South Carolina Law Review

Volume 59
Issue 4 *THE ROBERTS COURT AND EQUAL PROTECTION: GENDER, RACE, AND CLASS SYMPOSIUM*

Article 5

Summer 2008

Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right

Kevin D. Brown
Indiana Unversity Maurer School of Law

REFLECTIONS ON JUSTICE KENNEDY'S OPINION IN *PARENTS INVOLVED*: WHY FIFTY YEARS OF EXPERIENCE SHOWS KENNEDY IS RIGHT

KEVIN BROWN*

I. INTRODUCTION

I want to offer some thoughts on the implications of Justice Kennedy's controlling opinion in *Parents Involved*, which essentially was a four-to-one-to-four case.[1] Justice Kennedy's opinion will likely come to define the terms upon which public school districts, school administrators, and state officials that are still inclined to pursue school integration can implement and maintain the practice. The single most important statement in the plurality opinion of Justice Roberts came at its conclusion: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[2] My point of departure is Justice Kennedy's remarks to this solution. In reply, Kennedy stated, "Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so

*Professor of Law, Harry T. Ice Faculty Fellow, and Director of the Hudson & Holland Scholars Program, Indiana University-Bloomington. B.S. Indiana University, 1978, J.D. Yale Law School, 1982. The author would like to thank Stephen Reynolds and Dominique A. McGee for their excellent research which contributed greatly to these comments.

1. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

2. *Id.* at 2768 (plurality opinion).

easy a solution."[3] Kennedy also noted that we have "generations" of experience with the use of racial classifications to foster school integration.[4] While my heart and sympathies lie with Justice Breyer's dissent,[5] I assert that Justice Kennedy's opinion constitutionalizes the American experience with school desegregation, not our hopes and dreams about it.

II. TWO GENERATIONS OF EXPERIENCE WITH SCHOOL DESEGREGATION AND INTEGRATION

School desegregation and integration[6] have shaped my educational and academic careers for two generations. I was born two years after the Court rendered its opinion in *Brown v. Board of Education*[7] (*Brown I*). In the fall of 1961, I enrolled in an all-black neighborhood elementary school in the Indianapolis Public School District (IPS). This was the beginning of the third year that the public schools in Prince Edwards County, Virginia, were closed in order to prevent their integration.[8] My parents were both public school teachers in IPS from the 1950s until the 1980s when they retired. My father was the head of the math department at the all-black high school—the very high school he was class president of when he graduated in 1945. My mother was a teacher in an all-black elementary school in IPS—coincidentally, the very elementary school she attended when young. In 1968, the United States Department of Justice filed a complaint alleging that IPS's schools were unconstitutionally segregated.[9] This eventually led to a consent decree in 1971.[10] Because of that decree, both of my parents were reassigned to predominantly white schools.

In 1966, my parents moved our family from inner-city Indianapolis to the suburban school district of Washington Township. I entered fifth grade two years before the Supreme Court's monumental school desegregation opinion, *Green v. County School Board*.[11] In that decision, the Court commanded public school districts that had operated dual school systems to desegregate immediately.[12] Washington Township schools were reputed to be among the best public schools in the state of Indiana; however, black students never constituted more than 10% of the student body of my elementary, junior high, or high school. From the time we moved, I never had another African-American teacher during the rest of my

3. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment) (internal citation omitted).

4. *See id.* at 2792.

5. *See id.* at 2800–37 (Breyer, J., dissenting).

6. I use the term *desegregation* to refer to mandatory desegregation to remedy a constitutional violation of de jure segregation. I use the term *integration* to refer to efforts by local or state public school authorities to bring students of different racial and ethnic backgrounds together in the absence of a constitutional violation.

7. 347 U.S. 483 (1954).

8. Those schools remained closed until the Supreme Court addressed the situation in 1964. *See* Griffin v. County Sch. Bd., 377 U.S. 218, 222–25 (1964).

9. *See* United States v. Bd. of Sch. Comm'rs, 368 F. Supp. 1191, 1195 (S.D. Ind. 1973).

10. *See* Kevin Brown, *Recent Developments in the Termination of School Desegregation Decrees*, 26 IND. L. REV. 867, 887 (1993).

11. 391 U.S. 430 (1968).

12. *See id.* at 441–42.

elementary and secondary school education. My parents told my two brothers and me that the reason we were moving from our all-black neighborhood—which consisted of our all-black friends, classmates, and teachers—to go to the suburban schools was that they wanted us to have a better education than we could get in IPS.[13]

As a side note, the elementary school I attended in Washington Township closed in the early 1990s. Before it did, however, the student population became predominately black. In 1982, eight years after I graduated from high school, official statistics put the percentage of white students in Washington Township at 74%, with 24% black students, 2% Asians, and virtually no Hispanics.[14] Twenty years later the percentage of Asians stayed the same, but the percentage of white students had decreased to 48%, the percentage of black students had risen to 39%, and the percentage of Hispanic students had risen to 7%.[15]

Beyond experiencing the school integration process as a student, my academic research career has primarily involved writing about school desegregation and integration. I joined the faculty of Indiana University School of Law-Bloomington in 1987 and began to offer theories about how to determine when courts should release a public school district from its obligation to desegregate its schools.[16] I wrote about African-American Immersion Schools in 1993.[17] In so doing, I argued that the best form of education was true multicultural education in a racially- and ethnically-diverse school.[18] However, it was increasingly clear that such schools were unobtainable. Because the federal courts were abandoning their efforts to desegregate public schools, those concerned about the education of black kids would seek innovative ways to improve their education in these increasingly racially isolated schools.[19] Increasing efforts by public school officials to reorganize education around the African-American experience should be expected. In the last fifteen years, we have witnessed the creation and expansion of a wave of Afrocentric charter schools. In *Parents Involved*, Justice Thomas's concurring opinion sought to turn the motivating logic for these schools on its head. Rather than view them as natural by-products of the abandoning of school desegregation efforts, Thomas asserted that "[t]he Seattle school board itself must believe that racial mixing is not necessary to black [academic] achievement," because Seattle operated an African-American Academy that was founded in an effort to "increase

13. For further discussion of this episode in my life, see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 3 (1992).

14. METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, RACIAL PERCENTAGES, 1982–83, http://www.msdwt.k12.in.us/info/images/Slide9.jpg (last visited May 7, 2008).

15. METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, RACIAL PERCENTAGES, 2002–03, http://www.msdwt.k12.in.us/info/images/Slide10.jpg (last visited May 7, 2008).

16. *See* Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1162–63 (1990) (offering additional factors for courts to consider in determining whether a school district has achieved "unitary" status).

17. *See* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993).

18. *Id.* at 821.

19. *See id.*

academic achievement."[20] I first started publishing articles addressing equal protection issues related to school integration programs in 1997,[21] shortly after the decision by the Connecticut Supreme Court in *Sheff v. O'Neill*.[22] By 2003, I was publishing articles indicating that increasing school choice—including school vouchers—was inevitable, in part because of our failure as a country to integrate the public schools.[23]

III. THE LIMITED NATURE OF THE SCOPE OF THE SCHOOL DESEGREGATION AND INTEGRATION ISSUES ADDRESSED IN *PARENTS INVOLVED*

As a prelude to a discussion of Justice Kennedy's opinion in *Parents Involved*, it is important to recognize the limited scope of the school desegregation and integration issues that the Court addressed. This decision was of little interest to major urban school districts in our country—including Cleveland, Dallas, Denver, Detroit, Houston, Kansas City, and St Louis. Regardless of the political will of the voters or of public education officials, the percentage of white students in these public school districts is not enough to make school desegregation meaningful for a number of their students.[24] Chroniclers of the Supreme Court's school desegregation jurisprudence would likely point to the five-to-four decision of the Court in the 1974 case of *Milliken v. Bradley* as the opinion that effectively ended the hope of school desegregation for almost all major urban school districts.[25] Therefore, those who pursued the dream of an America that desegregated or integrated the urban public schools have had over thirty years to mourn the demise of this dream.

Parents Involved also does not apply to those school districts that do not have the political will to pursue integration policies. No one who dreamed of a means for the federal courts to compel recalcitrant public school officials and state governments to end racial isolation of blacks and Latinos would have read the

---

20. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2777 (2007) (Thomas, J., concurring) (internal quotation marks omitted).

21. *See* Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 CONN. L. REV. 999 (1997).

22. 678 A.2d 1267, 1290 (Conn. 1996) (holding that the legislature must take responsibility to remedy de jure and de facto segregation in public schools).

23. *See* KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION (2005); Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477, 507 (2003)..

24. In *Bradley v. Milliken*, the district court reviewed statistics that suggested there were too few white students enrolled in Detroit's public schools to relieve segregation. 338 F. Supp. 582, 585–87 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). In 1970, white students comprised 36.2% of Detroit's public school enrollment of 289,743 students. *Id.* at 585–86. For a list of school districts that have terminated their school desegregation decrees and observed a continued decline in the percentage of white students, see GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 33–35 & 35 tbl.15 (2006), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf. Selected percentages of white students in some of these school districts are the following: Boston (14%), Cleveland (18%), Dade County (10%), Dallas (6%), Denver County (20%), Detroit (3%), Houston (9%), Kansas City (13%), and St. Louis (16%). *Id.* at 35 tbl.15.

25. *See* 418 U.S. 717, 752 (1974) ("[A]bsent an interdistrict violation, there is no basis for an interdistrict remedy . . . .").

Parents Involved decision with any real interest. Such dreamers knew long before the Court accepted certiorari on this case[26] that federal-court-mandated school desegregation, spawned by *Brown I*[27] and its progeny, had long since peaked. The Supreme Court's desegregation termination decisions in the 1990s made it abundantly clear that there was no desire to spark a new round of constitutionally mandated school desegregation.[28] In fact, those who would argue for the use of federal judicial power to produce desegregated schools—including me—have long been cognizant of the eventual limitations of that approach. At the apex of school desegregation in the 1980s, 63% of the black students were still attending predominantly minority schools.[29] The percentage of blacks attending schools that were hypersegregated—those with at least 90% minority students—never fell below the 32% mark it reached in 1988.[30] Both of these figures have been climbing for the past twenty years.[31] Thus, those who dreamed that the Constitution could bring about desegregated schools have now had over twenty years to mourn the apparent demise of that dream.

The issues raised in *Parents Involved* were limited to those school districts that have both the political will and the racial and ethnic demographics to foster some school integration. The Civil Rights Project reported that in 2005 the percentage of black students attending predominantly minority schools was up to 73%,[32] and the percentage attending hypersegregated schools was up to 38%.[33] For Latinos, the corresponding figures—78%[34] and 39%[35] respectively—stand at their highest levels since recordkeeping of them began in 1968. Even the most ardent school desegregation proponent—and I would consider myself one of them—must recognize that the changing racial and ethnic demographics of America's public schools has also been outstripping the efforts of even the most committed to the

---

26. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 547 U.S. 1177 (2006) (mem.).

27. 347 U.S. 483 (1954).

28. *See* Missouri v. Jenkins, 515 U.S. 70, 99 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition and that a district court must strive to restore state and local authorities to the control of a school system . . . ." (internal citation omitted)); Freeman v. Pitts, 503 U.S. 467, 489 (1992) ("Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities."); Bd. of Educ. v. Dowell, 498 U.S. 237, 247 (1991) ("[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination."). Noted constitutional scholar Erwin Chemerinsky said as much on a number of occasions. *See* P. Michael Mahoney & Scott R. Paccagnini, *Declare Victory and Go Home: The Practical Ramifications of the Seventh Circuit's Interpretation of* Missouri v. Jenkins *in School Desegregation Cases*, 24 N. ILL. U. L. REV. 683, 687–88 (2004) (discussing the impact of statements by Professor Chemerinsky that the Supreme Court's opinion in *Missouri v. Jenkins* amounted to a statement to federal courts that they should "declare victory in school desegregation cases and go home").

29. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UNIV. OF CAL., L.A., HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 28 tbl.10 (2007), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.

30. *See id.* at 33 tbl.14.

31. *Id.* at 28 tbl.10, 33 tbl.14.

32. *Id.* at 28 tbl.10.

33. *Id.* at 33 tbl.14.

34. *Id.* at 34 tbl.16.

35. *Id.* at 35 tbl.17.

integration of public schools. In 1968, white students comprised over 80% of public school students.[36] By 2005, however, white public school students comprised only 57% of the total, while the proportion of Latino students had increased to 20%, followed closely by black students at 17%.[37] With these limitations, *Parents Involved* was never about the dream of desegregating or integrating our public schools nationwide; it was only about trying to hold on to the dwindling amount of school desegregation and integration that currently exists.

IV. ANALYSIS OF KENNEDY'S OPINION

There are two aspects of Kennedy's opinion I want to focus on. First, Kennedy provides a different rationale for the integration of public schools than that for desegregation. The rationale for integration is based on the notion that all school children will benefit from integration.[38] This contrasts sharply with the rationale for desegregation, which was viewed as only benefiting black students.[39] As a result, all students—including white students—will benefit from integration. Second, Justice Kennedy proposes two different paths for public school authorities interested in consciously pursuing school integration. Kennedy allows public school authorities wide discretion to pursue integration, so long as they are not employing individual racial classifications of students.[40] If these measures are inadequate, Kennedy also allows for a limited use of individual racial classifications to advance the compelling state interest of diversity or of preventing racial isolation.[41]

A. All Students Will Benefit from School Integration

Kennedy begins his opinion by stating, "The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."[42] This utilitarian justification for integration places the emphasis on diversity benefiting our nation as a whole and in particular, all public school students. This is a far cry from the justification for school desegregation that existed when I attended integrated elementary and secondary schools. At that time, whether dealing with school integration or desegregation, the country lived with the language justifying school desegregation from the Supreme Court's opinion in *Brown I*.[43]

---

36. *Id.* at 15.

37. *Id.* at 16 tbl.2.

38. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

39. *See* Freeman v. Pitts, 503 U.S. 467, 485–86 (1992) (quoting Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954)).

40. *See Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

41. *Id.* at 2792–93.

42. *Id.* at 2788.

43. Specifically, the *Brown I* Court noted, "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494.

Justice Kennedy authored the opinion for the Court in *Freeman v. Pitts*[44]—the Court's second school desegregation termination decision. In addressing the desegregation termination issues presented in *Freeman*, Justice Kennedy noted early that

> [t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.[45]

Kennedy then revisited Chief Justice Warren's unanimous opinion for the Court in *Brown I* in order to properly elucidate the injuries derived from de jure segregation that school desegregation remedies were intended to cure. Kennedy quoted the passages from Warren's opinion that specifically articulated the harm of segregation: "To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[46]

Kennedy also quoted the portion of Warren's opinion in *Brown I* that approvingly quoted a lower court in Kansas:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . [T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children . . . .[47]

---

44. 503 U.S. at 471.

45. *Id.* at 485.

46. *Id.* (alteration in original) (quoting *Brown I*, 347 U.S. at 494) (internal quotation marks omitted). The social science evidence cited by the Court was specifically intended to prove that segregation produced a psychological harm to African Americans. *See Brown I*, 347 U.S. at 494 & n.11.

47. *Id.* at 486 (second alteration in original) (quoting *Brown I*, 347 U.S. at 494) (internal quotation marks omitted). As I have noted in a prior article,

> I do not wish to be perceived as voicing the proposition that the Supreme Court was wrong in striking down *de jure* segregation in 1954. It seems to me that only a fool would take such an outlandish position. As an African-American law professor, it is obvious that had the Court not struck down *de jure* segregation in *Brown I*, I would not be in the position to write this article. I extol the valor that the Court exhibited in breathing life into the moral imperative of equality enshrined in America's most important legal documents. As a decision to strike down *de jure* segregation, *Brown I* should be looked upon and revered as a fundamental effort by the Supreme Court that sparked a historic effort by American society to attempt to break with its racially oppressive past. Without question, the opinion helped to open doors for African-Americans that prior to it were permanently barred. Certainly there were extra-legal implications for an opinion like *Brown I*, which made it important for the Court to reach unanimity. Additionally, considerations about the inflammatory nature of the subject matter may have caused the Court[,] quite correctly[,] to write the opinion the way that

The Court's opinion in *Brown I* justified remedies for de jure segregation on the express notion that segregation inflicted psychological and emotional harms on blacks.[48] Despite the rationale advanced by the Supreme Court to justify the Court's de jure segregation jurisprudence, scholars and judges have offered other interpretations of the meaning behind the Court's jurisprudence.[49] However, the debate carried on by scholars and judges about the meaning of *Brown I* does not alter the language of the text nor the experiences it produced.

When my white classmates and I had our few discussions about desegregation or integration of public schools in our integrated classes, it was generally understood that black students—including me—were culturally deprived because of our lack of interracial contact and that school desegregation or integration was solely for our benefit. Chief Justice Warren's desegregation rationale in *Brown I* also cast white students in the role of charitable contributors.[50] They did not derive any benefit from the presence of black students in their schools. Rather, they were donating in-kind benefits in the form of their interracial contact with black students

---

> it did. I am, therefore, willing to concede that the Court delivered the best opinion possible for the American society as it existed in 1954.

Kevin D. Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males*, 23 CAP. U. L. REV. 63, 121 (1994).

48. *Brown I*, 347 U.S. at 494–95.

49. Some have argued that *Brown I* should be understood as an antisubordination opinion. In Part I of Justice Ginsburg's 2003 dissenting opinion in *Gratz v. Bollinger*, joined by Justices Breyer and Souter, she adopted this point of view. *See* 539 U.S. 244, 301–02 (2003) (Ginsburg, J., dissenting). Justice Ginsburg argued that in implementing the Equal Protection Clause, "government decisionmakers may properly distinguish between policies of exclusion and inclusion." *Id.* at 301. Thus, Ginsburg reasoned, "[a]ctions designed to burden groups long denied full citizenship stature[, like African Americans,] are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated." *Id.* (citing Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 433–34 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism.")). At the other end of the spectrum, commentators have argued that *Brown I* should be understood to be nothing more than an opinion that declares the simple proposition that it is wrong for the government to classify and treat individuals as members of racial or ethnic groups. *E.g.*, LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 30–31 (1976) ("[A]n American citizen . . . should not be disadvantaged by government because of his race or ancestry."); *see also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("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."). There is no need for evidence to support the proposition that segregation is an insult to African Americans: "Segregation does involve stigma; the community knows it does." Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 158 (1955). As a result, segregation was wrong not because it psychologically harmed African Americans, but because government was wrong to classify and treat people based on a suspect characteristic like race. Still, other commentators, particularly Professor Derrick Bell, have asserted that *Brown I* should be understood as a utilitarian opinion seeking to advance the collective interest of white elites in American society. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980), *reprinted in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 90, 96–97 (Derrick Bell ed., 1980). In asserting this point of view, Professor Bell notes that the Court's opinion in *Brown I*—and the school desegregation it spawned—were particularly helpful in assisting the United States in its struggle against the Soviet Union during the Cold War. *Id.*; *see also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79–114 (2000) (describing the connections between desegregation efforts in American public education and the Cold War).

50. *See Brown I*, 347 U.S. at 493–95.

like me. In contrast, Kennedy's justification in *Parents Involved* for the integration of schools makes it clear that all students—including the white students—benefit by recognizing that the strength of our country "comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."[51] Thus, I applaud Justice Kennedy for adopting the positive utilitarian justifications for school integration. This reflects the culmination of our experience with school desegregation, school integration, and affirmative action over the past fifty years. Proponents of racial mixing in our public schools, colleges, and universities are much more likely to tout the benefits of bringing together students from different racial and ethnic backgrounds than they are to justify such efforts in terms of the need to improve the deficient cultural environment of black students.

B. The Structure and Limitations of Constitutionally Acceptable Integration Plans

Before discussing the structure and limitations of constitutionally acceptable school integration plans, Justice Kennedy notes that while "[t]he statement by Justice Harlan that '[o]ur Constitution is color-blind' was most certainly justified in the context of his dissent in *Plessy v. Ferguson*, ... And . . . [the] axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principal."[52] Justice Kennedy provides two different paths for public school authorities that want to consciously pursue school integration. He gives them wide discretion to pursue it without employing individual racial classifications of students.[53] If these measures are inadequate, however, then Justice Kennedy also allows for the limited use of individual racial classifications to advance the compelling state interest of diversity—as in *Grutter v. Bollinger*[54]—or of preventing racial isolation.[55]

1. Racially Conscious Measures that Do Not Employ Individual Racial Classifications

Justice Kennedy stated that it is permissible for public school authorities "to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[56] Thus, schools "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."[57] Justice Kennedy then goes on to note that "[s]chool boards may pursue the goal of [diversity] through . . . strategic site selection of new schools; drawing attendance

---

51. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

52. *Id.* at 2791–92 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown I*, 347 U.S. 483).

53. *See id.*

54. 539 U.S. 306 (2003).

55. *Parents Involved*, 127 S. Ct. at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment).

56. *Id.* at 2792.

57. *Id.*

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."[58] According to Kennedy, "[t]hese mechanisms are race conscious[,] but . . . it is unlikely any of them would demand strict scrutiny to be found permissible."[59]

Justice Kennedy's proposed mechanisms, when compared to Justice Roberts' plurality opinion, are significant concessions to those who desire to pursue integration policies. One of the concerns for school districts before *Parents Involved*—a concern that would have remained had Justice Roberts been writing a majority, rather than plurality, opinion—was the distinct possibility that measures primarily motivated by the race-conscious objective of increasing school integration could trigger strict scrutiny, even without employing racial classifications of individual students.[60] As Justice Kennedy indicated in his opinion, race-conscious measures that do not employ individual racial classifications have been employed for generations.[61] Now, school authorities employing such measures can do so "with confidence that a constitutional violation does not occur."[62] By removing this concern, Justice Kennedy's opinion allows school authorities to consciously attempt to produce as much integration as possible through means that eschew individual racial classifications.

We can also view Justice Kennedy's comments in *Parents Involved* as a huge concession over his prior opinions. Justice Kennedy authored the opinion of the Court in the five-to-four decision in the congressional redistricting case of *Miller v Johnson*.[63] In *Miller*, Justice Kennedy applied strict scrutiny to a redistricting plan created by the Georgia legislature that was motivated by the racially conscious

---

58. *Id.*

59. *Id.* It is also interesting to note that Justice Kennedy at this point quoted *Bush v. Vera*, which stated, "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." *Id.* (quoting Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion)) (internal quotation marks omitted). Justice Kennedy actually wrote a separate concurring opinion in *Bush*. *See Bush*, 517 U.S. at 996–99 (Kennedy, J., concurring). One of the matters that he took issue with was the meaning of this very part of Justice O'Connor's opinion. Kennedy stated,

> I join the plurality opinion, but the statements in Part II of the opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts require comment. Those statements are unnecessary to our decision, for strict scrutiny applies here. I do not consider these dicta to commit me to any position on the question whether race is predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State.

Id. (internal citation omitted).

60. See, for example, in *Grutter v. Bollinger*, responding to the argument by the United States that the law school could employ percentage plans recently adopted by public undergraduate institutions in Texas, Florida, and California, Justice O'Connor's statement that "*even assuming such plans are race-neutral*, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. 306, 340 (2003) (emphasis added).

61. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

62. *Id.*

63. Miller v. Johnson, 515 U.S. 900 (1995).

desire to produce a majority-minority congressional district.[64] However, the redistricting plan at issue in *Miller* did not employ systematic, individual typing of race.[65] Yet, when looking at this plan and concluding that it triggered strict scrutiny, Justice Kennedy said the problem with assigning citizens to voting districts based on race is that "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'"[66] Justice Kennedy also noted that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[67] Justice Kennedy actually compared the drawing of boundary lines primarily motivated by race to the use of racial classification in prior Supreme Court cases that involved the striking down of segregation statutes and ordinances related to public parks, buses, golf courses, beaches, and schools.[68]

Justice Kennedy's distinction between the use of racially conscious measures to produce integrated schools and the use of measures that are not only racially conscious but also employ racial classifications of individual students is a tenuous one. In addition, this distinction requires public schools to engage in inefficient and costly measures to pursue integration over what they could accomplish with a more direct approach. Kennedy squarely faces this tenuous distinction and the arguable irrationality of the distinction by posing several rhetorical questions that opponents of this distinction would likely raise:

> If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies? Does the Constitution mandate this inefficient result? Why may the authorities not recognize the problem in candid fashion and solve it altogether through resort to direct

---

64. *Id.* at 920. I am not arguing that Justice Kennedy's opinion in *Parents Involved* overrules his opinion in *Miller*. There could be legitimate grounds to apply the Equal Protection Clause differently in public schools than in voting. I have asserted in a number of articles that public education is *sui generis*, and thus, the Equal Protection Clause should apply in a different way. *See, e.g.*, Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 79 (2000) ("It is a mistake to view the use of racial classifications in public schools the same way that their use would be viewed outside the context of public education."); Brown, *supra* note 21, at 1002 ("The unique features of public education justify a different analysis for the use of race and ethnic classification in public schools than it does outside of that context."). However, the Supreme Court's jurisprudence could lend itself to the conclusion that a school system drawing school district boundary lines motivated primarily by a desire to produce integrated public schools could trigger strict scrutiny as well.

65. *See Miller*, 515 U.S. at 917–20.

66. *Id.* at 912 (quoting Metro Broad., Inc. v. Fed. Commc'ns Comm'n, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)).

67. *Id.* at 911 (quoting *Metro Broad.*, 497 U.S. at 602 (O'Connor, J., dissenting)) (internal quotation marks omitted).

68. *Id.* (citing New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (public parks); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches); *Brown I*, 347 U.S. 483 (1954) (schools)).

> assignments based on student racial classifications? So, the argument proceeds, if race is the problem, then perhaps race is the solution.[69]

Kennedy responds to these rhetorical questions and the last statement with a rationale reminiscent of Justice Holmes' famous saying—"The life of the law has not been logic: it has been experience."[70] Justice Kennedy explained,

> The argument ignores the dangers presented by individual classifications, dangers that are not *as* pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. *On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.*
>
> The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. *And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it.* Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.[71]

The justification for Justice Kennedy's distinction is that using racial classifications of individual students to accomplish school integration is simply too obvious. Kennedy's concern is the candor of employing efficient means to accomplish the goal of school integration, not school integration itself. This is a distinction that can be defended far more easily if it is defended based upon experience rather than logic. It is also a distinction that I, regrettably, must confess accords with my experience. It does not, however, accord with my experience or that of so many black people dealing with our race. Blacks (and Hispanics) are

---

69. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2796 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

70. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1951) (1881).

71. *Parents Involved*, 127 S. Ct. at 2796–97 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

often treated and reacted to in our society as members of a racial or ethnic group. In the affirmative action process, most underrepresented minorities are savvy and experienced enough to recognize that our admissions to selective colleges, universities, and graduate programs is based upon a calculation that considers our abilities—as measured by "objective" academic credentials—and our race or ethnicity. When we apply for jobs at accounting firms, law firms, or law schools, we know that our race or ethnicity is a part of the judgment of our abilities. Sometimes our race or ethnicity will help; at other times, it will be a burden. But it almost always matters.

The principal concern of underrepresented minorities—including me—is not being treated as members of a racial or ethnic minority, but being treated in a negative manner because we are racial or ethnic minorities. It is not the denial of individuality that is the harm; it is the fact that some person, some institution, or some institutional practice has affirmatively disadvantaged us because we are minorities. However, regardless of my experience as a black person dealing with my race, my experience of interacting with and observing the experiences of so many white people dealing with their race has clearly attuned me to the reality that many whites are not accustomed to thinking of themselves as members of a racial group. Many whites are much more likely to find the fact they are treated as a white person, as opposed to an individual, demeaning. Thus, my experience of being a black person tells me that it is negative treatment accorded to me because I am black that is the harm. My experience also is that so many white people react to the denial of their individuality when they are treated as being white as a harm in and of itself. The distinction Justice Kennedy draws is irrational and illogical when comprehended against my experience of being a black person. However, my experience of observing and interacting with so many whites when they are being treated as a member of a racial group tells me that Kennedy's distinction has merit.

2. *Employing Individual Racial Classifications*

If the exhaustion of racially conscious measures fails to produce an adequate amount of integration, Justice Kennedy would then allow school authorities to employ individual racial classifications in the pursuit of two distinct compelling state interests.[72] Justice Kennedy notes that public school authorities could employ "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[73] Thus, school authorities could use racial classifications in an individualized admissions process as provided for in *Grutter*.[74] The criteria would be different than that in *Grutter* due to "the age of the students, the needs of the parents, and the role of the schools."[75]

Justice Kennedy also noted that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that

72. *See id.* at 2797 ("[M]easures other than differential treatment based on racial typing of individuals first must be exhausted."). The two compelling government interests listed by Justice Kennedy are the avoidance of racial isolation and the achievement of a diverse student population. *Id.*

73. *Id.* at 2793.

74. *Id.*

75. *Id.*

ensures equal opportunity for all of its children."[76] In the pursuit of this duty, Justice Kennedy recognizes that "[a] compelling [state] interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."[77] Professor Rachel Moran has pointed out that public school officials do not even have to empirically demonstrate that avoiding racial isolation is a tangible benefit.[78] If public school officials want to use racial classifications to end racial isolation, they can do so by declaring it an exercise of their discretion and expertise regarding the best educational setting for their students.

According to Justice Kennedy, when public school authorities employ racial classifications of individual students, they are limited to using them in a narrowly tailored fashion to achieve the compelling state interest of producing the benefits of diversity—as allowed in *Grutter*—or to avoid racial isolation.[79] In *Grutter*, the University of Michigan Law School argued that in order to obtain the benefits of racial and ethnic diversity, they had to enroll a "critical mass" of students from minority groups that had historically been subjected to discrimination.[80] The concept of critical mass sets an upper limit on the consideration of race and ethnicity in the public school assignment process.[81] Professor Kent Syverud was a professor at the University of Michigan Law School and is now dean of Washington University School of Law. He testified before the district court, indicating that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."[82] Once a public school obtains a critical mass of underrepresented minorities, its continued use of racial classifications is no longer narrowly tailored to the compelling state interest.[83] Critical mass was defined by Jeffrey Lehman—the Dean of the University of Michigan Law School at the time of *Grutter*—as "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race."[84] While a definite percentage cannot be given for critical mass, there is evidence in *Grutter* to suggest that the percentage is between

---

76. *Id.* at 2797.

77. *Id.*

78. Professor Moran recently made the point at a recent symposium entitled "The School Desegregation Cases and the Uncertain Future of Racial Equality," hosted by the *Ohio State Law Journal* on February 21, 2008. For a web cast of Professor Moran's remarks, visit the journal's web site at http://moritzlaw.osu.edu/lawjournal/symposium/index.php.

79. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

80. Grutter v. Bollinger, 539 U.S. 306, 315–16 (2003).

81. *See id.* at 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."); Wessmann v. Gittens, 160 F.3d 790, 798 (1st Cir. 1998) (holding that the need for racial diversity was not a compelling interest justifying racial classifications in the admissions process where "black and Hispanic students together would [already] comprise between 15% and 20% of each entering class" under a "strict merit-selection approach").

82. *Grutter*, 539 U.S. at 319–20.

83. *See Wessman*, 160 F.3d at 798.

84. *Grutter*, 539 U.S. at 318–19. Other school officials defined critical mass as "meaningful representation" and "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318–20.

13.5% and 20%.[85] In addition, the First Circuit in *Wessman v. Gittens*[86] had the occasion to address the percentage of underrepresented minorities necessary to obtain the educational benefits of diversity for certain public high schools in Boston.[87] In so doing, the First Circuit noted,

> Statistics compiled for the last ten years show that under a strict merit-selection approach, black and Hispanic students together would comprise between 15% and 20% of each entering class, and minorities, *in toto*, would comprise a substantially greater percentage. Even on the assumption that the need for racial and ethnic diversity alone might sometimes constitute a compelling interest sufficient to warrant some type of corrective governmental action, it is perfectly clear that the need would have to be acute—much more acute than the relatively modest deviations that attend the instant case.[88]

In *Parents Involved*, Justice Kennedy does not say what percentage of a particular racial group is needed in order to constitute a racially isolated school. However, public school authorities may not need to establish through empirical research the harm resulting from racially isolated schools. Therefore, it is unlikely that a school will be considered racially isolated if the percentage of a minority group—whether black or Latino in a predominately white school, or white (or perhaps Asian) in a predominately black or Latino school—is greater than 15% to 20%. Thus, the compelling interest of preventing a school from being racially isolated is likely to yield a similar upper limit on the percentage of students in the school who are the racial or ethnic minority than will be yielded by a focus on critical mass.

As noted earlier, 38% of black and 39% of Latino students attend public schools where racial minorities constitute over 90% of the student population.[89] The benefits of diversity in *Grutter* focused on attracting students from minority groups—groups that had been historically discriminated against—to the predominantly white student body of the University of Michigan Law School.[90] Nevertheless, it would certainly seem that schools with predominately minority student bodies could also avail themselves of the same rationale to attract white (and maybe Asian) students to their schools. Beyond the diversity rationale, these schools could also assert the compelling state interest of avoiding racially isolated schools. However, candor requires us to note that it is unlikely that school authorities will pursue integration plans employing racial classifications of individual students with much enthusiasm or effect in schools with high

85. *See id.* at 336. The enrollment of underrepresented minority students in the University of Michigan Law School ranged from 13.5% to 20.1% of the class between 1993 and 1998. *Id.* The majority opinion did not raise any objection to these percentages as constituting a critical mass.

86. 160 F.3d 790.

87. 160 F.3d at 791–94.

88. *Id.* at 798. It should also be noted that at the time of the case, black and Hispanic students comprised 73% of the Boston public school students. *Id.* at 798 n.4.

89. ORFIELD & LEE, *supra* note 29, at 33 tbl.14, 35 tbl.17.

90. *See Grutter*, 539 U.S. at 315–16.

concentrations of minority students. The reason is not based in logic, but in fifty years of experience with school desegregation and integration. That experience strongly indicates that white parents will not send their children to these schools in any significant numbers. A brief review of the history of school desegregation will elucidate this reality.

All of us familiar with the school desegregation process are familiar with the concepts of "white flight"[91] and the "tipping point,"[92] as well as their implications for school desegregation and integration. During the 1950s, 1960s, and 1970s, the Supreme Court and our country were rudely introduced to the reality that whites who object to their children being part of a desegregation remedy and have the resources will often decide to "flee" the school system by sending their children to private schools or by choosing to move to another community. With one of the companion cases[93] to *Green v. County School Board*,[94] where the Supreme Court emphatically announced that the obligation of school districts that had once operated dual school systems was to desegregate and to do it now,[95] the Court was compelled to address the issue of white flight. In *Monroe v. Board of Commissioners*,[96] the Court addressed a desegregation plan for the three junior high schools in Jackson, Tennessee.[97] Two of the schools were formerly all-white schools and one was formerly all black.[98] The school district initially assigned students to the neighborhood schools; however, they were allowed to transfer to other schools.[99] The result was that the white students assigned to the black schools generally sought transfers to the former all-white schools.[100] Three years after the approval by the district court of the school district's attendance zones for the junior

---

91. Scholarly studies in the 1970s studying the impact of white flight followed the publication of JAMES S. COLEMAN, SARA D. KELLY & JOHN A. MOORE, TRENDS IN SCHOOL SEGREGATION, 1968–73 (1975) (concluding that the decline in white enrollments in schools in heavily black inner cities is significantly accelerated when desegregation occurs, especially where white suburbs exist). For a survey of the ensuing controversy, see David J. Armor, *White Flight and the Future of School Desegregation*, *in* SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 187, 187–96 (Walter G. Stephan & Joe R. Feagin eds. 1980); Thomas F. Pettigrew & Robert L. Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1 (1976); Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80–94 (1983).

92. The phenomena of "tipping point" was noted by Morton Grodzins in 1957 when he indicated that for the vast majority of white Americans there exists an upper limit of minority enrollment in their children's schools that they can tolerate—with about 20% being the tipping point in some East Coast cites. *See* THOMAS C. SCHELLING, STRATEGIES OF COMMITMENT AND OTHER ESSAYS 302 (2006).

93. The companion cases were *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968), and *Raney v. Board of Education*, 391 U.S. 443 (1968).

94. 391 U.S. 430 (1968).

95. *See id.* at 411–42.

96. 391 U.S. 450.

97. *See id.* at 452–56. While the case presented to the Supreme Court involved only the three junior high schools in Jackson, "the plan in its application to elementary and senior high schools [was] also necessarily implicated since the right of free transfer extend[ed] to pupils at all levels." *Id.* at 456.

98. *Id.* at 482.

99. *Id.* at 453–54.

100. *See id.* at 457 ("Not one of the considerable number of white pupils in the middle and northern parts of the Merry zone assigned there under the attendance zone aspect of the plan chose to stay at Merry. Every one exercised his option to transfer out of the Negro school." (internal quotation marks omitted)).

high schools, no white student was attending the formerly all-black school.[101] The school district frankly asserted in its brief to the Supreme Court that without the transfer option, it feared that the white students would "flee the school system altogether."[102] The Supreme Court responded by quoting *Brown v. Board of Education*[103] (*Brown II*): "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[104] The Court, discussing the issue of white flight four years later in *United States v. Scotland Neck City Board of Education*,[105] stated that while white flight "may be cause for deep concern, . . . it cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."[106]

In his path-breaking article back in 1983, Professor Paul Gewirtz noted,

> The degree to which white flight occurs in a school system depends upon the proportion of black enrollment in the schools as well as other variables. If the proportion of blacks in the schools is greater than some "tipping point," it is commonly believed that white flight significantly escalates, and the schools may become or remain identifiably black. A tipping point has typically been estimated to occur when the proportion of blacks is between twenty-five and fifty percent . . . .[107]

Despite the statements by the Supreme Court about white flight, lower courts fashioning desegregation remedies were also driven by Supreme Court mandates that stated the following: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole";[108] the existence of a small number of one-race or virtually one-race schools within a school district does not mean that the remedy is constitutionally inadequate.[109] The true object of the desegregation remedy is to achieve the maximum amount of desegregation possible.[110] Therefore, "[w]hile the fear of white flight cannot be accepted as a reason for not acting, the court may elect a constitutionally permissible plan calculated to minimize white boycotts."[111] Recognizing the impact that white flight can have on the effectiveness

---

101. *Id.* Only 7 black students were attending one of the formerly all-white schools, and the student body of the second formerly all-white school had 349 white children and 135 black children. *Id.*

102. *Id.* at 459.

103. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

104. *Id.* (quoting *Brown II*, 349 U.S. at 300) (internal quotation marks omitted).

105. 407 U.S. 484 (1972).

106. *Id.* at 491.

107. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629–30 (1983).

108. Swami v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).

109. *Id.* at 26.

110. *See id.*

111. Tasby v. Wright, 713 F.2d 90, 99 (5th Cir. 1983) (citations omitted) (internal quotation marks omitted).

of a remedial plan is nothing more than recognizing that there is a difference between catering to bias and seeking to minimize patron resistance.[112]

What the foregoing suggests is that, based on our experience with school desegregation and integration, not many white parents will eagerly send their children to racially isolated schools with a predominantly minority student body. In practice, Kennedy's limitation on employing racial classifications of individual students[113] constitutionalizes the school desegregation and integration phenomena of white flight and the tipping point. The tipping point sets an upper limit to the proportion of black (and other underrepresented minority) students who can attend a predominantly white school in order to obtain stable integration of that school's student body. Thus, the type of school where the use of racial classifications will be effective is that in which the student body is at least 80% to 85% white (or maybe white and Asian). In fact, the percentage of white (or maybe white and Asian) students is likely to be even higher because these percentages would be approaching the critical mass or racial isolation limits. Such public schools are the only ones that have the largely homogenous racial makeup necessary to use individual racial classifications. It will also be necessary for the public school officials to believe in the utilitarian benefits of diversity and the idea that the strength of our nation "comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."[114] If school authorities do not so believe, then they will not be interested in adopting a school integration plan using individual racial classifications in the first place. These communities will be composed of an overwhelming number of white students, white parents, and white voters who will have to agree that the limited use of racial classifications is beneficial for white students. If the white community does not support the limited use of racial classifications, they will be able to resort to the political process and easily defeat these types of plans by voting the offending school board members or other governmental officials out of office.

V. CONCLUSION

Justice Kennedy's opinion embodies the American experience of what we have learned through fifty years of school desegregation and integration. He does not write as one who is considering school integration while staring up into blue skies with a bright yellow sun. He does not write as one hearing trumpets blowing from the heavens that are heralding the dawn of a new and wonderful day. Justice Kennedy knows that as a country we are not novices at school integration embarking on a bold adventure of the American spirit with our typical optimism

---

112. The Eighth Circuit recognized this difference in *Clark v. Board of Education*, 705 F.2d 265 (8th Cir. 1983), when it held that a lower court may reduce the black population in some integrated schools—thereby maintaining a number of all-black schools—in order to prevent white flight and stabilize the integration process in a system that was 65% black. *See id.* at 269–73; Adams v. United States, 620 F.2d 1277, 1291–97 (8th Cir. 1980) (holding that a desegregation plan need not reassign additional black children to schools with at least 30% black enrollment to prevent white flight in a school system with 75% black enrollment, even though all-black schools remain).

113. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792–93 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

114. *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

and hubris. Rather, we are seasoned veterans who have come to realize that we cannot achieve everything we desire. Justice Kennedy is the sober and somber voice at the funeral that says, "I come to bury Caesar, not to praise him."[115] When it comes to school desegregation and integration, fifty years of experience adequately demonstrates to us that there are limits as to what American society is prepared to do at this time. What Justice Kennedy does is constitutionalize the limits of school integration that reflect our experience over the past two generations. Justice Kennedy allows public school authorities to produce as much integration as they can, without unduly upsetting the sensibilities of white students, white parents, and white voters.

Justice Kennedy's position cannot help but call to mind the prescient memorandum written by then-law clerk William Rehnquist, arguing against the Supreme Court overturning *Plessy v. Ferguson*[116] in its opinion in *Brown I*.[117] In his memorandum, Rehnquist asserted the following:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind . . . have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.[118]

115. WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2, l.71, *in* THE NORTON SHAKESPEARE: BASED ON THE OXFORD EDITION 1533, 1565 (Stephen Greenblatt et al. eds., 1997).

116. 163 U.S. 537 (1896).

117. *See* 347 U.S. 483, 494–95 (1954).

118. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 606 (1975) (reproducing portions of the Rehnquist memo).

*