* equal protection guarantee. In the Seattle case, the District Court granted the school district summary judgment, finding, *inter alia,* that its plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth [***3] Circuit affirmed. In the Jefferson County case, the District Court found that the school district had asserted a compelling interest in maintaining racially diverse schools, and that its plan was, in all relevant respects, narrowly tailored to serve that interest. The Sixth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, concluding:

1. The Court has jurisdiction in these cases. Seattle argues that Parents Involved lacks standing because its current members' claimed injuries are not imminent and are too speculative in that, even if the district maintains its current plan and reinstitutes the racial tiebreaker, those members will only be affected if their children seek to enroll in a high school that is oversubscribed and integration positive. This argument is unavailing; the group's members have children in all levels of the district's schools, and the complaint sought declaratory and injunctive relief on behalf of members whose

[***4] elementary and middle school children may be denied admission to the high schools of their choice in the future. The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them does not eliminate the injury claimed. The group also asserted an interest in not being forced to compete in a race-based system that might prejudice its members' children, an actionable form of injury under the *Equal Protection Clause*, see, *e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158*. The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails. See *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610*. Similarly, the fact that Joshua has been granted a transfer does not eliminate the Court's jurisdiction; Jefferson County's [***5] racial guidelines apply at all grade levels and he may again be subject to race-based assignment in middle school. Pp. 9-11.

2. The school districts have not carried their heavy burden of showing that the interest they seek to achieve justifies the extreme means they have chosen -- discriminating among individual students based on race by relying upon racial classifications in making school assignments. Pp. 11-17, 25-28.

(a) Because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove v. Klutznick, 448 U.S. 448, 537, 100 S. Ct. 2758, 65 L. Ed. 2d 902* (STEVENS, J., dissenting), governmental distributions of burdens or benefits based on individual racial classifications are reviewed under strict scrutiny, *e.g., Johnson v. California, 543 U.S. 499, 505-506, 125 S. Ct. 1141, 160 L. Ed. 2d 949*. Thus, the school districts must demonstrate that their use of such classifications is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra, at 227, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158* [***6] .

Although remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test, see *Freeman v. Pitts, 503 U.S. 467, 494, 112 S. Ct. 1430, 118 L. Ed. 2d 108*, that interest is not involved here because the Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree to which the Jefferson County schools were previously subject has been dissolved. Moreover, these cases are not governed by *Grutter v. Bollinger, 539 U.S. 306, 328, 123 S. Ct. 2325, 156 L. Ed. 2d 304*, in which the Court held that, for strict scrutiny purposes, a government interest in student body diversity "in the context of higher education" is compelling. That interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity," *id., at 337, 123 S. Ct. 2325, 156 L. Ed. 2d 304*, including, *e.g.*, having "overcome personal adversity and family hardship," *id., at 338, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. Quoting Justice Powell's articulation of diversity in *Regents of the University of California v. Bakke, 438 U.S. 265, 314-315, 98 S. Ct. 2733, 57 L. Ed. 2d 750* [***7] , the *Grutter* Court noted that "'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,' that can justify the use of race," *539 U.S., at 324-325, 123 S. Ct. 2325, 156 L. Ed. 2d 304*, but "'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,'" *id., at 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. 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," *id., at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. See *Gratz v. Bollinger, 539 U.S. 244, 275, 123 S. Ct. 2411, 156 L. Ed. 2d 257* [***8] . Even as 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. The *Grutter* Court expressly limited its holding -- defining a specific type of broad-based diversity and noting the unique context of higher education -- but these limitations were largely disregarded by the lower courts in extending *Grutter* to the sort of classifications at issue here. Pp. 11-17.

(b) Despite the districts' assertion that they employed individual racial classifications in a way necessary to achieve their stated ends, the minimal effect these classifications have on student assignments suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Similarly, Jefferson County admits that its use of racial classifications has had a minimal effect, and claims only that its guidelines provide a firm definition of the goal of racially integrated schools, thereby providing administrators with authority to collaborate with principals and staff to maintain schools within the desired range. Classifying [***9] and assigning schoolchildren according to a binary conception of race is an extreme approach in light of this Court's

precedents and the Nation's history of using race in public schools, and requires more than such an amorphous end to justify it. In *Grutter*, in contrast, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school there at issue. See *539 U.S., at 320, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. While the Court does not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using such classifications. The districts have also failed to show they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *id., at 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304*, and yet in Seattle several alternative assignment plans -- many of which would not have used express racial classifications -- were rejected with little or no consideration. Jefferson County [***10] has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Pp. 25-28.

THE CHIEF JUSTICE, joined by JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO, concluded for additional reasons in Parts III-B and IV that the plans at issue are unconstitutional under this Court's precedents. Pp. 17-25, 28-41.

1. The Court need not resolve the parties' dispute over whether racial diversity in schools has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits because it is clear that the racial classifications at issue are not narrowly tailored to the asserted goal. In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate. They 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. Whatever those demographics happen to be drives the required "diversity" number in each district. The districts offer no evidence [***11] that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective districts, or rather the districts' white/nonwhite or black/"other" balance, since that is the only diversity addressed by the plans. In *Grutter*, the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body, *539 U.S., at 316, 335-336, 123 S. Ct. 2325, 156 L. Ed. 2d 304*, and the Court concluded that the law school did not count back from its applicant pool to arrive at that number, *id., at 335-336, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. Here, in contrast, the schools worked backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. This is a fatal flaw under the Court's existing precedent. See, *e.g., Freeman, supra, at 494, 112 S. Ct. 1430, 118 L. Ed. 2d 108*. Accepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American [***12] society, contrary to the Court's repeated admonitions that this is unconstitutional. While the school districts use various verbal formulations to describe the interest they seek to promote -- racial diversity, avoidance of racial isolation, racial integration -- they offer no definition suggesting that their interest differs from racial balancing. Pp. 17-25.

2. If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. Government action dividing people by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson, supra, at 493, 109 S. Ct. 706, 102 L. Ed. 2d 854*, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno, 509 U.S. 630, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511*, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict," *Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 603, 110 S. Ct. 2997, 111 L. Ed. 2d 445* [***13] (O'Connor, J., dissenting). When it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873*, the Court held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because the classification and separation themselves denoted inferiority. *Id., at 493-494, 74 S. Ct. 686, 98 L. Ed. 873*. It was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation in that case. *Id., at 494, 74 S. Ct. 686, 98 L. Ed. 873*. The districts here invoke the ultimate goal of those who filed *Brown* and subsequent cases to support their argument, but the argument of the plaintiff in *Brown* was that the *Equal Protection Clause* "prevents states from according differential treatment to American children on the basis of their color or race," and that view prevailed -- this Court ruled in its remedial opinion that *Brown* required school [***14] districts "to achieve a system of determining admission to the public schools *on a nonracial basis*."

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Brown v. Board of Education, 349 U.S. 294, 300-301, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584 (emphasis added). Pp. 28-41.

JUSTICE KENNEDY agreed that the Court has jurisdiction to decide these cases and that respondents' student assignment plans are not narrowly tailored to achieve the compelling goal of diversity properly defined, but concluded that some parts of the plurality opinion imply an unyielding insistence that race cannot be a factor in instances when it may be taken into account. Pp. 1-9.

(a) As part of its burden of proving that racial classifications are narrowly tailored to further compelling interests, the government must establish, in detail, how decisions based on an individual student's race are made in a challenged program. The Jefferson County Board of Education fails to meet this threshold mandate when it concedes it denied Joshua's requested kindergarten transfer on the basis of his race under its guidelines, yet also maintains that the guidelines do not apply to kindergartners. This discrepancy is not some simple [***15] and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. As becomes clearer when the district's plan is further considered, Jefferson County has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. In its briefing it fails to make clear -- even in the limited respects implicated by Joshua's initial assignment and transfer denial -- whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and *ad hoc* manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the government. In the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions based on individual racial classifications, but it has nevertheless failed to explain why, in a district composed of a diversity of races, with only a minority of the students classified as "white," it has employed the [***16] crude racial categories of "white" and "non-white" as the basis for its assignment decisions. Far from being narrowly tailored, this system threatens to defeat its own ends, and the district has provided no convincing explanation for its design. Pp. 2-6.

(b) The plurality opinion is too dismissive of government's legitimate interest in ensuring that all people have equal opportunity regardless of their race. In administering public schools, it is permissible to consider the schools' racial makeup and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. School authorities concerned that their student bodies' racial compositions interfere with offering an equal educational opportunity to all are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion based solely on a systematic, individual typing by race. Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating [***17] resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Each respondent has failed to provide the necessary support for the proposition that there is no other way than individual racial classifications to avoid racial isolation in their school districts. Cf. *Richmond v. J. A. Croson Co., 488 U.S. 469, 501, 109 S. Ct. 706, 102 L. Ed. 2d 854*. In these cases, the fact that the number of students whose assignment depends on express racial classifications is small suggests that the schools could have achieved their stated ends through different means, including the facially race-neutral means set forth above or, if necessary, 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 the criteria relevant to student placement would differ based on the students' age, the parents' needs, and the schools' role. Pp. 6-9.

JUDGES: ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III-B and IV, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

OPINION BY: ROBERTS

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OPINION

[*2746] [**517] *CHIEF JUSTICE ROBERTS* announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which JUSTICES SCALIA, THOMAS, and [***19] ALITO join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the *Fourteenth Amendment* guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same [***20] underlying legal question -- 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.

[***34] II

As a threshold matter, we must assure ourselves of our jurisdiction. Seattle argues that Parents Involved lacks standing because none of its current members can claim an imminent injury. Even if the district maintains the current plan and reinstitutes the racial tiebreaker, Seattle argues, Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive -- too speculative a [*2751] harm to maintain standing. Brief for Respondents in No. 05-908, pp. 16-17.

This argument is unavailing. The group's members have children in the district's elementary, middle, and high schools, App. in No. 05-908, at 299a-301a; Affidavit of Kathleen Brose Pursuant to this Court's *Rule 32.3* (Lodging of Petitioner Parents Involved), and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future," App. in No. 05-908, at 30a. The fact that it is possible that children of group members will not be denied admission to [***35] a school based on their race -- because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage -- does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Ibid.* As we have held; [HN2] one form of injury under the *Equal Protection Clause* is being forced to compete in a race-based system that may prejudice the plaintiff, *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)*; *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)*, an injury that the members of Parents Involved can validly claim on behalf of their children.

In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05-908, at 16-17. But the district vigorously defends the constitutionality [***36] of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. [HN3] Voluntary cessation does not moot a case or controversy unless "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (quoting *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)* (internal quotation marks omitted)), a heavy burden that Seattle has clearly not met.

Jefferson County does not challenge our jurisdiction, Tr. of Oral Arg. in No. 05-915, p. 48, but we are nonetheless obliged to ensure that it exists, *Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*.

Although apparently Joshua has now been granted a transfer to Bloom, the school to which [**523] transfer was denied under the racial guidelines, Tr. of Oral Arg. in No. 05-915, at 45, the racial guidelines apply at all grade [***37] levels. Upon Joshua's enrollment in middle school, he may again be subject to assignment based on his race. In addition, Meredith sought damages in her complaint, which is sufficient to preserve our ability to consider the question. *Los Angeles v. Lyons, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983).*

III

A

[HN4] 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. *Johnson v. California, 543 U.S. 499, 505-506, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005)*; *Grutter v. Bollinger,* [*2752] *539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)*; *Adarand, supra, at 224, 115 S. Ct. 2097, 132 L. Ed. 2d 158.* As the Court recently reaffirmed, "'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz v. Bollinger, 539 U.S. 244, 270, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)* (quoting [***38] *Fullilove v. Klutznick, 448 U.S. 448, 537, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)* (STEVENS, J., dissenting); brackets omitted). 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. *Adarand, supra, at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158.*

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that [HN5] our 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. See *Freeman v. Pitts, 503 U.S. 467, 494, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).* 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 [***39] 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. *Hampton, 102 F. Supp. 2d, at 360.* 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. See Tr. of Oral Arg. in No. 05-915, at 38.

Nor could it. We have emphasized that [HN6] the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that "the Constitution is not violated by racial imbalance in the schools, without more." *Milliken v. Bradley, 433 U.S. 267, 280, n. 14, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977).* See also *Freeman, supra, at 495-496, 112 S. Ct. 1430, 118 L. Ed. 2d 108*; *Dowell, 498 U.S., at 248, 111 S. Ct. 630, 112 L. Ed. 2d 715*; [***40] *Milliken v. Bradley, 418 U.S. 717, 746, 94 S. Ct. 3112, 41 L.* [**524] *Ed. 2d 1069 (1974).* Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

[***41] [*2753] [HN7] 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, 539 U.S., at 328, 123 S. Ct. 2325, 156 L. Ed. 2d 304.* The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." *Ibid.* The diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." *Id., at 337, 123 S. Ct. 2325, 156 L. Ed. 2d 304.* We described the various types of diversity that the law school sought:

> "[The law school's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Id., at 338, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (brackets and internal quotation marks omitted).

The Court quoted the articulation of diversity from Justice Powell's [***42] opinion in *Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)*, noting that [HN8] "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race." *Grutter, supra, at 324-325, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (citing and quoting *Bakke, supra, at 314-315, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.); brackets and internal quotation marks omitted). Instead, what was upheld in *Grutter* was consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *539 U.S., at 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (quoting *Bakke, supra, at 315, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.); internal quotation marks omitted).

The entire gist of the analysis in *Grutter* was that the admissions program [**525] at issue there focused on each applicant as an individual, and not simply as a member of a particular [***43] racial group. The classification of applicants by race upheld in *Grutter* was only as part of a "highly individualized, holistic review," *539 U.S., at 337, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. As the Court explained, "the importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Ibid.* The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional." *Id., at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304*.

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," *ibid.*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with [***44] others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz, 539 U.S., at 275, 123 S. Ct. 2411, 156 L. Ed. 2d 257*, the plans here "do not [*2754] provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way. *Id., at 276, 280, 123 S. Ct. 2411, 156 L. Ed. 2d 257* (O'Connor, J., concurring).

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 see *Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 610, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990)* ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals") (O'Connor, J., dissenting). The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "providing students the opportunity to attend schools with diverse student [***45] enrollment," App. in No. 05-908, at 128a, 129a. 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,'" *Grutter, supra, at 329, 123 S. Ct. 2325, 156 L. Ed. 2d 304*.

> In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with [***47] the university environment, universities occupy a special niche in our constitutional tradition." *539 U.S., at 329, 334, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. See also *Bakke, supra, at 312, 313, 98 S. Ct. 2733, 57 L. E. 2d 750* (opinion of Powell, J.). The Court explained that "context matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." *Grutter, supra, at 327, 328, 334, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. The Court in *Grutter* expressly articulated key limitations on its holding -- defining a specific type of broad-based diversity and noting the unique context of higher education -- but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.
>
> [*2755] B
>
> Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter*, to justify their race-based assignments. In briefing and

argument before this [***48] Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Brief for Respondents in No. 05-908, at 19. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." App. in No. 05-915, at 22. Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity -- not the broader diversity at issue in *Grutter* -- it makes sense to promote that interest directly by relying on race alone.

[***49] [**527] The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

[***54] In *Grutter*, the number of minority [**529] students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body. *539 U.S., at 316, 335-336, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. Although the matter was the subject of disagreement on the Court, see *id., at 346-347, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (SCALIA, J., concurring in part and dissenting in part); *id., at 382-383, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (Rehnquist, C. J., dissenting); *id., at 388-392, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (KENNEDY, J., dissenting), the majority concluded that the law school did not count back from its applicant pool to arrive at the "meaningful number" it regarded as necessary to diversify its student body. *Id., at 335-336, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides [***55] the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that [HN9] "racial balance is not to be achieved for its own sake." *Freeman, 503 U.S., at 494, 112 S. Ct. 1430, 118 L. Ed. 2d 108*. See also *Richmond v. J. A. Croson Co., 488 U.S. 469, 507, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)*; *Bakke, 438 U.S., at 307, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid"). *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional." *539 U.S., at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304*.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that [HN10] "at 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 [***56] components of a racial, religious, sexual or national class." *Miller v. Johnson, 515 U.S. 900, 911, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)* (quoting *Metro Broadcasting, 497 U.S., at 602, 110 S. Ct. 2997, 111 L. Ed. 2d 445* (O'Connor, J., dissenting); internal quotation [*2758] marks omitted). Allowing 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 decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson, supra, at 495, 109 S. Ct. 706, 102 L. Ed. 2d 854* (plurality opinion of O'Connor, J.) (quoting *Wygant v. Jackson Bd. of* [**530] *Ed., 476 U.S. 267, 320, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986)* (STEVENS, J., dissenting), in turn quoting *Fullilove, 448 U.S., at 547, 100 S. Ct. 2758, 65 L. Ed. 2d 902* (STEVENS, J., dissenting); brackets and citation omitted). An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed [***57] first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting, supra, at 614, 110 S. Ct. 2997, 111 L. Ed 2d 445* (O'Connor, J., dissenting).

The Ninth Circuit below stated that it "shared in the hope" expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case. *Parents Involved VII, 426 F.3d at 1192*. But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal [***59]

discrimination does not justify race-conscious government action. See, *e.g., Shaw v. Hunt, 517 U.S. 899, 909-910, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996)* ("An effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson, supra, at 498-499, 109 S. Ct. 706, 102 L. Ed. 2d 854*; *Wygant, 476 U.S., at 276, 106 S. Ct. 1842, 90 L. Ed. 2d 260* (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id., at 288, 106 S. Ct. 1842, 90 L. Ed. 2d 260* (O'Connor, J., concurring in part and concurring in judgment) ("[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").

C

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," [***66] *Grutter, supra, at 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304*, and yet in Seattle several alternative assignment plans -- many of which would not have used express racial classifications -- were rejected with little or no consideration. See, *e.g.*, App. in No. 05-908, at 224a-225a, 253a-259a, 307a. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Brief for Respondents in No. 05-915, at 8-9. Compare [**533] *Croson, 488 U.S., at 519, 109 S. Ct. 706, 102 L. Ed. 2d 854* (KENNEDY, J., concurring in part [*2761] and concurring in judgment) (racial classifications permitted only "as a last resort").

IV

JUSTICE BREYER's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences [***67] of today's decision.

To begin with, JUSTICE BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. See *post*, at 18-24. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. See, *e.g., Milliken, 433 U.S., at 280, n. 14, 97 S. Ct. 2749, 53 L. Ed. 2d 745*; *Freeman, 503 U.S., at 495-496, 112 S. Ct. 1430, 118 L. Ed. 2d 108* ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications"). The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation, *post*, at 5, 18, 23, and fails to credit the judicial determination -- under the most rigorous standard -- that Jefferson County had eliminated the vestiges of prior segregation.

[***74] [*2763] JUSTICE BREYER's dissent next looks for authority to a footnote in *Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 472, n. 15, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982)*, *post*, at 56-57, but there this Court expressly noted that it was *not* passing on the propriety of race-conscious student assignments in the absence of a finding of *de jure* segregation. Similarly, the citation of *Crawford v. Board of Ed. of Los Angeles, 458 U.S. 527, 102 S. Ct. 3211, 73 L. Ed. 2d 948 (1982)*, *post*, at 24, in which a state referendum prohibiting a race-based assignment plan was challenged, is inapposite -- in *Crawford* the Court again expressly reserved the question presented by these cases. *458 U.S., at 535, n. 11, 102 S. Ct. 3211, 73 L. Ed. 2d 948*. Such reservations and preliminary analyses of course did not decide the merits of this question -- as evidenced [**536] by the disagreement among the lower courts on this issue. Compare *Eisenberg, 197 F.3d at 133*, with [***75] *Comfort, 418 F.3d at 13*.

JUSTICE BREYER's dissent also asserts that these cases are controlled by *Grutter*, claiming that the existence of a compelling interest in these cases "follows *a fortiori*" from *Grutter*, *post*, at 41, 64-66, and accusing us of tacitly overruling that case, see *post*, at 64-66. The dissent overreads *Grutter*, however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be "patently unconstitutional," *539 U.S., at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. The Court was exceedingly careful in describing the interest furthered in *Grutter* as "not an interest in simple ethnic diversity" but rather a "far broader array of qualifications and characteristics" in which race was but a single element. *539 U.S., at 324-325, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (internal [*2764] quotation marks omitted). We take the *Grutter* Court at its

word. We simply do not understand how JUSTICE BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a [***76] determinative factor in assigning children to achieve pure racial balance, can be regarded as "less burdensome, and hence more narrowly tailored" than the consideration of race in *Grutter*, *post*, at 47, when the Court in *Grutter* stated that "the importance of . . . individualized consideration" in the program was "paramount," and consideration of race was one factor in a "highly individualized, holistic review." *539 U.S., at 337, 123 S. Ct. 2325, 156 L. Ed. 2d 304*. Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter*. In light of the foregoing, JUSTICE BREYER's appeal to *stare decisis* rings particularly hollow. See *post*, at 65-66.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, JUSTICE BREYER's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, see *post*, at 31-33, 35-36, arguing that a different standard [***77] of review should be applied because the districts use race for beneficent rather than malicious purposes, see *post*, at 31-36.

This Court has recently reiterated, however, that "'*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.'" *Johnson, 543 U.S., at 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949* (quoting *Adarand, 515 U.S., at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158*; emphasis added by *Johnson* Court). See also *Grutter, supra, at 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304* ("Governmental action based on race -- a group classification long recognized as in most circumstances irrelevant and therefore prohibited -- should be subjected to detailed judicial inquiry" (internal quotation marks and emphasis omitted)). JUSTICE BREYER nonetheless relies on the good intentions and motives [**537] of the school districts, stating that he has found "no case that . . . repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." *Post*, at 29 (emphasis in original). [***78] We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis. See *Johnson, supra, at 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949* ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand, 515 U.S., at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158* (rejecting idea that "'benign'" racial classifications may be held to "different standard"); *Croson, 488 U.S., at 500, 109 S. Ct. 76, 102 L. Ed. 2d 854* ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice").

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, *e.g.*, *Gratz, 539 U.S., at 282, 123 S. Ct. 2411, 156 L. Ed. 2d 257* (BREYER, J., concurring in judgment); *id., at 301, 123 S. Ct. 2411, 156 L. Ed. 2d 257* (GINSBURG, J., dissenting); [***79] *Adarand, supra, at 243, 115 S. Ct. 2097, 132 L. Ed. 2d 158* (STEVENS, J., dissenting); *Wygant, 476 U.S., at 316-317, 106 S. Ct. 1842, 90 L. Ed. 2d 260* (STEVENS, J., dissenting), and has been repeatedly rejected. See also *Bakke, 438 U.S., at 289-291, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating "racial and ethnic distinctions of any sort are inherently [*2765] suspect and thus call for the most exacting judicial examination").

The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility . . . . 'Benign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." [***80] *Metro Broadcasting, 497 U.S., at 609-610, 110 S. Ct. 2997, 111 L. Ed. 2d 445* (O'Connor, J., dissenting). See also *Adarand, supra, at 226, 115 S. Ct. 2097, 132 L. Ed. 2d 158* ("'It may not always be clear that a so-called preference is in fact benign'" (quoting *Bakke, supra, at 298, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.))). Accepting JUSTICE BREYER's approach would "do no more than move us from 'separate but equal' to 'unequal but benign.'" *Metro Broadcasting, supra, at 638, 110 S. Ct. 2997, 111 L. Ed. 2d 445* (KENNEDY, J., dissenting).

JUSTICE BREYER speaks of bringing "the races" together (putting aside the purely black-and-white nature of the plans), as the justification for excluding individuals on the basis of their race. See *post*, at 28-29. Again, this approach to racial classifications is fundamentally at odds with our precedent, which makes clear that the *Equal Protection Clause* "protects *persons*, not *groups*," [***81] *Adarand, 515 U.S., at 227, 110 S. Ct. 2997, 111 L. Ed. 2d 445* (emphasis in original). See *ibid.* ("All governmental action based on race -- a *group* classification [**538] long recognized as 'in

most circumstances irrelevant and therefore prohibited,' *Hirabayashi [v. United States, 320 U.S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943)]* -- should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" (first emphasis in original); *Metro Broadcasting, supra, at 636, 110 S. Ct. 2997, 111 L. Ed. 2d 445* ("Our Constitution protects each citizen as an individual, not as a member of a group" (KENNEDY, J., dissenting)); *Bakke, supra, at 289, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.) (*Fourteenth Amendment* creates rights "guaranteed to the individual. The rights established are personal rights"). This fundamental principle goes back, in this context, to *Brown* itself. See [***82] *Brown v. Board of Education, 349 U.S. 294, 300, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584 (1955)* (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis" (emphasis added)). For the dissent, in contrast, "'individualized scrutiny' is simply beside the point." *Post*, at 55.

JUSTICE BREYER's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,'" *post*, at 67, but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends *and* as to means." *Adarand, supra, at 236, 110 S. Ct. 2997, 111 L. Ed. 2d 445* (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a "standard of review that is not 'strict' in the [***83] traditional sense of that word," *post*, at 36, JUSTICE BREYER still purports to apply strict scrutiny to these cases. See *post*, at 37. It is evident, however, that JUSTICE BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. [*2766] Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals.

[***84] In keeping with his view that strict scrutiny should not apply, JUSTICE BREYER repeatedly urges deference to local school boards on these issues. See, *e.g.*, *post*, at 21, 48-49, 66. Such deference "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson, 543 U.S., at 506, n. 1, 125 S. Ct 1141, 160 L. Ed.* See *Croson, 488 U.S., at 501, 109 S. Ct. 706, 102 L. Ed. 2d 854* ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"); *West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 637, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)* ("The *Fourteenth Amendment* . . . protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted").

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand, 515 U.S., at 214, 115 S. Ct. 2097, 132 L. Ed. 2d 158* (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson, supra, at 493, 109 S. Ct. 706, 102 L. Ed. 2d 854*, "reinforce the belief, [**540] held by too many for too much of our history, that individuals should be judged by the color of their skin," [***87] *Shaw v. Reno, 509 U.S. 630, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993)*, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting, 497 U.S., at 603, 110 S. Ct. 2997, 111 L. Ed. 2d 445* (O'Connor, J., dissenting). As the Court explained in *Rice v. Cayetano, 528 U.S. 495, 517, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000)*, "one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

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," *Brown II, 349 U.S., at 300-301, 75 S. Ct. 753, 99 L. Ed. 1083*, 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.

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The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

CONCUR BY: THOMAS

III

Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. See *post*, at 29. The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. [9] See *ibid.*; see also *post*, at 61. 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." *Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896)* (dissenting opinion). And my view was the rallying cry for the lawyers who litigated *Brown*. See, *e.g.*, Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1953, Nos. 1, 2, and 4 p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The *Fourteenth Amendment* precludes a state from imposing distinctions or classifications based upon race and color alone"); [10] see also [***134] In Memoriam: Honorable Thurgood Marshall, Proceedings [*2783] of the Bar and Officers of the Supreme Court of the United States, X (1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' [**557] would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson, 163 U.S. 537, 552, 16 S. Ct. 1138, 41 L. Ed. 256 (1896)*. I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days . . . ").

> 19 The dissent half-heartedly attacks the historical underpinnings of the color-blind Constitution. *Post*, at 28-29. I have no quarrel with the proposition that the *Fourteenth Amendment* sought to bring former slaves into American society as full members. *Post*, at 28 (citing *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 71-72, 21 L. Ed. 394 (1873))*. What the dissent fails to understand, however, is that the color-blind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination -- indeed, it requires that such measures be taken in certain circumstances. See, *e.g.*, Part I-B, *supra*. Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the color-blind Constitution.

The dissent appears to pin its interpretation of the *Equal Protection Clause* to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance [***136] on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy*, where the Court asked whether a state law providing for segregated railway cars was "a reasonable regulation." *163 U.S., at 550, 16 S. Ct. 1138, 41 L. Ed. 256*. The Court deferred to local authorities in making its determination, noting that in inquiring into reasonableness "there must necessarily be a large discretion on the part of the legislature." *Ibid.* The Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to "the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Ibid.* Guided by these principles, the Court concluded: "We cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the *Fourteenth Amendment* than the acts of Congress requiring separate schools for colored children in the District of Columbia." [***137] *Id., at 550-551, 16 S. Ct. 1138, 41 L. Ed. 256*.

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 "each plan embodies the results of local experience and community consultation." *Post*, at 47. Similarly, the segregationists made repeated appeals to societal practice and expectation.

[***143] The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too

theoretical a view of the *Fourteenth Amendment.* [25] And just as [*2786] the dissent argues that the need for these programs will lessen over time, the segregationists claimed that reliance [**560] on segregation was lessening and might eventually end. [26]

25 Compare Brief for Appellees in *Davis* v. *County School Board*, O. T. 1952, No. 3, p. 16-17 ("'It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered'" (quoting *Railway Express Agency, Inc. v. New York, 336 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949)*)); Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 3, p. 76 ("The question is a practical one for them to solve; it is not subject to solution in the theoretical realm of abstract principles"); Tr. of Oral Arg. in *Davis* v. *County School Board*, O. T. 1953, No. 4, p. 86 ("You cannot talk about this problem just in a vacuum in the manner of a law school discussion"), with *post*, at 57 ("The Founders meant the Constitution as a practical document").

[***144]

26 Compare Brief for Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 57 ("The people of Kansas . . . are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible"), Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 3, p. 76 ("As time passes, it may well be that segregation will end"), with *post*, at 19 ("They use race-conscious criteria in limited and gradually diminishing ways"); *post*, at 48 ("Each plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans"); *post*, at 55 (describing the "historically-diminishing use of race" in the school districts).

What was wrong in 1954 cannot be right today. [27]

27 It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. See *post*, at 62. How does one tell when a racial classification is invidious? The segregationists in *Brown* argued that their racial classifications were benign, not invidious. See Tr. of Oral Arg. in *Briggs* v. *Elliott*, O. T. 1953, No. 2, p. 83 ("It [South Carolina] is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"); Brief for Appellees on Reargument in *Davis* v. *County School Board*, O. T. 1953, No. 3, p. 82-83 ("Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races"); Tr. of Oral Arg. in *Davis* v. *County School Board*, O. T. 1952, No. 3, p. 71 ("To make such a transition, would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep"). It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.

[***146]

[***147] Indeed, if our [***148] history has taught us anything, it has taught us to beware of elites bearing racial theories. [30] See, *e.g.*, *Dred Scott v. Sandford, 60 U.S. 393, 19 How.* [*2788] *393, 407, 15 L. Ed. 691 (1857)* ("They [members of the "negro African race"] had no rights which the white man was bound to respect").

30 JUSTICE BREYER's good intentions, which I do not doubt, have the shelf life of JUSTICE BREYER's tenure. Unlike the dissenters, I am unwilling to delegate my constitutional responsibilities to local school boards and allow them to experiment with race-based decisionmaking on the assumption that their intentions will forever remain as good as JUSTICE BREYER's. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) ("If men were angels, no government would be necessary").

[***150] * * *

The plans before us base school assignment decisions on students' race. Because "our Constitution is color-blind, and neither knows nor tolerates classes among citizens," such race-based decisionmaking is unconstitutional. *Plessy, supra, at 559, 16 S. Ct. 1138, 41 L. Ed. 256* (Harlan, J., dissenting). I concur in THE CHIEF JUSTICE's opinion so holding.

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

I

The opinion of the Court and JUSTICE BREYER's dissenting opinion (hereinafter [*2789] dissent) describe in detail the history of integration efforts [***152] in Louisville and Seattle. These plans classify individuals by race and allocate benefits [**563] and burdens on that basis; and as a result, they are to be subjected to strict scrutiny. See *Johnson v. California, 543 U.S. 499, 505-506, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005)*; *ante*, at 11. The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. See *post*, at 37-45. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. See *ante*, at 17-25. For this reason, among others, I do not join Parts III-B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality [***160] on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. 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 "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante*, at 40-41, is not sufficient [**566] to decide these cases. Fifty years of experience since [***161] *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)*, 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.

The statement by Justice Harlan that "our Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy v. Ferguson, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256* [*2792] *(1896)*. The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. [***162] In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

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. Cf. *Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)*; *id., at 387-388, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (KENNEDY, J., dissenting). 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; [***163] 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. See *Bush v. Vera, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996)* (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . . Electoral district lines are 'facially race neutral' so a more

searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race'" (quoting *Adarand, 515 U.S., at 213, 115 S. Ct. 2097, 132 L. Ed. 2d 158*)). Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor [**567] and with confidence that a constitutional violation does not occur [***164] 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.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition. Cf. *Croson, 488 U.S., at 501, 109 S. Ct. 706, 102 L. Ed. 2d 854* ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest. See *id., at 519, 109 S. Ct. 706, 102 L. Ed. 2d 854* (KENNEDY, J., concurring in part and concurring in judgment).

III

B

To uphold these programs the Court is asked to brush aside two concepts of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting from race discrimination. The first is the difference between *de jure* and *de facto* segregation; the second, the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals.

Where there has been *de jure* segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. The remedy, though, was limited in time and limited to the wrong. The Court has allowed school districts to remedy their prior *de jure* segregation by classifying individual students based on their race. See *North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 45-46, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971)*. The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.

The cases here were argued upon the assumption, and come to [***177] us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here.

C

* * *

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student [***180] on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors -- some influenced by government, some not -- neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other

concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial [***181] classifications.

With this explanation I concur in the judgment of the Court.

JUSTICE STEVENS, dissenting.

While I join JUSTICE BREYER's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in *Brown v. Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584 (1955)*. The first sentence in the concluding paragraph of his opinion states: "Before [*2798] *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." *Ante*, at 40. This sentence reminds me of Anatole France's observation: "The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, [**573] and to steal their bread." [1] 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. [***182] [2] In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions.

1 Le Lys Rouge (The Red Lily) 95 (W. Stephens transl. 6th ed. 1922).

2 See, *e.g.*, J. Wilkinson, From *Brown* to *Bakke* 11 (1979) ("Everyone understands that *Brown* v. *Board of Education* helped deliver the Negro from over three centuries of legal bondage"); Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424-425 ("History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way -- an incontrovertible fact which itself hardly consorts with equality").

[***183] THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude. [3] The only justification for refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions -- none of which even approached unanimity -- grandly proclaiming that all racial classifications must be analyzed under "strict scrutiny." See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)*. The Court's misuse of the three-tiered approach to Equal Protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution. See [***184] *Craig v. Boren, 429 U.S. 190, 211, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)* (concurring opinion).

3 I have long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason. See, *e.g.*, *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243, 248, n. 6, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)* (STEVENS, J., dissenting); *Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 316, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986)* (same). This distinction is critically important in the context of education. While the focus of our opinions is often on the benefits that minority schoolchildren receive from an integrated education, see, *e.g.*, *ante*, at 15 (THOMAS, J., concurring), children of *all* races benefit from integrated classrooms and playgrounds, see *Wygant, 476 U.S., at 316, 106 S. Ct. 1842, 90 L. Ed. 2d 260* ("The fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it").

[***185]

[***186] [*2799] [**574] If we look at cases decided during the interim between *Brown* and *Adarand*, we can see how a rigid adherence to tiers of scrutiny obscures *Brown*'s clear message.

It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.

127 S. Ct. 2738, *; 168 L. Ed. 2d 508, **;
2007 U.S. LEXIS 8670, ***; 75 U.S.L.W. 4577

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

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)*, long ago promised -- efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race-conscious than the plans before us. And we have understood [***190] that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality. [*2801] This cannot be justified in the name of the *Equal Protection Clause*.

[**576] I

The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

I describe those histories at length in order to highlight three important features of these cases. First, the school districts' plans serve "compelling interests" and are "narrowly tailored" on any reasonable definition of those terms. Second, the distinction [***195] between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.*, by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.

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 district court found that school segregation reflected pre-*Brown* state laws separating the races. In Seattle, the plaintiffs alleged that school segregation unconstitutionally reflected not only generalized societal discrimination and residential housing patterns, but also *school board policies and actions* that had helped to create, maintain, and aggravate racial segregation. In [***196] 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 [**578] in ways that progressively *diminish* the plans' use of explicit race-conscious criteria.

The histories that follow set forth these basic facts. They are based upon numerous sources, which for ease of exposition I have cataloged, along with their corresponding citations, at Appendix B, *infra*.

A

Seattle

1. Segregation, 1945 to 1956. During and just after World War II, significant [*2803] numbers of black Americans began to make Seattle their home. Few black residents lived outside the central section of the city. Most worked at unskilled jobs. Although black students made up about 3% of the total Seattle population in the [***197] mid-1950's,

nearly all black children attended schools where a majority of the population was minority. Elementary schools in central Seattle were between 60% and 80% black; Garfield, the central district high school, was more than 50% minority; schools outside the central and southeastern sections of Seattle were virtually all white.

2. Preliminary Challenges, 1956 to 1969. In 1956, a memo for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to transfer out of black schools while restricting the transfer of black students into white schools. In 1958, black parents whose children attended Harrison Elementary School (with a black student population of over 75%) wrote the Seattle board, complaining that the "'boundaries for the Harrison Elementary School were not set in accordance with the long-established standards of the School District . . . but were arbitrarily set with an end to excluding colored children from McGilvra School, which is adjacent to the Harrison school district.'"

In 1963, at the insistence of the National Association for the Advancement of Colored [***198] People (NAACP) and other community groups, the school board adopted a new race-based transfer policy. The new policy added an explicitly racial criterion: If a place exists in a school, then, irrespective of other transfer criteria, a white student may transfer to a predominantly black school, and a black student may transfer to a predominantly white school.

At that time one high school, Garfield, was about two-thirds minority; eight high schools were virtually all white. In 1963, the transfer program's first year, 239 black students and 8 white students transferred. In 1969, about 2,200 (of 10,383 total) of the district's black students and about 400 of the district's white students took advantage of the plan. For the next decade, annual program transfers remained at approximately this level.

3. The NAACP's First Legal Challenge and Seattle's Response, 1969 to 1977. In 1969 the NAACP filed a federal lawsuit against the school board, claiming that the board had "unlawfully and unconstitutionally" "established" and "maintained" a system of "racially segregated public schools." The complaint said that 77% of black public elementary school students in Seattle attended 9 of the [***199] city's 86 elementary schools and that 23 of the remaining schools had no black students at all. Similarly, of the 1,461 black students enrolled in the [**579] 12 senior high schools in Seattle, 1,151 (or 78.8%) attended 3 senior high schools, and 900 (61.6%) attended a single school, Garfield.

The complaint charged that the school board had brought about this segregated system in part by "making and enforcing" certain "rules and regulations," in part by "drawing . . . boundary lines" and "executing school attendance policies" that would create and maintain "predominantly Negro or non-white schools," and in part by building schools "in such a manner as to restrict the Negro plaintiffs and the class they represent to predominantly negro or non-white schools." The complaint also charged that the board discriminated in assigning teachers.

The board responded to the lawsuit by introducing a plan that required race-based transfers and mandatory busing. The plan created three new middle schools [*2804] at three school buildings in the predominantly white north end. It then created a "mixed" student body by assigning to those schools students who would otherwise attend predominantly white, [***200] or predominantly black, schools elsewhere. It used explicitly racial criteria in making these assignments (*i.e.*, it deliberately assigned to the new middle schools black students, not white students, from the black schools and white students, not black students, from the white schools). And it used busing to transport the students to their new assignments. The plan provoked considerable local opposition. Opponents brought a lawsuit. But eventually a state court found that the mandatory busing was lawful.

In 1976-1977, the plan involved the busing of about 500 middle school students (300 black students and 200 white students). Another 1,200 black students and 400 white students participated in the previously adopted voluntary transfer program. Thus about 2,000 students out of a total district population of about 60,000 students were involved in one or the other transfer program. At that time, about 20% or 12,000 of the district's students were black. And the board continued to describe 26 of its 112 schools as "segregated."

4. The NAACP's Second Legal Challenge, 1977. In 1977, the NAACP filed another legal complaint, this time with the federal Department of Health, Education, [***201] and Welfare's Office for Civil Rights (OCR). The complaint alleged that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e.g.*, certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts.

The OCR and the school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the "Seattle Plan."

5. The Seattle Plan: Mandatory Busing, 1978 to 1988. The board began to implement the Seattle Plan in 1978. This plan labeled "racially imbalanced" any school at which the percentage of black students exceeded by more than 20% the minority population of the school district as a whole. It applied that label to 26 schools, including 4 high schools -- Cleveland [**580] (72.8% minority), Franklin (76.6% minority), Garfield (78.4% minority), and Rainier Beach (58.9% minority). The [***202] plan paired (or "triaded") "imbalanced" black schools with "imbalanced" white schools. It then placed some grades (say, third and fourth grades) at one school building and other grades (say, fifth and sixth grades) at the other school building. And it thereby required, for example, all fourth grade students from the previously black and previously white schools first to attend together what would now be a "mixed" fourth grade at one of the school buildings and then the next year to attend what would now be a "mixed" fifth grade at the other school building.

At the same time, the plan provided that a previous "black" school would remain about 50% black, while a previous "white" school would remain about two-thirds white. It was consequently necessary to decide with some care *which* students would attend the new "mixed" grade. For this purpose, administrators cataloged the racial makeup of each neighborhood housing block. The school district met its percentage goals by assigning to the new [*2805] "mixed" school an appropriate number of "black" housing blocks and "white" housing blocks. At the same time, transport from house to school involved extensive busing, with about half of all students [***203] attending a school other than the one closest to their home.

The Seattle Plan achieved the school integration that it sought. Just prior to the plan's implementation, for example, 4 of Seattle's 11 high schools were "imbalanced," *i.e.*, almost exclusively "black" or almost exclusively "white." By 1979, only two were out of "balance." By 1980 only Cleveland remained out of "balance" (as the board defined it) and that by a mere two students.

Nonetheless, the Seattle Plan, due to its busing, provoked serious opposition within the State. See generally *Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 461-466, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982)*. Thus, Washington state voters enacted an initiative that amended state law to require students to be assigned to the schools closest to their homes. *Id., at 462, 102 S. Ct. 3187, 73 L. Ed. 2d 896*. The Seattle School Board challenged the constitutionality of the initiative. *Id., at 464, 102 S. Ct. 3187, 73 L. Ed. 2d 896*. This Court then held that the initiative -- which would have prevented the Seattle Plan from taking effect -- violated the *Fourteenth Amendment* [***204] . *Id., at 470, 102 S. Ct. 3187, 73 L. Ed. 2d 896*.

6. Student Choice, 1988 to 1998. By 1988, many white families had left the school district, and many Asian families had moved in. The public school population had fallen from about 100,000 to less than 50,000. The racial makeup of the school population amounted to 43% white, 24% black, and 23% Asian or Pacific Islander, with Hispanics and Native Americans making up the rest. The cost of busing, the harm that members of all racial communities feared that the Seattle Plan caused, the desire to attract white families back to the public schools, and the interest in providing greater school choice led the board to abandon busing and to substitute a new student assignment policy that resembles the plan now before us.

The new plan permitted each student to choose the school he or she wished to attend, subject to race-based constraints. In respect to high [**581] schools, for example, a student was given a list of a subset of schools, carefully selected by the board to balance racial distribution in the district by including neighborhood schools and schools in racially different neighborhoods elsewhere in the city. [***205] The student could then choose among those schools, indicating a first choice, and other choices the student found acceptable. In making an assignment to a particular high school, the district would give first preference to a student with a sibling already at the school. It gave second preference to a student whose race differed from a race that was "over-represented" at the school (*i.e.*, a race that accounted for a higher percentage of the school population than of the total district population). It gave third preference to students residing in the neighborhood. It gave fourth preference to students who received child care in the neighborhood. In a typical year, say, 1995, about 20,000 potential high school students participated. About 68% received their first choice. Another 16% received an "acceptable" choice. A further 16% were assigned to a school they had not listed.

7. The Current Plan, 1999 to the Present. In 1996, the school board adopted the present plan, which began in 1999. In doing so, it sought to deemphasize the use of racial criteria and to increase the likelihood that a student would receive

an assignment at his first or second choice high school. The district [***206] retained a racial tiebreaker [*2806] for oversubscribed schools, which takes effect only if the school's minority or majority enrollment falls outside of a 30% range centered on the minority/majority population ratio within the district. At the same time, all students were free subsequently to transfer from the school at which they were initially placed to a different school of their choice without regard to race. Thus, at worst, a student would have to spend one year at a high school he did not pick as a first or second choice.

The new plan worked roughly as expected for the two school years during which it was in effect (1999-2000 and 2000-2001). In the 2000-2001 school year, for example, with the racial tiebreaker, the entering ninth grade class at Franklin High School had a 60% minority population; without the racial tiebreaker that same class at Franklin would have had an almost 80% minority population. (We consider only the ninth grade since only students entering that class were subject to the tiebreaker, and because the plan was not in place long enough to change the composition of an entire school.) In the year 2005-2006, by which time the racial tiebreaker had not been used for [***207] several years, Franklin's overall minority enrollment had risen to 90%. During the period the tiebreaker applied, it typically affected about 300 students per year. Between 80% and 90% of all students received their first choice assignment; between 89% and 97% received their first or second choice assignment.

Petitioner Parents Involved in Community Schools objected to Seattle's most recent plan under the State and Federal Constitutions. In due course, the Washington Supreme Court, the Federal District Court, and the Court of Appeals for the Ninth Circuit (sitting en banc) rejected the challenge and found Seattle's plan lawful.

[**582] B

Louisville

1. Before the Lawsuit, 1954 to 1972. In 1956, two years after *Brown* made clear that Kentucky could no longer require racial segregation by law, the Louisville Board of Education created a geography-based student assignment plan designed to help achieve school integration. At the same time it adopted an open transfer policy under which approximately 3,000 of Louisville's 46,000 students applied for transfer. By 1972, however, the Louisville School District remained highly segregated. Approximately half the district's [***208] public school enrollment was black; about half was white. Fourteen of the district's nineteen non-vocational middle and high schools were close to totally black or totally white. Nineteen of the district's forty-six elementary schools were between 80% and 100% black. Twenty-one elementary schools were between roughly 90% and 100% white.

2. Court-Imposed Guidelines and Busing, 1972 to 1991. In 1972, civil rights groups and parents, claiming unconstitutional segregation, sued the Louisville Board of Education in federal court. The original litigation eventually became a lawsuit against the Jefferson County School System, which in April 1975 absorbed Louisville's schools and combined them with those of the surrounding suburbs. (For ease of exposition, I shall still use "Louisville" to refer to what is now the combined districts.) After preliminary rulings and an eventual victory for the plaintiffs in the Court of Appeals for the Sixth Circuit, the District Court in July 1975 entered an order requiring desegregation.

The order's requirements reflected a (newly enlarged) school district student population of about 135,000, approximately [*2807] 20% of whom were black. The order required the [***209] school board to create and to maintain schools with student populations that ranged, for elementary schools, between 12% and 40% black, and for secondary schools (with one exception), between 12.5% and 35% black.

The District Court also adopted a complex desegregation plan designed to achieve the order's targets. The plan required redrawing school attendance zones, closing 12 schools, and busing groups of students, selected by race and the first letter of their last names, to schools outside their immediate neighborhoods. The plan's initial busing requirements were extensive, involving the busing of 23,000 students and a transportation fleet that had to "operate from early in the morning until late in the evening." For typical students, the plan meant busing for several years (several more years for typical black students than for typical white students).

The District Court monitored implementation of the plan. In 1978, it found that the plan had brought all of Louisville's schools within its "'guidelines' for racial composition" for "at least a substantial portion of the [previous] three years." It removed the case from its active docket while stating that it expected the board "to continue to implement those portions of the desegregation order which are by their nature of a continuing effect. "

By 1984, after several schools had fallen out of compliance with the order's racial percentages due to shifting demographics in the community, the school board revised its desegregation plan. In doing so, the board created a new racial "guideline," namely a "floating range of 10% above and 10% below the countywide average for the different grade levels." The board simultaneously redrew district boundaries so that middle school students could attend the same school for three years and high school students for four years. It added "magnet" programs at two high schools. And it adjusted its alphabet-based system for grouping and busing students. The board estimated that its new plan would [*2808] lead to annual reassignment [***211] (with busing) of about 8,500 black students and about 8,000 white students.

3. Student Choice and Project Renaissance, 1991 to 1996. By 1991, the board had concluded that assigning elementary school students to two or more schools during their elementary school years had proved educationally unsound and, if continued, would undermine Kentucky's newly adopted Education Reform Act. It consequently conducted a nearly year-long review of its plan. In doing so, it consulted widely with parents and other members of the local community, [**584] using public presentations, public meetings, and various other methods to obtain the public's input. At the conclusion of this review, the board adopted a new plan, called "Project Renaissance," that emphasized student choice.

Project Renaissance again revised the board's racial guidelines. It provided that each elementary school would have a black student population of between 15% and 50%; each middle and high school would have a black population and a white population that fell within a range, the boundaries of which were set at 15% above and 15% below the general student population percentages in the county at that grade level. The plan [***212] then drew new geographical school assignment zones designed to satisfy these guidelines; the district could reassign students if particular schools failed to meet the guidelines and was required to do so if a school repeatedly missed these targets.

In respect to elementary schools, the plan first drew a neighborhood line around each elementary school, and it then drew a second line around groups of elementary schools (called "clusters"). It initially assigned each student to his or her neighborhood school, but it permitted each student freely to transfer between elementary schools within each cluster *provided that* the transferring student (a) was black if transferring from a predominantly black school to a predominantly white school, or (b) was white if transferring from a predominantly white school to a predominantly black school. Students could also apply to attend magnet elementary schools or programs.

The plan required each middle school student to be assigned to his or her neighborhood school unless the student applied for, and was accepted by, a magnet middle school. The plan provided for "open" high school enrollment. Every 9th or 10th grader could apply to any high school [***213] in the system, and the high school would accept applicants according to set criteria -- one of which consisted of the need to attain or remain in compliance with the plan's racial guidelines. Finally, the plan created two new magnet schools, one each at the elementary and middle school levels.

4. The Current Plan: Project Renaissance Modified, 1996 to 2003. In 1995 and 1996, the Louisville School Board, with the help of a special "Planning Team," community meetings, and other official and unofficial study groups, monitored the effects of Project Renaissance and considered proposals for improvement. Consequently, in 1996, the board modified Project Renaissance, thereby creating the present plan.

At the time, the district's public school population was approximately 30% black. The plan consequently redrew the racial "guidelines," setting the boundaries at 15% to 50% black for *all* schools. It again redrew school assignment boundaries. And it expanded the transfer opportunities available to elementary and middle school pupils. The plan forbade transfers, however, if the transfer would lead to a school population outside the guideline range, *i.e.*, if it would create a school [***214] where fewer [*2809] than 15% or more than 50% of the students were black.

The plan also established "Parent Assistance Centers" to help parents and students navigate the school selection and assignment process. It pledged the use of other resources in [**585] order to "encourage all schools to achieve an African-American enrollment equivalent to the average district-wide African-American enrollment at the school's respective elementary, middle or high school level." And the plan continued use of magnet schools.

In 1999, several parents brought a lawsuit in federal court attacking the plan's use of racial guidelines at one of the district's magnet schools. They asked the court to dissolve the desegregation order and to hold the use of *magnet* school racial guidelines unconstitutional. The board opposed dissolution, arguing that "the old dual system" had left a "demographic imbalance" that "prevented dissolution." In 2000, after reviewing the present plan, the District Court

dissolved the 1975 order. It wrote that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes." It added that the Louisville School Board [***215] had "treated the ideal of an integrated system as much more than a legal obligation -- they consider it a positive, desirable policy and an essential element of any well-rounded public school education."

The Court also found that the magnet programs available at the high school in question were "not available at other high schools" in the school district. It consequently held unconstitutional the use of race-based "targets" to govern admission to *magnet schools*. And it ordered the board not to control access to those scarce programs through the use of racial targets.

5. The Current Lawsuit, 2003 to the Present. Subsequent to the District Court's dissolution of the desegregation order (in 2000) the board simply continued to implement its 1996 plan as modified to reflect the court's magnet school determination. In 2003, the petitioner now before us, Crystal Meredith, brought this lawsuit challenging the plan's unmodified portions, *i.e.*, those portions that dealt with *ordinary*, not magnet, schools. Both the District Court and the Court of Appeals for the Sixth Circuit rejected Meredith's challenge and held the unmodified aspects of the plan constitutional.

C

The histories [***216] I have set forth describe the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools. In both cases the efforts were in part remedial. Louisville began its integration efforts in earnest when a federal court in 1975 entered a school desegregation order. Seattle undertook its integration efforts in response to the filing of a federal lawsuit and as a result of its settlement of a segregation complaint filed with the federal OCR.

The plans in both Louisville and Seattle grow out of these earlier remedial efforts. Both districts faced problems that reflected initial periods of severe racial segregation, followed by such remedial efforts as busing, followed by evidence of resegregation, followed by a need to end busing and encourage the return of, *e.g.*, suburban students through increased student choice. When formulating the plans under review, both districts drew upon their considerable experience with earlier plans, having revised their policies periodically in light of that experience. Both districts rethought their methods over time and explored a wide range of other [**586] means, including non-race-conscious [***217] policies. Both districts also [*2810] considered elaborate studies and consulted widely within their communities.

Both districts sought greater racial integration for educational and democratic, as well as for remedial, reasons. Both sought to achieve these objectives while preserving their commitment to other educational goals, *e.g.*, districtwide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice, reduced risk of white flight, and so forth. Consequently, the present plans expand student choice; they limit the burdens (including busing) that earlier plans had imposed upon students and their families; and they use race-conscious criteria in limited and gradually diminishing ways. In particular, they use race-conscious criteria only to mark the outer bounds of broad population-related ranges.

The histories also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of "race-conscious" criteria. JUSTICE THOMAS suggests that it will [***218] be easy to identify *de jure* segregation because "in most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Ante*, at 6, n. 4 (concurring opinion). But our precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws. See *Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)*.

These facts and circumstances help explain why in this context, as to means, the law often [***222] leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving "different communities" the opportunity to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort v. Lynn School Comm., 418 F.3d 1, 28 (CA1 2005)* (Boudin, C. J., concurring) (citing *United States v. Lopez, 514 U.S. 549, 581, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)* (KENNEDY, J., concurring)), cert. denied, *546 U.S. 1061, 126 S. Ct. 798, 163 L. Ed. 2d 627 (2005)*.

With this factual background in mind, I turn to the legal question: Does the United States Constitution prohibit these school boards from using [**588] race-conscious criteria in the limited ways at issue here?

II

The basic objective of those who wrote the *Equal Protection Clause* [w]as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery. See *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 71, 21 L. Ed. 394 (1872)* ("No one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] . . . we mean the freedom of the slave race"); [***235] *Strauder v. West Virginia, 100 U.S. 303, 306, 25 L. Ed. 664 (1879)* ("[The *Fourteenth Amendment*] [**592] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy").

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together. See generally R. Sears, A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866-1904 (1996) (describing federal funding, through the Freedman's Bureau, of race-conscious school integration programs). See also R. Fischer, The Segregation Struggle in Louisiana 1862-77, p. 51 (1974) (describing the use of race-conscious remedies); Harlan, Desegregation in New Orleans Public Schools During Reconstruction, 67 Am. Hist. Rev. 663, 664 (1962) (same); W. Vaughn, Schools for All: [***236] The Blacks and Public Education in the South, 1865-1877, pp. 111-116 (1974) (same). Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter. See *Gratz v. Bollinger, 539 U.S. 244, 301, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)* (GINSBURG, J., dissenting); *Adarand Constructors, Inc. v. PeNa, 515 U.S. 200, 243, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)* (STEVENS, J., dissenting).

Sometimes Members of this Court have disagreed about the degree of leniency that the Clause affords to programs designed to include. See *Wygant v. Jackson Board of Education, 476 U.S. 267, 274, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986)*; *Fullilove v. Klutznick, 448 U.S. 448, 507, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)*. But I can find no case in which this Court has followed JUSTICE THOMAS'"colorblind" approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races.

The plurality claims that later cases -- in particular *Johnson*, *Adarand*, and *Grutter* -- supplanted *Swann*. See *ante*, at 11-12, 31-32, n. 16, 34-35 (citing *Adarand, supra, at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158*; *Johnson v. California, 543 U.S. 499, 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005)*; *Grutter v. Bollinger, 539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)*). The plurality says that cases such as *Swann* and the others I have described all "were decided before this Court definitively determined that 'all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.'" *Ante*, at 31, n. 16 (quoting *Adarand, 515 U.S., at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158*). This Court in *Adarand* added that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Ibid.* And [***240] the Court repeated this same statement in *Grutter*. See *539 U.S., at 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304*.

The cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude*; they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.

The plurality cannot avoid this simple fact. See *ante*, at 34-36. Today's opinion reveals that the plurality would rewrite this Court's prior jurisprudence, at least in practical application, transforming the "strict scrutiny" test into a rule that is fatal in fact across the board. In doing so, the plurality parts company from this [*2818] Court's prior cases, and it takes from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.

[***244] As *Grutter* specified, "context matters when reviewing race-based governmental action under the *Equal Protection Clause*." *539 U.S., at* [**595] *327, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (citing *Gomillion v. Lightfoot, 364 U.S. 339, 343-344, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960)*). And contexts differ dramatically one from the other.

Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

Here, the context is one in which school districts seek to advance or to maintain [***245] racial integration in primary and secondary schools. It is a context, as *Swann* makes clear, where history has required special administrative remedies. And it is a context in which the school boards' plans simply set race-conscious limits at the outer boundaries of a broad range.

This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.

The importance of these differences is clear once one compares the present circumstances with other cases where one or more of these negative features are present. See, *e.g.*, [***246] *Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880)*; *Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)*; *Brown, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873*; *Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*; *Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)*; *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*; *Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)*; *Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993)*; *Adarand Constructors, Inc. v. PeNa, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)*; *Grutter, supra; Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*; *Johnson v. California, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005)*.

The view that a more lenient standard than "strict scrutiny" should apply in the present context would not imply abandonment of judicial efforts [***249] carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need. And the present context requires a court to examine carefully the race-conscious program at issue. In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that JUSTICE THOMAS and JUSTICE KENNEDY mention. See *ante*, at 11-12 (THOMAS, J., concurring); *ante*, at 3, 17 (opinion of KENNEDY, J.).

In my view, this contextual approach to scrutiny is altogether fitting. I believe that the law requires application here of a standard [***250] of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described. See *Gratz, supra, at 301, 123 S. Ct. 2411, 156 L. Ed. 2d 257* (GINSBURG, J., joined by SOUTER, J., dissenting); *Adarand, supra, at 242-249, 115 S. Ct. 2097, 132 L. Ed. 2d 158* (STEVENS, J., joined by GINSBURG, J., dissenting); *426 F.3d at 1193-1194* [**597] (Kozinski, J., concurring). Apparently JUSTICE KENNEDY also agrees that strict scrutiny would not apply in respect to certain "race-conscious" school board policies. See *ante*, at 9 ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted [*2820] 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").

Nonetheless, in light of *Grutter* and other precedents, see, *e.g.*, [***251] *Bakke, 438 U.S., at 290, 98 S. Ct. 2733, 57 L. Ed. 2d 750* (opinion of Powell, J.), I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody. I shall consequently ask whether the school boards in Seattle and Louisville adopted these plans to serve a "compelling governmental interest" and, if so, whether the plans are "narrowly tailored" to achieve that interest. I conclude that the plans before us pass both parts of the strict scrutiny test. Consequently I must conclude that the plans here are permitted under the Constitution.

III. *Applying the Legal Standard*

A

Compelling Interest

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial "diversity." Other times a court, like the plurality here, refers to it as an interest in racial "balancing." I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial "integration" [***252] of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience.

Regardless of its name, however, the interest at stake possesses three essential elements. 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. See Part I, *supra*, at 4; Appendix A, *infra*. See also *ante*, at 17 (opinion of [***253] KENNEDY, J.) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children").

Second, there is an educational element: [**598] an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools.

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. *Swann, 402 U.S., at 16, 91 S. Ct. 1267, 28 L. Ed. 2d 554*. 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.

Again, data support this insight.

There are again studies that offer contrary conclusions. See, *e.g.*, Schofield, School Desegregation and Intergroup Relations, in 17 Review of Research in Education 356 (G. Grant ed. 1991). See also *ante*, at 22-23 (THOMAS, J., concurring). Again, however, the evidence supporting a democratic interest in racially integrated schools is firmly established and sufficiently strong to permit a school board to determine, as this Court has itself often found, that this interest is compelling.

Moreover, this Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education. See, *e.g.*, [***258] *Swann, supra, at 16, 91 S. Ct. 1267, 28 L. Ed. 2d 554*; *Seattle School Dist. No. 1, 458 U.S., at 472-473, 102 S. Ct. 3187, 73 L. Ed. 2d 896*. In *Grutter*, in the context of law school admissions, we found that these types of interests were, constitutionally speaking, "compelling." See *539 U.S., at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (recognizing that Michigan Law School's race-conscious admissions policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races," and pointing out that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" (internal quotation marks omitted; alteration in original)).

In light of this Court's conclusions in *Grutter,* the "compelling" nature of these interests in the context of primary and secondary public education follows here *a fortiori.* Primary and [**600] secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry [***259] with us to the end of our days. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley, 418 U.S. 717, 783, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974)* (dissenting opinion).

And it was *Brown,* after all, focusing upon primary and secondary schools, not *Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950),* focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed., 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950),* focusing on graduate schools, that affected so deeply not only Americans but the world.

The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination," *ante,* at 23 [***261] (plurality opinion), but of primary and secondary school segregation, see *supra,* at 7, 14; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is?

The majority acknowledges that in prior cases this Court has recognized at least two interests as compelling: an interest in "remedying the effects of past intentional discrimination," and an interest in "diversity in higher education." *Ante,* at 12, 13. But the plurality does not convincingly explain why those interests do not constitute a "compelling interest" here. How do the educational and civic interests differ in kind from those that [***262] underlie and justify the racial "diversity" that the law school sought in *Grutter,* where this Court found a compelling interest?

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation ("segregation by state action") and *de facto* segregation ("racial imbalance caused by other factors"). *Ante,* at 28. But that distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do.

Nor does any precedent indicate, as the plurality suggests with respect to Louisville, *ante,* at 29, that remedial interests vanish the day after a federal court declares that a district is "unitary."

For his part, JUSTICE THOMAS faults my citation of various studies supporting the view that school districts can find compelling educational and civic interests in integrating their [**602] public schools. 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.

B

Narrow Tailoring

I next ask whether the plans before us are "narrowly tailored" to achieve these "compelling" objectives. I shall not accept the school board's assurances [***266] on faith, cf. *Miller v. Johnson, 515 U.S. 900, 920, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995),* and I shall subject the "tailoring" of their plans to "rigorous judicial review." *Grutter, 539 U.S., at 388, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (KENNEDY, J., dissenting). Several factors, taken together, nonetheless lead me to conclude that the boards' use of race-conscious criteria in these plans passes even the strictest "tailoring" test.

Indeed, the plans before us are *more narrowly tailored* than the race-conscious admission plans that this Court approved in *Grutter.* 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. Cf. [***270] *Wygant, 476 U.S., at 283, 106 S. Ct. 1842, 90 L. Ed. 2d 260.* And, in Seattle, the disadvantaged student loses at most one year at the high school of his choice. One will search *Grutter* in vain for similarly persuasive evidence of narrow tailoring as the school districts have presented here.

The school boards' widespread consultation, their experimentation with numerous other plans, indeed, the 40-year history that Part I sets forth, make clear that plans that are less [**604] explicitly race-based are unlikely to achieve the board's "compelling" objectives. The history of each school system reveals highly segregated schools, followed by remedial plans that [***271] involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city's integration goals. See Parts I-A and I-B, *supra*, at 6-18.

Nor could the school districts have accomplished their desired aims (*e.g.*, avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals. Nevertheless, JUSTICE KENNEDY suggests that 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." *Ante*, at 8.

Finally, I recognize that the Court seeks to distinguish *Grutter* from these cases by claiming that *Grutter* arose in "'the context of higher education.'" *Ante*, at 16. But that is not a meaningful [**608] legal distinction. I have explained why I do not believe the Constitution could possibly find "compelling" the provision of a racially diverse education for a 23-year-old law student but not for a 13-year-old high school pupil. See *supra*, at 46-48. And I have explained how the plans before us are more narrowly tailored than those in *Grutter*. See *supra*, at 45. I add that one cannot find a relevant distinction in the fact that these school districts did not examine the merits of applications "individually. " See *ante*, at 13-15. The context here does not involve admission by merit; a child's academic, artistic, and athletic "merits" are not at all relevant to the child's placement. These are not affirmative action plans, and hence "individualized scrutiny" is simply [***283] beside the point.

The upshot is that these plans' specific features -- (1) their limited and historically-diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with [*2830] prior plans, and (5) the lack of reasonably evident alternatives -- together show that the districts' plans are "narrowly tailored" to achieve their "compelling" goals. In sum, the districts' race-conscious plans satisfy "strict scrutiny" and are therefore lawful.

IV

Direct Precedent

Seattle School Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896, is directly on point. That case involves the original Seattle Plan, a *more heavily race-conscious predecessor* of the very plan now before us. In *Seattle School Dist. No. 1*, this Court struck down a state referendum that effectively barred implementation of Seattle's desegregation plan and "burdened all future attempts to integrate Washington schools in districts throughout the State." *Id., at 462-463, 483, 102 S. Ct. 3187, 73 L. Ed. 2d 896*. Because the referendum would have prohibited the adoption of a school-integration plan that involved mandatory busing, and because it would have imposed a special burden on school integration plans (plans that sought to integrate [***286] previously segregated schools), the Court found it unconstitutional. *Id., at 483-487, 102 S. Ct. 3187, 73 L. Ed. 2d 896*.

In reaching this conclusion, the Court did not directly address the constitutional merits of the underlying Seattle plan. But it explicitly cited *Swann*'s statement that the Constitution permitted a local district to adopt such a plan. *458 U.S., at 472, n. 15, 102 S. Ct. 3187, 73 L. Ed. 2d 896*. It also cited to Justice Powell's opinion in *Bakke*, *approving of* the limited use of race-conscious criteria in a university-admissions "affirmative action" case. *458 U.S., at 472, n. 15, 102 S. Ct. 3187, 73 L. Ed. 2d 896*. In addition, the Court stated that "attending an ethnically diverse [*2831] school," *id., at 473, 102 S. Ct. 3187, 73 L. Ed. 2d 896*, could help prepare "minority children for citizenship in our pluralistic society,"

hopefully "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Ibid.* (internal quotation marks and citation omitted).

It is difficult to believe that the Court that held unconstitutional a referendum that would [***287] have interfered with the implementation of this plan thought that the integration plan it sought to preserve was itself an *unconstitutional* plan. And if *Seattle School Dist. No. 1* is premised upon the constitutionality of the original Seattle Plan, it is equally premised upon the constitutionality of the present plan, for the present plan *is* the Seattle Plan, modified only insofar as it places even *less* emphasis on race-conscious elements than its predecessors.

V

Consequences

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* [***294] 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.

As I have pointed out, *supra*, at 4, *de facto* resegregation is on the rise. See Appendix A, *infra*. It is reasonable to conclude that such resegregation can create serious educational, social, and civic problems. See *supra*, at 37-45. Given the conditions in which school boards work to set policy, see *supra*, at 20-21, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital -- the limited use of broad race-conscious student population ranges.

I use the words "may need" here deliberately. The plurality, or at least those who follow JUSTICE THOMAS'" 'color-blind'" approach, [***295] see *ante*, at 26-27 (THOMAS, J., concurring); *Grutter, 539 U.S., at 353-354, 123 S. Ct. 2325, 156 L. Ed. 2d 304* (THOMAS, J., concurring in part and dissenting in part), may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work.

Has the supreme court Lost Its Way?, From Washington Lawyer, By Lawrence Latto, September 2007

On June 28, 2007, the Supreme Court handed down its decisions in *Parents Involved in Community Schools v. Seattle School District No. 1* and in the companion case, *Meredith v. Jefferson County Board of Education.* As expected, the decision was by a narrowly divided Court with Chief Justice Roberts and Justice Alito joining Justices Scalia, Thomas, and Kennedy to make up the majority. There were five opinions. I leave to others the analysis of the opinions. I argue here that the decision is the result of an incorrect determination some 30 years ago of an issue in *Regents of the University of California v. Bakke.* Had that determination been made correctly, these decisions of the courts of appeals would have been upheld by a routine denial of petitions for certiorari, if they had even been filed at all.

A considerable amount of prior history is needed before we reach the decision in *Bakke.* Not long after Chief Justice Marshall announced the judiciary had the power to declare acts enacted by Congress or state legislatures unconstitutional, an important limitation upon that power was added. It was well stated, about 100 years later, by the great constitutional scholar, James Bradley Thayer, in his biography of Marshall:

Marshall himself said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.'...

To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. ...

The judiciary, today, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it.

Although that doctrine is a well-settled element of Supreme Court jurisprudence today, it was often honored, along the way, as much in the breach as in the observance. It was rarely mentioned in cases declaring a law to be unconstitutional. During the *Lochner* period that extended into the early 1930s of the Franklin D. Roosevelt administration, the "nine old men" led by reactionary Justices McReynolds, Van Devanter, and Butler invalidated sound act after sound act that were inconsistent with their economic views. They saw themselves as a kind of superlegislature, relying primarily upon liberty of contract and substantive due process clauses to accomplish their ends. That period, thankfully, came to an end, not through Roosevelt's dubious Court-packing proposal, but by death and transfiguration.

In 1937, with the knowledge of that earlier Court in mind as well as the knowledge that he lived in an apartheid society, Justice Stone (later, chief justice) took the opportunity to restate that doctrine.

In 1923 Congress passed the Filled Milk Act, prohibiting the transportation in interstate commerce of any milk product that contained any other fat than butter fat. The act denounced such products as injurious to health and a fraud upon the public. Carolene Products Co., a dairy in Georgia, produced a nutritious condensed milk made with coconut oil. Ignoring the act, it sold the product outside of Georgia and, after being indicted, challenged the act as beyond the power of Congress and also because it took away its property in violation of the Fifth Amendment. The lower courts agreed and the case reached the Supreme Court.

Justice Stone curtly dismissed the power of Congress contention and instead focused on the Fifth Amendment contention, also noting his response applied to equal protection claims as well. All laws enacted by Congress, he said, were presumed to be constitutional. If there appeared to be any rational basis for enacting a law, the constitutional inquiry was over. Congress could not support the constitutionality of a law by including derogatory epithets in the law, as it had done here. But there was more to support this law. Extensive testimony had been given at Congressional committee hearings that supported the enactment of the law. Stone did not summarize that testimony but it was enough for him and his unanimous court. A casual observer might conclude Carolene Products had not been treated nearly as well as the lobbyists for the dairy industry. The presumption of constitutionality was too strong. The case was returned to the lower court so that it could proceed to prosecute Carolene Products. I have often wondered what happened next.

So far this was a mundane and boring case. It had all been said before and would be said again, over and over. And surely the principle it described was eminently sensible. As Thayer had explained, congressmen also take an oath to uphold the Constitution. They must be reelected, and enactment of foolish or harmful laws can lead to defeat at the polls and repeal of such laws. Court decisions are much more final and, as a practical matter, hard to correct. It is right and proper that judges should observe restraint before declaring the action of a coordinate governmental body invalid.

But Justice Stone went further. He added a lengthy footnote, enhanced by learned references to previous constitutional decisions, about matters that had nothing to do with the case before the Court. Evidently Justice Stone was unhappy that there were no settled neutral principles that offered either explanation or guidance as to when the doctrine of presumption of constitutionality might not apply. So he went off on a frolic of his own in what has become known as the famous footnote 4 of *Carolene Products.* For the past 70 years, law school professors have fallen in love with this footnote and more are added every year.

Stone made three related points, only the third of which is relevant here. "There may be," he began, "narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments. ... It is unnecessary to consider now," he went on (so why did he go on at such length?), "whether legislation which restricts those

political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny ...

"Nor need we now enquire [but let's do it anyway] whether similar considerations enter into the review of statutes directed at particular religious, ... or racial minorities. ... Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

What an interesting and insightful idea! Perhaps a bigoted majority that adopts a law that harms members of a weak and helpless minority should not get a free pass. There might be a double standard, or even more, when interpreting the equal protection clause. In some instances, all a state or Congress needs to show is that there is some rational basis for discriminating between two persons or groups. If that is done, the law or action is constitutional. In other situations, however, that may not be good enough. Stone suggested a stricter test must be met, and he left to subsequent justices to figure out when the standard should apply and what it should be.

The footnote is written in the terse, precise, and somewhat turgid fashion of a judge of the very highest rank. About 30 years later another giant, Lyndon Johnson, also a government official, who probably was less qualified by temperament and ability than anyone to be a judge, also explained why the meaning of "equal" might depend upon the context:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

Perhaps, he plainly implied, it would provide a sounder, more honest, equality if the weaker contestant were given an appropriate head start.

Remarkably, only three years later, the Court was given a golden opportunity to adopt Justice Stone's double standard of review, when it had to decide the first of the two flag-salute Jehovah's Witnesses cases. Children whose religion forbade them from reciting the pledge of allegiance or saluting the flag had been expelled from school. The Supreme Court denied their claim that they had been denied freedom of religion. Justice Frankfurter wrote an opinion in which seven other justices concurred. He stated that the case presented a conflict between liberty of conscience and the authority to safeguard the nation's fellowship, a word not found in the Constitution. He found for the latter.

Only Justice Stone dissented. He relied heavily on his *Carolene Products'* footnote 4. It was a perfect fit. The defendants were in a discrete and insular minority. Their claim was that they had been denied the freedom of religion explicitly promised them by the First Amendment. They were politically powerless and illregarded. A sterner scrutiny could well have resulted in upholding the First Amendment right. No other justice joined him. One wonders why. He was a highly respected judge. His contention had obvious merit. Yet no one paid him any attention and Frankfurter did not even respond.

Only three years later the decision was overruled. Justice Jackson wrote the Court's opinion. Frankfurter, writing only for himself, wrote a lengthy dissenting opinion that included a stirring defense of majority rule and the standard of nationality. How could the expulsion be irrational, he asked, when he could count 13 justices who had voted to uphold it? Of course, it was not irrational. But he did not deal with the question of whether that standard should be applied. Stone, however, was silent. He could have assigned the opinion to himself and written a more elaborate and learned opinion in favor of a different standard of review that might have persuaded some of his colleagues and kept the idea alive. Unfortunately, he was likely concerned about a shaky majority and believed that a Jackson opinion was the way to hold it together.

In due course the Supreme Court did begin to fashion an alternative standard for interpreting the equal protection clause as well as the categories to which it would apply. But it did not at all adopt what Stone had suggested.

In 1943 the Court was faced with a law imposing measures, such as a curfew for Japanese Americans, which placed citizens of different ancestry in different categories. The ensuing opinion acknowledged?without much explanation?that a "legislative classification or discrimination based on race alone has often been held to be a denial of equal protection." But the Court, relying on concerns for national security, took a strikingly deferential approach and upheld the law.

Just one year later in the second more famous and also more infamous case, *Korematsu v. United States,* the Court shamefully approved the exclusion of Japanese American citizens from areas on the West Coast even after purportedly subjecting that action to the "most rigid scrutiny." The majority used the right words, such as stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Further, the majority thoughtfully explained that "[p]ressing public necessity" could *sometimes* justify racial classifications but "racial antagonism" could *never* do so. Today we suspect that racial antagonism may have unconsciously played a role in the decision. The case does demonstrate that, as Justice Murphy said in dissent, even after being strictly scrutinized, a law that "falls into the ugly abyss of racism" can sometimes pass constitutional muster. One might think that the same would be true if the law stemmed from a desire to alleviate the lasting effects of the community's earlier immoral behavior. But we are getting ahead of ourselves.

Soon "strict scrutiny" was a settled part of constitutional interpretation. In 1967 the Court reviewed a challenge to Virginia's antimiscegenation statute. It applied *Korematsu's* standard and struck down the law because it was a blatant example of "invidious racial discrimination." A slightly earlier case invalidated Florida's interracial cohabitation law on precisely the same grounds. These cases also contain the kernels of modern strict

scrutiny's two prongs. In the Virginia case the Court said that racial classification must be founded on a very good reason. There must be a "legitimate overriding purpose independent of invidious racial discrimination which justifies" race-based classifications. In the Florida case, the Court pointed out that the design of any valid race-based classification would have to be carefully crafted to avoid sweeping too far.

These cases show that even in a civilized democracy, bias and prejudice can lead the majority into enacting laws that invade the freedom and human rights that are so dear to our society. The Court could not stand idly by and apply a weak standard of review that allowed those laws to survive.

In all of these cases, either the persons or groups seeking equal protection were disfavored minorities or the challenged action was plainly based on racism or bigotry. The possibility that the victim might be a member of the generally favored white community apparently did not occur to the authors of those opinions, and some strong unqualified statements about the evil of ever relying upon race were often made. In 1977, however, the first of several highly controversial cases reached the Court in which a white person claimed that he had been denied the equal protection of the law.

Allan Bakke applied for admission to the medical school of the University of California at Davis. Of the 100 places available, the college had set aside 16 to be filled only from four designated minority groups. Bakke's application was denied. The California Supreme Court held that he had been denied equal protection and ordered the medical school to admit him. The school sought review by the Supreme Court. Hundreds of colleges had similar programs which differed in detail, but all had the objective and result of increasing the number of persons of color who were admitted. The highly anticipated decision was made by a most unusually divided Court. There were six opinions, some of them lengthy and intricate.

Before the equal protection question could be considered, an interesting threshold question had first to be decided. Section 601 of the Civil Rights Act of 1964 prohibited discrimination on the basis of race by "any program or activity receiving Federal financial assistance." Four justices joined in an opinion written by Justice Stevens that the special admissions program of the medical school violated this law and concluded that Bakke should therefore be admitted. They insisted that no interpretation of the Fourteenth Amendment was needed or appropriate. It seemed pretty clear that Bakke had been denied participation in a program that had received federal funding. That was enough for those four.

But four other justices disagreed. In an opinion written by Justice Brennan, they argued at inordinate length that the legislative history of the Civil Rights Act unequivocally showed that the act could not mean what it said and, in addition, that it was ridiculous if it did. They asserted that Congress plainly meant that the act prohibited exactly what was prohibited by the equal protection clause, no more and no less. It simply had wider application.

So the swing-voting Justice Powell had to decide whether to stop there or go on. He was a solid conservative who did not legislate or "make law." He was a reliable strict constructionist, who could be counted upon to enforce what Congress had enacted. Surprisingly, he voted with the Brennan group. One is reminded of the famous 14th century English jurist, who said to the barrister below him: "Take that law away! The Parliament that wrote it knew not the law of England!"

So the majority had to decide three more issues: First, what standard should be applied in determining what the equal protection clause means in this context? Second, applying that standard, did the university violate the Fourteenth Amendment when it denied admission to Bakke? Third, if it did so hold, should an injunction prohibiting the university from ever taking race into account during its admission process be upheld? The Stevens group of four refused to say one word about any of these questions. They said that they did not have to be answered by them in order to get the five votes needed to decide the case. So the Court was now down to five rather than nine justices to answer these three questions.

Brennan's opinion was in many respects similar to Powell's with respect to what standard should apply. Both the Brennan four and Powell rejected the rational basis test. They held something more rigorous was required.

Justice Powell's opinion was less than persuasive, as was Brennan's.

This part of Justice Powell's opinion is in the form of a theme and variations. As is customary, after a brief introduction?in which he states that the medical school's special program unequivocally treats two groups of different races differently (as, of course, it did)?the theme appears. The equal protection clause protects individuals, "persons," not groups. If any person is treated differently than another person because his skin is of a different color, then he is denied the guarantee of equal protection. "The Court has never questioned the validity of these pronouncements."

"Never?" Before even introducing the first variation, Powell had conceded that a major purpose of the Fourteenth Amendment was to "protect" the newly made "freeman and citizen" from the oppression of his former masters. Their skins were of different colors, were they not? He also concedes that the equal protection clause was "virtually strangled in its infancy by post-war reactionism" and that it was "relegated for decades of relative desuetude." And later, he said that his unqualified statement that an innocent person may never be burdened for this reason was incorrect. Of course, this had already been established by *Korematsu.*

But he quickly put aside this minor inconsistency and moved on to other variations. The great guarantee, after the bad times were over, was no longer applicable only to persons of color. It had been extended to the many ethnic groups that were being poured into our melting pot. We were no longer a "majority-minority country" but a nation of many minorities.

As this expansion of the application of equal protection took place, the courts frequently did say that, because discrimination *against* ethnic groups was so offensive, it required stricter or heightened scrutiny by the courts. As we have pointed out, however, all of these cases involved discrimination against a smaller protected group. None involved discrimination against the still existent majority class of white persons, and the issue of whether that stricter scrutiny should apply in that context had never before been presented or thoroughly discussed. Powell simply put aside the possibility that programs based upon benign motives designed to do good might be viewed differently than those with invidious motives, designed to do harm.

All racial distinctions are "odious" and that's all there is to it. Ignoring Justice Stone's admonition that epithets are not an adequate substitute for logical analysis, his opinion is full of them?some his own, some quoting others. "Noxious, "immoral," "inherently wrong," "destructive of democratic society," "illegal," and "unconstitutional." Did Justice Powell really believe that these terms apply to the desire of hundreds of colleges, government agencies, and private corporations to provide a few persons of color opportunities that had been denied for a century to their ancestors, even if some more highly qualified persons were turned away?

Powell also asserted that it may be hard to tell whether a particular program is being invidious and even that an assertion of noble motive may only be the sheep's clothing of a malevolent wolf. But he cited no example either of a previous case, or a hypothetical example.

Justice Powell finally made a plausible argument for strict scrutiny. Legislators' decisions are often the result of compromise. So they may step over the line between right and wrong. Thus, strict scrutiny is needed for *any* action based on race. But why is it needed in both contexts? He never explains why the vast difference between benign and invidious discrimination should be so inconsequential.

The medical school pointed to three sets of cases in which significant burdens had been imposed upon innocent persons and yet had been upheld. Court orders remedying past discrimination, which require many who never did anything wrong to be disadvantaged, had been repeatedly upheld. A finding that an employer had consistently denied employment to persons of color may be the basis of an order requiring preferential hiring until the situation is rectified. Innocent whites might not get jobs that might otherwise have been theirs. Similar rulings had been made in cases involving gender discrimination. Powell asserted that in almost all of these cases there had been a violation of the Constitution or of law, and that that justified imposing burdens on innocent persons without strict scrutiny. Lawyers are very good at finding distinctions but sometimes they forget to explain why that should call for a different treatment. These cases do, however, add some dissonance to the last variation of the central theme that *any* reliance on race is *always* odious. The fact that there was a violation in these cases but none by the medical school satisfied Powell and it was his decision to make. Strict scrutiny applies with equal force to well-intentioned state agencies trying to make this a better country and to states that wish to deny fundamental rights to a particular class and to perpetuate disadvantages they already suffer.

With Powell's rejection of the rationality standard, there were now five unqualified votes on this issue and so the five-judge quorum turned to the next question: What will satisfy strict scrutiny? Or, more accurately stated, what requirements must be met for a program based in whole or in part on race to be constitutional? They were now all engaged, in a Talmudic/Jesuitical analysis, so loved by lawyers and philosophers. For Powell "strict scrutiny" meant very strict, indeed. He opted for the formulation that had been emerging from earlier cases: the challenged action had to be in furtherance of a "compelling governmental interest." It also had to be "narrowly tailored" to accomplish that goal and no more than was actually needed. If either test failed, the action violated the equal protection clause.

The Brennan four were not in full agreement with Powell but their difference was not very large. Brennan and his three brethren preferred something a little less strict, more vague, more flexible. Perhaps a substantial or significant governmental interest would be enough. Perhaps the tailoring could be a little more double breasted. More important, how did they decide when they applied that somewhat different standard to the university's special admissions program? Brennan concluded that the university's affirmative action program, predicated on the conclusion that some preference in favor of the disadvantaged applicants should be added to that side of the balance scale in order to make things more equal, met the test. The disadvantage was the result of decades of brutal treatment of that group, not only by the community but also because of unconstitutional laws and by tacit, sometimes explicit approval by the courts. Moreover, the lingering effects of that treatment were still significant and unquestionable. Who could deny that a state's desire and effort to reach a truer equality could be objectionable?

"I can deny it," said Powell. He wrote sympathetically about the justifiable adverse reaction of whites, relatively few in number, who would have to bear the awful burden of not attending the college of their choice just because persons of color were being preferred. That, of course, was not "equal" . . . the Fourteenth Amendment protects each and every individual, not groups. Powell forgot that he had just conceded, and would shortly concede again, that under certain circumstances it was wholly constitutional to impose such a burden on innocent persons, even though it was not, in one sense, "equal" treatment.

The medical school's lawyers offered four objectives of its special program that, they believed, satisfied the first of the two strict scrutiny requirements?that it must advance a compelling governmental interest. They maintained that (1) it sought to make an evidently disadvantaged group more truly equal by giving them a compensating preference; (2) it sought to counter the effect of societal discrimination; (3) it sought to increase the number of doctors practicing in underserved minority neighborhoods; and (4) it sought to improve the quality of the education it provided. Justice Powell dealt carefully with each of these.

He rejected the first two by a reprise of the themes he used when rejecting the rationality standard of review. If a state agency has itself violated the Constitution or a law by discriminating against a discrete class of persons, then it is acceptable to provide preference to the successors of that group?to persons who themselves suffered no harm?and to impose burdens on innocent persons who did no harm or violated any law. But if the agency had never acted unlawfully in the near or distant past, it is evident that it is unfair and wrong to not treat two individuals equally or to impose a burden on any innocent person. The third objective put forward by the medical school was also rejected because it was only its assertion that some of the persons of color that it graduated would practice in places that were not adequately served. No proof was offered and proof is essential.

The fourth objective Powell warmly embraced. Academic freedom was rooted in the First Amendment protecting freedom of speech. Brilliant and experienced educators had written persuasively that a diverse student body (and faculty) enhances the quality of the education for all, black and white. It is plainly a governmental interest that is compelling. So he turned to the second test, "narrow tailoring," and the medical school's program failed. Here, too, Powell employed his highly talented lawyer's skill of drawing narrow distinctions. The special program certainly resulted in diversity with respect to skin color which was, after all, what the case was primarily about. But it was not good enough.

Using still another variation of his earlier theme, he emphasized that the program relied on race and race alone to get the diversity it wanted. That way of getting diversity is not narrowly tailored. It has a fatal flaw. It makes it impossible for white applicants ever to fill one of the reserved 16 places. It is just not fair to impose such a burden on them. They are protected by the Constitution from such unwarranted racial discrimination.

Powell had before him, in amicus briefs, the diversity plans of Ivy League schools. Their plans were more sophisticated, more clever. They had no hint of a "quota" that so clearly was in violation of the equal protection clause. Race was only one of a number of factors. Was a parent an alumnus? Were the parents willing to contribute a million dollars to endow a chair in pediatrics? Did the applicant come from North Dakota rather than Boston? How enthusiastic were his references and how articulate the essay in the application? Everyone was individually appraised. If three applicants were being compared and one was a highly qualified African American, one was a white farm boy from Iowa who played the violin at a concert level, and the third a descendant of a signer of the Declaration of Independence who had an uncanny ability to throw a ball into a hoop from long distances, the African American might well be rejected.

Of course, if this subtle process happened to admit only a handful of token blacks, they would go back and do it over. They made sure it didn't happen. But this was not mentioned, either by Harvard or by Justice Powell.

So Powell cast the fifth vote to admit Bakke. He did not have to describe a plan that would be upheld. It was and is a settled principle that federal courts do not provide advisory opinions. Powell thought the advice might be useful and he turned out to be accurate.

Two justices need to be singled out for special criticism and, paradoxically, both are great and admirable men. The stature and number of admirers of John Paul Stevens, currently the oldest member of the Court, grows each year. Thurgood Marshall's contribution to this country cannot be overstated. His brilliant execution of Charles Houston's legal strategy, with help from only a handful of lawyers, was the major factor in bringing to an end this country's sorry history of apartheid.

Justice Stevens led his team of four into refusing to participate in the vote on the equal protection issues. They abstained. His assertion, that it was settled Supreme Court practice not to reach a thorny constitutional question if the case can be decided on another ground, is unqualifiedly correct. Their conclusion that the case could be decided under Title VI of the Civil Rights Act was shared only by four justices. They were not wrong to do what they did. Neither would they have been wrong to have the equal protection issues decided by a court of nine rather than a court of five. Since the vote on whether to uphold the medical school's affirmative action plan under the Fourteenth Amendment was 4–1 to uphold it, it is highly likely that either Stevens, Stewart, Blackmun or Chief Justice Burger, had they voted, would have provided a fifth vote to affirm Bakke's rejection. That would have made things significantly easier for universities and state legislatures over the past 28 years and enabled them to be more scrupulously truthful about their plans.

Justice Marshall joined in Brennan's opinion rejecting rationality as the proper standard for the constitutionality of state action in this context. He also wrote a separate opinion. It was not a "legal" opinion. It was a polemic that movingly traced the history and lasting impact of slavery and Jim Crow in this country. Without saying so explicitly, he applied the familiar smell test to the decision and found it to be rancid, foul. He was a great man but he was not a great judge, and he was so focused on the forest that he could not see the trees. Had he paid just a little more attention to the details?which was not his forte?he almost certainly would *not* have joined in rejecting rationality and imposing strict scrutiny. He would have kept alive, for future justices, Justice Stone's brilliant and innovative analysis. He might even have written a fully reasoned dissent that might have persuaded some of his colleagues.

Why did they make this bad decision? Probably because of the arrogance that too often occurs in persons with unlimited and unaccountable power. The case, and others like it that might later arise, presented a very different issue from those decided earlier. The threshold question was who should be the primary decision maker?the Congress, the state legislatures and their agencies, or the Court? Naturally, they believed that they were better equipped to do the job. Also it increased, rather than diminished, their role. But they missed the point and, being so entranced by the intricacies of their craft at which they were so skilled, they found all the wrong reasons for making this choice.

What should have they done? Justice Blackmun wrote a quiet, separate opinion of his own in which he told them, although he did not take his own advice:

A long time ago, as time is measured for this Nation, a Chief Justice, both wise and farsighted, said:
... Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The Court in *Bakke* should have looked at the unique and marvelous structure of our Constitution, which grew out of the work of the Founders, the significant amendments, and the wise interpretations of their own Court.

The Framers created three major departments. They thought they were creating a Congress with limited power leaving significant power assigned to the states. We could not have become the great country we are with that divided authority and, little by little, the Supreme Court held that the Congress could do almost anything it chose to do. The Framers also prescribed limitations upon the power of the president and on a few occasions the Supreme Court has told him so. A contrary view has crept into the current administration, but in a short time, that will dissipate or the Court will say so again.

The Framers did not give the Court the power to review federal or state laws and to find them invalid if they violated the Constitution. But someone had to be able to do that and the Court, led by a great Chief Justice, arrogated that job to itself. That role was most essential with respect to the first

10 amendments. If Congress were to enact a law that Jews could not worship or that forced an accused person to incriminate himself, there had to be someone to say nay.

The first 10 amendments made an extraordinary inroad into the basic tenet of a democratic form of government?that the majority makes the rules. What a wonderful and useful thing it has been for us to enjoy certain critical rights that cannot be taken away, except by a supermajority through a complex and difficult amendment process! The Supreme Court also corrected the mistakes of the Framers when they made those prohibitions apply only to the federal government and not to the states. Those prohibitions, regrettably, have had to be enforced on numerous occasions.

The Constitution included a procedural due process clause applicable to the Congress, and in the Fourteenth Amendment, added one that was applicable to the states. There was no substantive due process clause and it was necessary to invent one in order to invalidate the rare outrageous incursions into our liberties by a foolish majority. The Supreme Court remedied that omission and invented one.

It is astonishing that it took so long to add an equal protection clause. The concept was first on Jefferson's mind when he wrote the Declaration of Independence. It is so essential to our idea of the rule of law that a paraphrase is proudly displayed on the pediment of the Supreme Court building.

Justice Blackmun could have reminded his colleagues of a statement by another famous justice, Oliver Wendell Holmes:

...it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Had the Court listened to those words and considered thoughtfully its proper role under our governmental structure, it would not have insisted that it have the primary role in second guessing a state agency's decision to adopt an affirmative action program that could unmistakenly have been rationally adopted. That kind of state action should be entitled to the presumption of constitutionality and its rationality test.

It seemed likely, after the unfortunate *Bakke* decision, that it would have very little standing as a precedent. After all, one of the critical questions that was resolved was the work of a single justice with four others dissenting. Such was our passionate admiration for middle of the road, and so strong our distaste for extremes, that this proved to be wrong. Somehow, however, the universities and their lawyers saw the handwriting on the wall. They struck the evil phrase "affirmative action" from their lexicons. The mantra was now "diversity," first and always. They were ready for the next chapter and the extent of the damage was significantly lessened.

Actually this tale has several interesting chapters, but they can be quickly summarized. In addition, one more has now been published.

Although some temporary and ambiguous backsliding occurred with respect to the "compelling interest-narrow tailoring" doctrine, it was firmly restored in the *Adarand* decision in 1995. The Court closed the door on a lesser scrutiny and held that strict scrutiny had to be applied unconditionally wherever race was a factor in differentiating between two persons or classes, without regard to skin color. Finally, two landmark cases, both involving the University of Michigan?one, the undergraduate school, and the other, the law school were decided in 2003. The principal ballerina was Justice O'Connor who wrote the opinion of the Court in the law school case, and the principal male dancer was Chief Justice Rehnquist who wrote the opinion in the other case. But almost all of the principals in the company were given major roles as they danced their entrechats and grand jetés on the head of a pin, like semidespondent furies. Justice O'Connor's solo could have been subtitled "Homage to Powell." Almost obsequiously she embraced everything he had said and expanded upon it. She made it clear that any doubts about the precedential value of his opinion in *Bakke* was gone and it was now the law of the land.

The choreographers of the law school admission procedures did a better job than those who fashioned the undergraduate guidelines. Both, of course, were modeled upon the Harvard plan blessed by Powell. The law school added more factors and made it clear that every applicant was accorded individualized consideration. There was no hint of a quota. Race was almost lost in the welter of other factors. That plan did honestly concede that an undefined "critical mass" of minorities had to emerge from the process but that did not prevent them from getting the Court's approval. The undergraduate school made the mistake of believing that arithmetic could be helpful in the selection process and gave each applicant a numerical grade from 1 to 100. They also gave each minority applicant a bonus of 20 points. That was fatal. This resembled the unacceptable evil "quota." If they had established only 18 grades?A+, A, A-, B+, etc.?and awarded a bonus of a "soft plus," they might have carried the day. Such is the subtle constitutional analysis resulting from using the wrong standard. Had the Court applied the correct standard of review, "constitutionality is presumed in this context," only two pithy, near-unanimous decisions would have been needed.

Justice Ginsburg, in an opinion that was joined by Justices Souter and Breyer, asserted that a less strict standard should have been used. She spoke of plans of "inclusion" and "exclusion" rather than of benign and invidious. But she did not offer a full analysis of why this should be so. She did not make even a nod of acknowledgment or a backward glance to the great Chief Justice or his footnote 4. She was tired from watching all the dancing.

Our record in bringing this country to a colorblind society can hardly be described as good. In 1787 the northern states made a pact with the devil by putting the stamp of approval on slavery in our new Constitution. There would have been no country without it. But it took a terrible bloody civil war to erase that stain from the Constitution. Soon thereafter we established a system of apartheid and invidious discrimination that lasted until 1954 in plain violation of the Fourteenth Amendment. Next, the Court's too long delayed decision in *Brown* was met with vigorous resistance that lasted for decades but did not prevent much progress from being made toward a country with more freedom and opportunity for all. It is still a work in progress. It is strange the Supreme Court, which we view as the protector of our liberties and even of certain natural rights, should now erect a barrier against more rapid progress toward that end. The schools, particularly the elementary schools, are one of the best places that can bring us closer to that goal. Until June 28, 2007, that barrier was permeable and not extraordinarily high. We could hope, that like other undesirable walls, it would someday be removed. Those hopes were reduced by a mean-spirited plurality opinion, rooted in an "I am safe on board, let the suckers drown"

mentality that would heighten the wall and make it thicker. Fortunately, that opinion does not state the current law of the land. Justice Kennedy joined the four dissenters in asserting that, *under certain circumstances,* race may constitutionally be taken into account.

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C. THE INCORPORATION CONTROVERSY

In Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), decided before the adoption of the fourteenth amendment, the Court, per Chief Justice Marshall, held that the rights guaranteed in the first eight amendments do not apply to the states:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.

In *Slaughter-House*, the Court held that the rights guaranteed in the first eight amendments are not "privileges or immunities of citizens of the United States" and thus are not applicable to the states via the privileges or immunities clause of the fourteenth amendment. The fourteenth amendment also provides, however, that "[no] State shall [deprive] any person of life, liberty, or property, without due process of law." To what extent, if any, does the fourteenth amendment due process clause "incorporate" the specific guarantees of the bill of rights?

This section traces the process by which the Court, since *Slaughter-House*, has gradually held most of the rights guaranteed in the first eight amendments applicable to the states via the due process clause of the fourteenth amendment. The incorporation controversy is important not only because of the questions it raises about the identification of fundamental values but also because of the questions it raises about the nature and structure of the federal system.

TWINING v. NEW JERSEY, 211 U.S. 78 (1908). In a state court prosecution, the jury was instructed that it might draw an unfavorable inference against the defendants from their failure to testify. The Court rejected the defendants' contention that this instruction violated their rights under the federal Constitution:

"[It] is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. [If] this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. . . .

"[We] prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is [a] fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government. [None] of the great instruments in which we are accustomed to look for the declaration of the fundamental rights [such as Magna Charta and the Petition of Right] made reference to [the exemption from

self-incrimination]. [Moreover, of the thirteen states which ratified the original Constitution, only four proposed amendments to incorporate] the privilege in the Constitution, [and] Congress, in submitting the amendments to [the] States, treated [due process of law and the privilege against self-incrimination] as exclusive of each other. [Thus, the] inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. . .

"Even if the historical meaning of due process of law [did] not exclude the privilege from it, it would be going far to rate it as an immutable principle of [justice]. [There is no reason] for straining the meaning of due process of law to include this privilege within it."

Justice Harlan dissented.

PALKO v. CONNECTICUT, 302 U.S. 319 (1937). *Palko* concerned the constitutionality of a Connecticut statute permitting the state to appeal in criminal cases. Although the Court "assumed for the purpose of the case" that such a statute, if enacted by the United States, would violate the double jeopardy clause of the fifth amendment, it rejected appellant's contention that the challenged statute violated the due process clause of the fourteenth amendment. Noting that the Court had incorporated such rights as freedom of speech, press, assembly, and religion and the right to counsel, but not the fifth amendment right to be free from self-incrimination or the right to trial by jury, Justice Cardozo delivered the opinion of the Court:

"The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. [But] there emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.' [Few] would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also [of] the immunity from compulsory self-incrimination. This too might be lost, and justice still be done.

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. [The] process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. [This] is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, and indispensable condition, of nearly every other form of freedom. [Fundamental] too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial.

"[Is] that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? [The] answer must surely be 'no.'"

Justice Butler dissented.

Note that by 1937 there was no longer any doubt that "due process" could embrace not only procedural rights but also substantive rights such as freedom of speech and religion. Is this consistent with the textual guarantee of "due process"?

ADAMSON v. CALIFORNIA, 332 U.S. 46 (1947). In a state court prosecution, the government was permitted to comment on the defendant's failure to take the stand. The Court assumed that such comment "would infringe defendant's privilege against self-incrimination [if] this were a trial in a court of the United States." The Court, in a five-to-four decision, held that the fourteenth amendment did not incorporate the privilege. In a lengthy dissenting opinion, Justice Black, joined by Justice Douglas, set forth his theory of "total" incorporation:

"This decision reasserts a constitutional theory spelled out in [*Twining*], that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.' [I] would not reaffirm the *Twining* decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise. . . .

"My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. . . .

"[I] fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. [I] would follow what I believe was the original purpose of the Fourteenth Amendment — to extend to all the people of the nation the complete protection of the Bill of Rights. . . ."

In a concurring opinion, Justice Frankfurter attacked Justice Black's theory of "total" incorporation: "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on failure of an accused to take the witness stand is forbidden in federal prosecutions. [But] to suggest that such a limitation can be drawn out of 'due process' in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. . . .

"The short answer to the suggestion that the [due process clause of the fourteenth amendment] was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. [Those] reading the English language with the meaning which it ordinarily conveys [would] hardly recognize the Fourteenth Amendment as a summary for the various explicit provisions of the first eight Amendments

"Judicial review of [the due process] guaranty [inescapably] imposes upon the Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples. [These] standards [are] not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. [An] important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review."

Note: The Black/Frankfurter Debate

1. *"Total" incorporation.* Justice Black's "total" incorporation theory has never commanded a majority of the Court. The historical record is ambiguous, and there is no clear consensus on the actual intentions of the framers and ratifiers of the fourteenth amendment. For analysis of the historical issue, see generally A. Amar, The Bill of Rights (1998); R. Berger, Government by Judiciary (1977); J. Ely, Democracy and Distrust (1980); H. Flack, The Adoption of the Fourteenth Amendment (1908); W. Guthrie, The Fourteenth Article of Amendment to the Constitution of the United States (1898); TenBroek, The Antislavery Origins of the Fourteenth Amendment (1951); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Crosskey, "Legislative History" and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949).

2. *"Fundamental fairness."* For about fifteen years after *Adamson*, the Court continued to employ the "fundamental fairness" approach to due process. In applying this approach, the Court struggled to avoid decisions based on what Justice Frankfurter termed "the idiosyncrasies of a merely personal judgment." Consider Kadish, Methodology and Criteria in Due Process Adjudication – A Survey and Criticism, 66 Yale L.J. 319, 327–328 (1957):

> The effort to eliminate the purely personal preference from flexible due process decision making has taken two main forms. One has been a respectful deference to the judgment of the state court or the act of the legislature under review. The other had been an attempt to rest conclusions upon external and objective evidence in such fashion that as far as possible it can be said that the Court is not so much itself creating its own policy determinations as it is interpreting and reading determinations that have already been made. [The] most significant kind of such objective data has consisted of the moral judgments already made on the point at issue, sought for in the express or implicit view of important segments of our society, past or present. [The Court has thus looked to four primary sources]: (1) the opinions of the progenitors and architects of American institutions; (2) the implicit opinions of the policymaking organs of state governments; (3) the explicit opinions of other American courts that have evaluated the fundamentality of [the asserted right]; or, (4) the opinions of other countries in the Anglo-American tradition "not less civilized than our own" as reflected in their statutes, decisions, and practice.

3. *The "demise" of "fundamental fairness."* In the early 1960s, the Warren Court, without expressly abandoning "fundamental fairness," began to modify incorporation methodology. As the Court looked increasingly to the bill of rights for guidance, it "selectively" incorporated more and more of the specific guarantees of the bill of rights into the due process clause of the fourteenth amendment. These developments are traced in *Duncan*.

DUNCAN v. LOUISIANA, 391 U.S. 145 (1968). In *Duncan*, the Court held the sixth amendment right to jury trial applicable to the states via the fourteenth amendment due process clause. Justice White delivered the opinion of the Court: "[Many] of the rights guaranteed by the first eight Amendments [have] been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State [Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897)]; the rights of speech, press, and religion covered by the First Amendment [Fiske v. Kansas, 274 U.S. 380 (1927)]; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized [Mapp v. Ohio, 367 U.S. 643 (1961)]; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination [Malloy v. Hogan, 378 U.S. 1 (1964), overruling *Twining* and *Adamson*]; and the Sixth Amendment rights to counsel [Gideon v. Wainwright, 372 U.S. 335 (1963)], to a speedy and public trial [Klopfer v. North Carolina, 386 U.S. 213 (1967); In re Oliver, 333 U.S. 257 (1948)], to confrontation of opposing witnesses [Pointer v. Texas, 380 U.S. 400 (1965)], and to compulsory process for obtaining witnesses [Washington v. Texas, 388 U.S. 14 (1967)].

"The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in opinions of this Court. The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' [whether] it is 'basic in our system of jurisprudence,' [and] whether it is a 'fundamental right, essential to a fair trial.' . . .

"[In] one sense recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate. Earlier the Court can be seen as having asked [if] a civilized system could be imagined that would not accord the particular protection. [Citing *Palko*.] The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . .

"When the inquiry is approached in this way the question whether the State can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older [cases]. A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. [In] every State [the] structure

and style of the criminal process [are] the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

"Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. . . ."

Justice Black, joined by Justice Douglas, filed a concurring opinion; Justice Fortas also filed a concurring opinion; Justice Harlan, joined by Justice Stewart, dissented.

Note: Incorporation since Duncan

1. *The current scope of incorporation.* Although the Court has never embraced Justice Black's total incorporation theory, it has used selective incorporation to make almost all the specific guarantees of the bill of rights applicable to the states. To the enumeration set out in *Duncan*, the Court has added the fifth amendment prohibition on "double jeopardy," Benton v. Maryland, 395 U.S. 784 (1969), overruling *Palko*; the eighth amendment prohibition on "cruel and unusual punishment," Robinson v. California, 370 U.S. 660 (1962); and the eighth amendment prohibition on "excessive" bail, Schilb v. Kuebel, 404 U.S. 357 (1971). The only provisions of the first eight amendments that have not been incorporated are the second and third amendments, the fifth amendment's requirement of grand jury indictment, and the seventh amendment. (With regard to the second amendment right to bear arms, the Court recently noted that its prior decision holding that the right was not incorporated "also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).)

2. *Incorporation "jot-for-jot."* Prior to the 1960s, there were frequent suggestions that, even if a specific guarantee of the bill of rights was incorporated in the due process clause of the fourteenth amendment, it did not necessarily apply to the states in the same manner as it applied to the federal government. In Wolf v. Colorado, 338 U.S. 25 (1949), for example, the Court held that the "security of one's privacy against arbitrary intrusion by the police — which is at the core of the fourth amendment — is basic to a free society" and "is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Nonetheless, the Court refused to apply the exclusionary rule, which was applicable to the federal government, to the states. Similarly, in Roth v. United States, 354 U.S. 476 (1957), Justice Harlan argued that the first amendment imposed fewer limits on state regulation of obscenity than it did on federal regulation.

As illustrated by *Duncan*, however, by the 1960s the Court had reached the conclusion that the guarantees of the bill of rights that were "selectively" incorporated in the due process clause of the fourteenth amendment should apply to the states in precisely the same manner as they applied to the federal government. See also Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy). See also Williams v. Florida, 399 U.S. 78 (1970) ("the twelve-man panel is not a necessary ingredient of 'trial by jury'"); Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding the constitutionality of

less-than-unanimous jury verdicts in state criminal cases); Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting) (arguing that the fourteenth amendment does not "necessarily" impose on the states particular aspects of the fifth amendment's prohibition on "double jeopardy").

3. *Evaluation.* Consider Israel, Selective Incorporation Revisited, 71 Geo. L.J. 253, 336–338 (1982):

> Over the years [the Court's incorporation] opinions [have] referred largely to five concerns: (1) adhering to the language of the amendment and the intent of its framers; (2) avoiding vague standards that invite the Justices to apply their own subjective and idiosyncratic views of basic justice; (3) providing broad protection of individual liberties against state systems too often willing to sacrifice those [liberties]; (4) giving appropriate recognition to the principles of federalism; and (5) providing sufficient direction to state courts to gain consistent enforcement of federal constitutional [standards]. Perhaps no concern has been mentioned more frequently than the first, [but] neither the language nor the history has proven especially [confining]. [In] the end, the fifth concern [may] have proven the most significant, [for selective incorporation's relative clarity] may do more to promote a vital federalist system than [an approach that] gives the state slightly greater leeway at the fringes.

Note, however, that reading the fourteenth amendment to incorporate the rights enumerated in the first eight amendments does not preclude the possibility of also reading it to protect arguably less clear unenumerated rights. In fact, as the next sections demonstrate, the Court has treated the fourteenth amendment as protecting both enumerated and unenumerated rights. Does this approach combine the most serious weaknesses (or greatest strengths?) of the Black and Frankfurter positions?

Office of the Attorney General
Washington, D. C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications

[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[2] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none

[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the

engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or

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argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

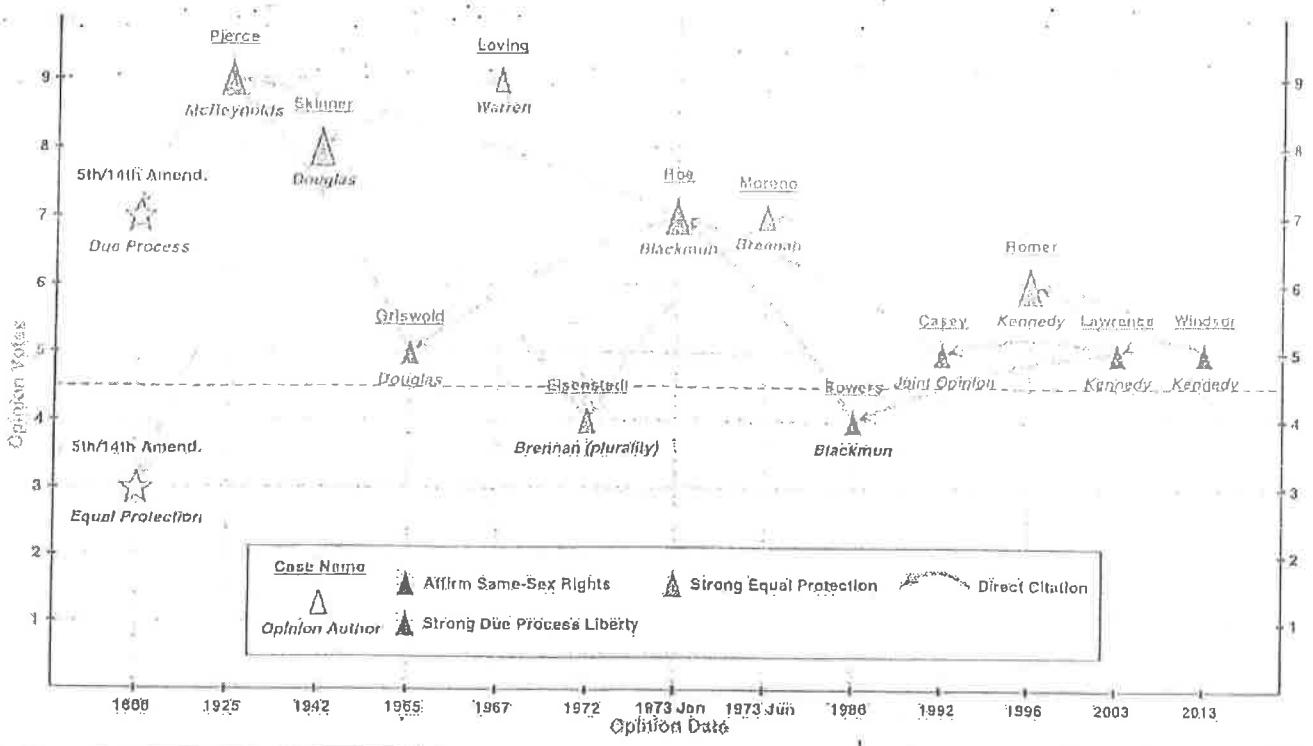
A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Eric H. Holder, Jr.
Attorney General

A VISUAL GUIDE TO *UNITED STATES V. WINDSOR*: DOCTRINAL ORIGINS OF JUSTICE KENNEDY'S MAJORITY OPINION

Colin Starger[*]



MAP EXPLANATION

After finding that the Court had jurisdiction, Justice Kennedy's majority opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), reached the merits and concluded that the Defense of Marriage Act (DOMA) was in violation of the Fifth Amendment. In his dissent, Justice Scalia attacked the majority's doctrinal reasoning on the merits as "nonspecific hand-waving" that invalidated DOMA "maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role." *Id.* at 2707 (Scalia, J., dissenting).

This Map responds to Justice Scalia's accusation by illustrating the doctrinal origins of Justice Kennedy's majority opinion. Specifically, the Map shows how both the equal protection and substantive due process doctrines have contributed to a constitutional jurisprudence that affirms the rights of same-sex couples. The accompanying case descriptions highlight reasoning and quotes that ultimately influenced the majority opinion in *Windsor*.

Moreover, the Map takes the sting from Justice Scalia's complaint that the majority failed to conduct a proper substantive due process analysis. Justice Scalia argued that the opinion failed to ask whether same-sex marriage was a right "deeply rooted in this Nation's history and tradition," *id.* at 2707 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)), and failed to articulate a "tier[] of scrutiny" when considering whether DOMA violated equal protection. *Id.* at 2706. As demonstrated in the Map, however, the Court has long applied tests other than Justice Scalia's when conducting both substantive due process and equal protection review. Indeed, Justice Kennedy's doctrinal approach is consistent with precedent and the doctrinal traditions advanced by Justices Douglas, Brennan, and Blackmun.

Note: This Map *is not* the territory. It does not purport to represent every case backing the majority's approach in due process or equal protection doctrine. Rather, it highlights representative and influential opinions that define the basic genealogy of Justice Kennedy's doctrinal argument. Similarly, the Map does not draw every citation connection between opinions; arrows instead represent the key doctrinal lines in the same-sex marriage debate. Finally, note that opinion triangles grow in size based on the number of citations to the opinion represented on the Map.

***Pierce v. Society of Sisters*, 268 U.S. 510 (1925)**
Although the phrase "substantive due process" did not appear in *Pierce*, the case stands as a prominent example of that nascent doctrine. Justice McReynolds's majority opinion struck down an Oregon statute that required public education for all children, finding the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of [their] children." *Id.* at 534–35. Justice McReynolds noted that the Constitution's "fundamental theory of liberty . . . excludes any general power of the State to standardize its children." *Id.* at 535.

***Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)**
Before *Skinner*, equal protection challenges to state legislation usually failed. Yet Justice Douglas's majority opinion struck down Oklahoma's Habitual Criminal Sterilization Act under the Equal Protection Clause. The Act punished those thrice convicted of larceny with sterilization but spared repeat embezzlers. Describing marriage and procreation as "basic civil rights," Justice Douglas concluded "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* at 541.

***Griswold v. Connecticut*, 381 U.S. 479 (1965)**
In *Griswold*, the Court struck down a Connecticut law prohibiting the sale or use of contraceptives. Justice Douglas's majority opinion held the law, as applied to married couples, violated the constitutional right to privacy. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is . . . an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Id.* at 486.

***Loving v. Virginia*, 388 U.S. 1 (1967)**
In *Loving*, the unanimous Court struck down Virginia's miscegenation law on both equal protection and due process grounds. In his opinion, Chief Justice Warren applied strict scrutiny and concluded that the law discriminated invidiously. He also cited *Skinner* for the proposition that marriage is a basic civil right and concluded that "deny[ing] this fundamental freedom on so unsupportable a basis . . . [is] so directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . . [that it] deprive[s] all the State's citizens of liberty without due process of law." *Id.* at 12.

Eisenstadt v. Baird, 405 U.S. 438 (1972)
In *Eisenstadt*, the Court struck down a Massachusetts law that prohibited distribution of contraceptives to unmarried persons. In his plurality opinion, Justice Brennan ostensibly applied rational basis scrutiny but nonetheless rejected all of the state's asserted rationales for the law. Justice Brennan argued that "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible," as the relevant right to privacy inheres in the individual rather than in couples. *Id.* at 453.

Roe v. Wade, 410 U.S. 113 (1973)
Roe famously—and controversially—recognized a substantive due process abortion right. Justice Blackmun's majority opinion claimed doctrinal justification for a constitutional right of privacy from the *Griswold–Pierce* line of cases as well as from other lines including that from *Skinner* to *Eisenstadt*. "This right of privacy," wrote Justice Blackmun, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)
In *Moreno*, the Court struck down a portion of a federal law that denied food stamps to households composed of unrelated individuals. Justice Brennan's majority opinion noted that the legislative history showed that the provision was intended to deny "hippies" and "hippie communes" food stamps. *Id.* at 534. Justice Brennan wrote, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* Justice Kennedy directly cited *Moreno* in *Windsor* and similarly questioned Congress's purpose in passing DOMA.

Bowers v. Hardwick, 478 U.S. 186 (1986)
The majority in *Bowers*, per Justice White, upheld the constitutionality of Georgia's sodomy statute against a same-sex challenge. Like Justice Scalia in *Windsor*, Justice White insisted that only liberties "deeply rooted in this Nation's history and tradition" deserved constitutional recognition. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.)). Justice Blackmun forcefully dissented. He construed the Court's precedent differently and argued that the Constitution protected "the right of an individual to conduct intimate relationships in the intimacy of his or her own home." *Id.* at 208.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)
The first of four Justice Kennedy majority opinions in the Map, *Casey* (co-authored by Justices O'Connor, Kennedy, and Souter) found that stare decisis required upholding *Roe*'s recognition of a woman's right to choose an abortion before fetal viability. Regarding the proper substantive due process inquiry, *Casey* quoted Justice Harlan: Due process "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . No formula could serve as a substitute, in this area, for judgment and restraint." *Id.* at 850 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

Romer v. Evans, 517 U.S. 620 (1996)
In *Romer*, the Court struck down Colorado's Amendment 2 that purported to deny LGBT persons special rights. Justice Kennedy, however, found the law much broader—"[i]t identifies persons by a single trait and then denies them protection across the board. . . . It is not within our constitutional tradition to enact laws of this sort." *Id.* at 633. Arguing that the law's peculiar nature defied conventional rational basis review, Justice Kennedy cited *Moreno* for its proposition that a bare desire to harm unpopular groups violates equal protection. In *Windsor*, Justice Kennedy returned to this proposition and relied heavily on *Romer* in striking down DOMA.

Lawrence v. Texas, 539 U.S. 558 (2003)
In *Lawrence*, the Court overruled *Bowers* and struck down Texas's law against homosexual sodomy. In his majority opinion, Justice Kennedy explicitly embraced the substantive due process logic of Justice Blackmun's *Bowers* dissent and of the *Casey* majority. Tellingly, Justice Kennedy also pointed to *Romer* as evidence that the jurisprudential foundations of *Bowers* had been eroded. Thus, Justice Kennedy in *Lawrence* used an equal protection case to justify finding a substantive due process right. In *Windsor*, Justice Kennedy once again bridged the two doctrines by citing *Lawrence* as reason to strike down DOMA on equal protection grounds. Though Justice Scalia's *Windsor* and *Lawrence* dissents complained about Justice Kennedy's doctrinal crossbreeding, the history revealed by this Map shows that equal protection and substantive due process often form two complimentary sides of the same constitutional coin.

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Constitutional Analysis of Individual Rights Issues

To argue that the government is completely disabled from taking some particular action against an individual regardless of what process it follows:

1. **Power**

A. Federal government - does any granted power, e.g. commerce clause, taxing power, permit this action?

B. State government - does any constitutional restraint on the exercise of state power (e.g. dormant commerce clause, contracts clause) forbid this action?

2. **Bill of Rights**

A. Federal government - does some provision of the first 8 amendments forbid this action?

B. State government - is the action forbidden by some provision of the first 8 amendments that has been incorporated into the due process clause of the 14th Amendment? (Asst. 36)

N.B. Some liberty-protecting amendments since the Civil War (e.g. 13, 15, 19, 24, 26) apply by their terms to both the federal and state governments.

3. **Equal Protection/Substantive Due Process**

A. Federal government - the due process clause of the 5th Amendment applies both of these restraints against the federal government. (E.g. Bolling v. Sharpe (CB 478-79))

B. State government - derived from the respective clauses of the 14th amendment.

You can't do this to me vs. you can't do that to me.
As a litigation tip one should argue equal protection before substantive due process because the former is less controversial

4. Ninth Amendment

A. Federal government - even if no violation under any of the foregoing, the Ninth Amendment may prevent the federal government from acting to abrogate an existing liberty. (No case actually invalidates a federal act on these grounds, but the theory is uncontroversial).

B. State government - no case accepts, and many authorities reject, the idea of applying the 9th Amendment to the states, but it makes sense to Professor Freedman.

Procedural Due Process

Premise: The government may take the challenged action (e.g. deprive person of welfare benefits or custody of child, lock person up for duration of war, fire person from government job) provided that it grants whatever procedural protections the Constitution demands under the circumstances.

Legal Sources: Due Process Clause of Fifth Amendment for federal government.
Due Process Clause of Fourteenth Amendment for state governments.

Questions Needing Consideration

Question 1: Has the government deprived the claimant of "liberty" or "property"?

a. If not, that's the end of the inquiry, e.g. Sandin v. Conner (CB 961) (since transfer to disciplinary segregation would not deprive prisoner of any liberty interest, no need to reach Question 2 below and consider what rights prison had to afford him at disciplinary hearing) *compare* Wilkinson v. Austin (CB 961) (finding that transfer to Supermax prison would deprive prisoner of liberty interest, proceeding to Question 2 below and assessing adequacy of procedures at transfer hearing).

b. Two competing approaches in the case law to answering Question 1:

A. Look to state law

E.g. Roth, Perry (CB 954-56).

Although this approach has its attractions, it also has very serious problems most notably that it is governments that are supposed to be constrained and they should not be allowed to take away property or liberty by simply defining it as non-property or non-liberty.

B. Exercise independent judgment (e.g. Owen, Ingraham (CB 959))

Elements include original intent, importance of the right, acceptance at common law and by other states.

E.g. If the Florida Beach Commission could simply send anyone who owned land within half a mile of the ocean a letter requiring the landowner to allow pedestrians to walk across the land in order to escape from the beach during periods of hurricane danger, a federal court would certainly conclude that a deprivation of "property" (right to exclude trespassers) was involved, regardless of Florida law on the subject. (Cf. Fuentes v. Shevin and companion cases cited at CB 1564-65 that you are deemed to remember from Civil Procedure).

Then the court would turn to Question 2 below, and consider what process (e.g. the

chance to write the Commission a letter showing that although the land is within half mile of the ocean it is on the inland side of the main evacuation road) might be due to the landowner.

Question 2: What process must be provided in connection with the deprivation?

The Court has decisively and correctly rejected the idea of applying approach A above to this question, Loudermill (CB 956 bottom), and applies the three-part test of Mathews v. Eldridge (CB 963, middle; "First ... entail.").

Applications of the test are necessarily fact-specific, but need to be informed by a focus on the underlying values (CB 966-72).

. Class discussion; Little v. Streater (CB 813), Wilkinson (noted under Question 1 above and now considering Question 2), Hamdi (CB 395, Part III), Brock (CB 967)

New York Law Journal

March 16, 2011 Wednesday

HEADLINE: Further Discussion Of No-Fault Divorce And Due Process; Letters to the Editor

BODY:

Readers of these pages have recently been treated to the spectacle of a clash of experts regarding New York's new nofault divorce law. As a certified non-expert, I venture to suggest that neither of the views so far presented is entirely persuasive. Timothy Tippins in "No-Fault, Divorce and Due Process" (NYLJ, March 3) has opined that the statute did not intend to cut off the right of the defendant to contest the allegation that the marriage had irretrievably broken down and that if so read it would be an unconstitutional denial of due process to the defendant.

Several other experts responded in a letter, "Jurisdiction, Due Process and No-Fault Divorce" (NYLJ, March 14) that the statute did indeed intend to preclude litigation over the fact of marital breakdown and is constitutional. The letter contends that since the Legislature was not required to permit any judicial divorces at all it has exclusive "authority to establish the predicates for exiting [a] marriage" and hence no due process issues arise unless it acts "irrationally or in a discriminatory manner."

On the legislative intent issue, the letter's position makes a lot more sense than the column's. If the statute was not designed to foreclose litigation regarding the existence of the alleged grounds for a divorce then "it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited... the people on its passage." The Slaughter-House Cases, 83 U.S. 36, 96 (1872) (Field, J. dissenting).

But with respect to the constitutional question the letter reaches the right result for the wrong reason. Just as with the benefit of a judicial divorce, a legislature need not grant welfare benefits, disability benefits or unemployment benefits. But if it does it must provide procedural due process before depriving an individual of the benefit. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Zimmerman Brush Co. v. Logan,* 455 U.S. 422 (1982).

In assessing a challenge to the procedure the state provides for termination of the benefit the court undertakes "consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews,* 424 U.S. at 335.

In this case a significant private interest is affected. But, as the letter persuasively shows, granting an adversary hearing will impose costs without in any way improving the quality of adjudication as to whether the marriage has broken down -- an issue whose resolution is virtually foreordained given the obdurate insistence of one party that the parties' differences are irreconcilable.

Thus, a court should reach the conclusion that the statute does indeed prohibit litigation over the fact of marital breakdown but that the prohibition is consistent with the applicable constitutional test of procedural due process.

Eric M. Freedman, *Hofstra Law School.*

State Action

I. *Finding State Action*

1. **State agent?**

If the actor, regardless of whether public or private, is performing a function that the government wishes to have performed (e.g. garbage collection) then its activities within the scope of the agency are state action. (West v. Atkins, CB 1590)

2. **Economic interdependence**

A. Where the state and the private actor each derive economic benefits from the relationship (and the private actor almost always does; it's the state that's key), then the private actor's conduct is likely to be attributed to the state and constitute state action on the part of the private actor. (E.g. Burton v. Wilmington Parking Authority (CB 1582) (Coffee shop has a profitable lease; government has revenue and an enhanced parking garage)).

B. Where there is no mutual economic interdependence, just a subsidy from the government to a private entity (e.g. government provides police protection to all properties in town, including racially discriminatory school), the ultimate question is whether the government desires that the allegedly unconstitutional conduct occur. (Norwood v. Harrison (CB 155); Gilmore (CB 1585-86)). If so, the recipient of the subsidy will be held to be a state actor because it is a state agent. Tests designed to answer this ultimate question (and you should understand how they are) include:

a. Is the aid direct or indirect, or, in a closely-related phraseology, specialized or generalized? The more indirect and generalized it is, the less likely the recipient is a state actor. Thus if the state provides athletic fields, which the Ku Klux Klan baseball team uses, the team is less likely to be a state actor than if the state provides baseball uniforms, which the Ku Klux Klan baseball team uses. (CB 1586, second paragraph of second quote)

b. Does the government have a monopoly on the service (e.g. arresting people for trespass)? If so, receiving the service almost never converts the recipient into a state actor. (CB 1586, first paragraph of second quote).

3. State Licensing and Authorization

The ultimate question again is whether the entity in taking the challenged action did so at the behest of the state, thereby becoming a state agent. Considerations include (Pollak (CB 1595)):

A. The pervasive regulation of the entity by the state. In more recent times, this alone won't do it. There also has to be a nexus between the purpose of the regulation and the challenged

action (otherwise, the entity is not acting as a state agent in the relevant respect). E.g. Rendell-Baker (CB 1587).

B. Has the state (acting through any of its branches, including the courts, e.g. Shelley v. Kraemer) specifically approved the challenged practice?

C. Is the entity a state-created monopoly?

D. Is the entity performing a public function, i.e. a function (like counting votes in elections to office but unlike providing a college education) that has traditionally been exclusively performed by the government? In recent times this has been a weak factor in finding the entity to be a state actor. (CB 1603-08)

II. *Implications* (CB 1560-61)

1. In some situations, limitations on what a court will deem to be state action restrict the power of the judicial as opposed to the legislative branch. In Moose Lodge (CB 1592) and Metropolitan Edison (CB 1594), for example, legislation could have imposed the restraints on the defendants' conduct that the plaintiffs sought. The finding of "no state action" meant that the Court was unwilling to do so as a matter of constitutional interpretation. (As discussed in class, once the court does so the right of a plaintiff to sue the actor under 42 U.S.C. Sec. 1983 almost always follows automatically. (E.g. Lugar (CB 1568-69)).

2. In other situations, limiting what is deemed to be state action preserves private autonomy and constrains the reach of government because the finding of "no state action" means that the government may not displace private decisionmaking in the area. (E.g. CBS (CB 1548-49)).

3. For these two reasons the general trend in the caselaw as the Court has become more conservative over the last decades has been to constrict the range of private entities who are deemed to be state actors. Hence, when faced with this issue a sound approach is to begin with the presumption that the entity is private and place the burden on the litigant who asserts otherwise.