What’s Good for the Goose is Good for the Gander: A Critique of Parents Involved and an Application of the Grutter Framework to Public Secondary Education

Joseph R Weidenburner

Available at: https://works.bepress.com/joseph_weidenburner/1/
What’s Good for the Goose is Good for the Gander: A Critique of Parents Involved and an Application of the Grutter Framework to Public Secondary Education

Joseph R. Weidenburner

I. Introduction
II. Background
   A. Standard of Review – Strict Scrutiny Test for Racial Classifications
   B. Brown v. Board of Education and the Mandatory Desegregation of Public Schools
      1. Separate, But Equal is Inherently Unequal
      2. Remediaying Schools in the Aftermath of Mandatory Desegregation is the Responsibility of Local School Boards
   C. The Use of Race in Determining Admissions in Public Higher Education
III. The Seattle Open Choice Plan
   A. Operation of the Plan
      1. Stated Purpose
      2. Factors Used
   B. Results of the Integration Tiebreaker
IV. Parents Involved in Community Schools v. Seattle School District No. 1: The Supreme Court Splits Over Resolution of the Case
   A. The Roberts Plurality Striking Down the Seattle Plan
      1. Racial Balancing is an Unconstitutional End
      2. The Compelling Interest in Diversity in Higher Education is Inapplicable to Secondary Education
      3. Public Policy Prohibits the Perpetuation of America’s Racial Divide Through the Use of Racial Classifications in Education
   B. The Four-Justice Dissent Upholding the Plan in its Entirety
      1. Seattle Plan Reflects the Spirit and Promise of Brown
      2. Race-Conscious Education Plans Should Be Viewed Contextually
      3. Seattle Plan Survives Strict Scrutiny
   C. The Kennedy Concurrence – Recognizing Diversity as a Compelling Interest
      1. The Interest in Diverse Classrooms is Legitimate and Compelling
      2. Seattle Plan is Not Sufficient to Meet Narrow Tailoring
V. Proposing a Solution
   A. The Major Flaws in Seattle’s Open Choice Plan
   B. The Major Flaws in the PICS Opinion
      1. Workable Standard
      2. Confusion Over Diversity as a Compelling Interest
   C. Diversity as a Compelling Interest in Secondary Education
   D. A Grutter Plan to Meet Narrow Tailoring
      1. Race as a Plus-Factor Rather Than as a Singularly Determinative Factor
      2. Diversifying Student Bodies Through Stated Interests or Academic Performance
VI. Conclusion
I. Introduction

In the decades following the Supreme Court’s landmark decision in Brown v. Board of Education (“Brown”), mandating desegregation of public schools nationwide, the issue of what role race can play in public education has provided controversial, contentious, and provocative court battles. The Supreme Court requires that any state or state actor seeking to make race-based classifications must tailor their actions to survive the strict scrutiny test. Only racial classifications comprising narrowly tailored means of achieving compelling governmental interests will pass constitutional muster. Beginning with Brown, the Supreme Court became the forum in which racial disputes concerning public education are contested. Throughout the years, the Court remained consistent in preserving the spirit and promise of Brown. In 2007, the Supreme Court decided Parents Involved in Community Schools v. Seattle School District No. 1 (“PICS”), which once again brought the use of race-based classifications in public schools to the forefront of Supreme Court jurisprudence. However, rather than produce a clear and understandable result, the PICS Court made confusing a line of precedent that had evolved into a workable roadmap for school boards post-Brown.

The Court’s precedent until PICS made clear that some use of race was acceptable in attempting to integrate classrooms. This was due to the autonomy historically given to local school boards not only in determining the best means of complying with Brown’s mandatory desegregation decree, but also in determining the best means of governing local public education.

---

2 See U.S. v. Carolene Products, 304 U.S. 144, n. 4 (1938) (hinting for the first time that strict scrutiny should be applied in the context of suspect classifications such as race).
3 See Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995) (holding that all racial classifications are to be analyzed under the strict scrutiny test).
on the whole. However, the Court in PICS strayed from traditional precedent deferring to school boards and their better judgment, holding that Seattle’s plan using race as one of many factors in determining student assignment did not satisfy the Court’s strict scrutiny analysis. In the aftermath of PICS, the question of what constitutes a lawful and constitutional means of using race as a factor in determining public school assignment remains confusing and largely unanswered. With Justice Kennedy refusing to join significant parts of Chief Justice Roberts’ opinion, substantial questions remain as to what standard school boards should apply in deciding whether or how to use race in student assignment plans. Is Chief Justice Roberts’ opinion the controlling law on the use of race in public education, or should such a distinction be accorded to Justice Kennedy’s concurrence? Are there other factors to be considered in determining the constitutionality of a student assignment plan that uses racial classifications?

This Note examines the PICS opinion and proposes that the framework of Grutter v. Bollinger (‘Grutter”) should counsel school boards on how to fashion student assignment plans using racial classifications in secondary schools that would pass constitutional muster.

This Note will critique the decision in PICS and argue that application of Grutter to public secondary schools makes logical and practical sense. Part II traces the history of Supreme Court precedent dealing with racial classifications and the venue of public education. The evolution of Fourteenth Amendment jurisprudence is examined as applied to the Court’s

---

5 See Missouri v. Jenkins, 515 U.S. 70, 99 (1995) (recognizing the importance of the autonomy traditionally given to local school boards); Freeman v. Pitts, 503 U.S. 467, 490 (1992) (commenting on the need for courts to give deference to local school authorities who are in the best position to determine the needs particular to their locality).
6 Parents Involved, 127 S. Ct. at 2757-58.
7 See id. at 2788 (Kennedy, J., concurring) (proclaiming that Justice Kennedy cannot join significant parts of the Chief Justice’s opinion due to its “inconsistencies in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause”).
9 Limiting the Grutter framework to secondary education provides the most practical means of attempting to achieve diversity in the classroom. Ideally, diverse classrooms should be the goal of school boards no matter what level of education is considered, but for purposes of this Note, the analysis of the Grutter framework applies only to public secondary education.
landmark decisions in the education law field. Part III discusses at length the composition of the plan used by the Seattle school district in PICS. Part IV examines the various opinions of the Court in PICS and attempts extract a workable standard by which school districts can assess the use of race in student assignment. Part V proposes a plan based on Grutter that would apply to public secondary schools. The analysis in Part V will show the problems with Seattle’s plan in PICS. It will also propose that the distinction between higher education and education at the secondary school level is not so great as to require different constitutional standards for the use of race in student assignment.

II. Background

A. Standard of Review – Strict Scrutiny Test for Racial Classifications

As the PICS Court makes clear, the standard of review for racial classifications in the context of public education is strict scrutiny. 10 The two-part test for strict scrutiny requires that the government establish a compelling interest as the end sought, and that the government use narrowly tailored means to achieve this end. 11 Failure to establish an interest deemed sufficiently compelling will prove fatal under strict scrutiny analysis. 12 Even if the interest sought is shown to be compelling, courts will invalidate a race-based classification if the means

10 Parents Involved, 127 S. Ct. 2738 (2007). Other courts have hinted at the need for an intermediate level of scrutiny in the educational arena, but the Supreme Court remains steadfast in applying strict scrutiny. See Comfort v. Lynn Sch. Comm., 418 F. 3d 1 (1st Cir. 2005) (declaring that the educational arena is so unique as to need a different level of scrutiny for racial classifications). Scholars have indicated that strict scrutiny should not be applied to public education because the context of education differs substantially from that of affirmative action. See Deborah N. Archer, Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs, 9 U. PA. J. CONST. L 629, 639 (2007) (arguing that “voluntary school integration does not emerge out of the legal fabric of affirmative action in higher education, public employment, or government contracting.”) but rather that “it is a milestone along the long and difficult road down which this nation has traveled over the past fifty years in its quest to achieve the promise of Brown”).


12 Id.
used to achieve the interest prove to be less than necessary.\textsuperscript{13} Although this analysis requires the “most exacting judicial scrutiny,”\textsuperscript{14} the test itself is not “strict in theory, but fatal in fact.”\textsuperscript{15}

The standard used when the government acts on the basis of race is more stringent than intermediate scrutiny, which is used when the government acts on the basis of gender,\textsuperscript{16} and rational basis, which is used when the government acts in any other way.\textsuperscript{17} If the end sought by the government is not compelling, the use of race as a means to achieve that end will fail.\textsuperscript{18} A compelling interest is a necessary component for the use of race under strict scrutiny. If the government shows that the end sought through the use of race is compelling, then the analysis turns on whether the means used to achieve this end are narrowly tailored.\textsuperscript{19} Narrow tailoring requires that the means used must be the least restrictive means available to the government.\textsuperscript{20}

\textbf{B. Brown v. Board of Education and the Mandatory Desegregation of Public Schools}

\textbf{1. Separate, But Equal is Inherently Unequal}

In 1954, the Supreme Court rendered a landmark decision outlawing racial segregation in public schools in \textit{Brown}.\textsuperscript{21} For years, the country operated under the jurisprudential mantra of “separate but equal” handed down by the Court in \textit{Plessy v. Ferguson}.\textsuperscript{22} Writing for the Court in \textit{Brown}, Chief Justice Warren made clear that in the fundamental world of public education, racial segregation had no place.\textsuperscript{23} Any school board or school district that maintained racially

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.} at 230.
  \item \textsuperscript{15} \textit{Id.} at 237. \textit{See} Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (“Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision maker for the use of race.”).
  \item \textsuperscript{18} Adarand Constr., Inc. v. Pena, 515 U.S. 200, 227 (1995).
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990).
  \item \textsuperscript{22} Plessy v. Ferguson, 163 U.S. 537 (1896).
  \item \textsuperscript{23} \textit{Brown}, 347 U.S. at 495. Chief Justice Warren wrote, “We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we
segregated schools after Brown would violate the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{24} Brown also established that diversity in public school classrooms offers educational benefits for students.\textsuperscript{25}

2. **Remedying Schools in the Aftermath of Mandatory Desegregation is the Responsibility of Local School Boards**

The Supreme Court reconvened in 1955 in order to determine whose responsibility it would be for implementation of Brown’s mandatory desegregation decree.\textsuperscript{26} The decision rested on whether implementation of such a large-scale remedy was best left to the courts or to local school boards that governed public education.\textsuperscript{27} While offering guidance that desegregation should occur “with all deliberate speed,”\textsuperscript{28} the Brown II Court left the ultimate responsibility to school boards.\textsuperscript{29} Despite being wary of attempts by local school boards to feign compliance with Brown’s mandate,\textsuperscript{30} the Court maintained that the ultimate burden of achieving racial

\begin{footnotesize}
\begin{itemize}
  \item[24] \textit{Brown}, 347 U.S. at 495.
  \item[25] \textit{Id.}
  \item[26] \textit{See Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955) (discussing whose primary responsibility it was for implementing mandatory school desegregation).}
  \item[27] \textit{Id. at 299.}
  \item[28] \textit{Id. at 301.}
  \item[29] \textit{Id. at 299.} Chief Justice Warren, acknowledging that courts would still play a role in implementation if school boards and school districts were unsuccessful, writes, “Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.” \textit{Id.}. Justice Thomas has also recognized the need to allow local school boards latitude in fashioning local educational remedies. Justice Thomas writes:
    \begin{quote}
      Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.
    \end{quote}
  \item[30] \textit{See Green v. New Kent County Sch. Bd., 391 U.S. 430 (1968) (holding that freedom of choice plans resulting in de facto segregation are unconstitutional).} In striking down a freedom of choice plan which resulted in de facto segregation within the school district, the Court wrote, “The Board must be required to formulate a new plan and, in
\end{itemize}
\end{footnotesize}
integration of schools was best left to the school boards, which had both the experience in and the knowledge of basic educational issues.\(^{31}\)

**C. The Use of Race in Determining Admissions in Public Higher Education**

The Supreme Court first entertained the question of the permissibility of using race in determining admission to institutions of higher education in *Regents of the U. of Cal. v. Bakke* ("Bakke").\(^ {32}\) The admissions program at the University of California’s medical school set aside 16 out of every one hundred seats in the class for minority applicants.\(^ {33}\) Justice Powell concluded that this distinct number of seats set aside for applicants on the basis of their race or ethnicity constituted a racial quota.\(^ {34}\) However, Justice Powell’s opinion left open the door to permissible uses of race in admissions programs as long as these uses complied with strict scrutiny.\(^ {35}\)

In 2003, the Court issued opinions in companion cases from the University of Michigan that dealt with the use of race in admissions. These decisions outlined the limits to which race was an acceptable factor in determining university admissions. In *Gratz v. Bollinger* ("Gratz"),\(^ {36}\) the Court overturned a plan for undergraduate admissions that gave a number of points required

---

\(^{31}\) See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that the determination of whether mandatory busing as a means of complying with court-ordered desegregation was best left to the school board). The Court writes:

> School authorities are traditionally charged with road power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

*Id.* at 16.


\(^{33}\) *Id.* at 275.

\(^{34}\) *Id.* at 289. Justice Powell writes, “To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.” *Id.*

\(^{35}\) *Id.* at 318-19.

for admission to minority applicants based solely on their race.\textsuperscript{37} In \textit{Grutter},\textsuperscript{38} the Court upheld the law school’s plan which used race as a plus factor within a comprehensive, individualized review of law school applicants.\textsuperscript{39} In distinguishing the two plans, the Court pointed out that the undergraduate plan operated as a quota system designed to achieve racial balancing within the university.\textsuperscript{40} The law school plan differed in that race was not the sole determinant, but rather one of many factors used to judge applicants in compiling an admissions class that was wholly diverse.\textsuperscript{41} The Court made clear that racial balancing was not a constitutionally permissible compelling governmental interest,\textsuperscript{42} but that diversity in the classroom was a constitutionally permissible compelling governmental interest.\textsuperscript{43} Furthermore, the use of race as a plus factor in the law school’s comprehensive review process satisfied narrow tailoring.\textsuperscript{44}

\textbf{III. The Seattle Open Choice Plan}

\textbf{A. Operation of the Plan}

\textbf{1. Stated Purpose}

In response to developing de facto segregation\textsuperscript{45} within the school district based on housing patterns within the city, Seattle’s school board fashioned a plan that attempted to

\textsuperscript{37} \textit{Id.} at 270. Acknowledging that the plan in question did not satisfy strict scrutiny analysis, Justice O’Connor writes, “We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.” \textit{Id.}


\textsuperscript{39} \textit{Id.} at 334. The Court writes, “Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,’ without ‘insulat[ing] the individual from comparison with all other candidates for the available seats.’” \textit{Id.} (quoting \textit{Bakke}, 438 U.S. at 317).

\textsuperscript{40} \textit{Gratz}, 539 U.S. at 258-59.

\textsuperscript{41} \textit{Grutter}, 539 U.S. at 335-36.

\textsuperscript{42} \textit{Id.} at 330.

\textsuperscript{43} \textit{Id.} at 333.

\textsuperscript{44} \textit{Id.} at 336.

\textsuperscript{45} See Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 207 (1973) (distinguishing between de jure segregation, in which a finding of intent must be made, and de facto segregation, wherein a finding of intent is not necessary, but segregation has arisen due to some other factor such as housing patterns).
ameliorate these effects by diversifying classrooms district-wide. The board indicated that its plan attempted to balance the racial composition of schools within the district. To achieve this, the board required that the racial composition of each school should reflect the racial composition of the district as a whole. The board believed that the use of a racial tiebreaker to integrate “integration positive” schools was the best means of achieving racially balanced schools.

The school board offered another purpose for implementing its student assignment plan, namely racial diversity in the classroom. The board believed that racial diversity would increase the learning experiences of its students. The board also believed that creating racially diverse classrooms would help to cultivate acceptance among the students of different cultures and ethnicities. In its Brief to the Supreme Court, the board argues, “Diversity ‘enhances the educational process’ by ‘bring[ing] different viewpoints and experiences to [the] classroom’ and ‘has inherent educational value from the standpoint of education’s role in a democratic society.’” It is clear, however, that the board merely thought of diversity along racial and ethnic lines, without attempting to fashion the type of broad, wide-ranging diversity in the classroom about which the Supreme Court opined in Bakke and Grutter.

---

46 Brief for Respondents at 1, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (Oct. 10, 2006) (No. 05-908), 2006 WL 2922956. In its brief to the Supreme Court, the school board writes, “[H]ousing patterns in Seattle are starkly divided along a north-south line: more than 75% of the District’s non-white students live in the southern half of the city, while 67% of white students live in the northern half.” Id.

47 Id. at 2. The board states, “The Board, accordingly, included a limited consideration of race in its assignment plan to avoid these foreseeable results [of racially imbalanced schools] while providing every student with the opportunity to attend at least one of the District’s over-subscribed high schools.” Id.

48 Id.

49 Id.

50 Id. at 8.

51 Id. The board writes, “Diversity is therefore ‘a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.’” Id.

52 Id. According to the board, “[A] diverse student enrollment ‘fosters racial and cultural understanding’ by ‘increas[ing] the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races.’” Id.

53 Id.
2. Factors Used

The main thrust of the Seattle plan was choice. Incoming ninth graders listed their top choices for high school. The school board assigned students on the basis of their preference so long as there were seats available in a given school. However, when a school was over-subscribed, the board implemented a set of tiebreakers to judge which students should be assigned to which schools. The first tiebreaker at the board used was family connection. If a decision on student assignment to School X was between Student A and Student B, and Student A had a brother already attending School X but Student B did not, then Student A was assigned to School X over Student B. The next tiebreaker implemented by the board was the geographic proximity of a student’s home to the high school of his choice. The closer a student’s home was to a school of his choice, the more likely it would be that the board would assign this student to that high school. As the board acknowledges, “the proximity tiebreaker was subject, at some over-subscribed schools, to an ‘integration tiebreaker.’” The integration tiebreaker would prove to be the most controversial aspect of Seattle’s plan. In theory, student assignments could be based solely on the race of an incoming student if his preferred high school was over-subscribed, thus subjecting assignment to that school to the integration tiebreaker. Decisions

---

54 Id. at 1.
55 Id.
56 Id.
57 Id. at 6.
58 Id.
59 Id.
60 See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2747 (2007). The Supreme Court characterized the integration tiebreaker as follows: In the district’s public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as non-white. If an oversubscribed school is not within 10 percentage points of the district’s overall white/nonwhite racial balance, it is what the district calls “integration positive,” and the district employs a tiebreaker that selects for assignment students whose race “will serve to bring the school into balance.”

Id.
made based solely on the classification of students by race would prove detrimental to the school board’s operation of its plan.61

**B. Results of the Integration Tiebreaker**

The effects of the integration tiebreaker can only be measured from data compiled for the 2000-01 school year, since the district ceased operation of the plan after commencement of a lawsuit.62 According to the school board, “the integration tiebreaker initially determined the assignments for approximately 300 of 3,000 incoming ninth graders for the 2000-01 school year.”63 While the board believed the negative effects to be minor when compared with the benefits derived from the plan,64 parents of students not given their preferred choice of high school due to the integration tiebreaker argued that any denial of a student’s preferred high school on the basis of race amounted to a violation of the Equal Protection Clause.65

**IV. Parents Involved in Community Schools v. Seattle School District No. 1: The Supreme Court Splits Over Resolution of the Case**

**A. The Roberts Plurality Striking Down the Seattle Plan**

1. **Racial Balancing is an Unconstitutional End**

Writing for a plurality of the Court, Chief Justice Roberts combined analytical principles based on strict scrutiny with scathing retorts to the dissent, which the Chief Justice claimed, “fail[ed] to ground the result it would reach in law.”66 The plurality’s main issue with the Seattle

---

61 [Id. at 2752.](#)
62 [Brief for Respondents, supra note 46, at 9.](#)
63 [Id. at 8-9.](#)
64 [Id. at 9.](#)
66 [The parents argue that:](#)

Each such student was denied a benefit made available by the government (attendance at her preferred school) solely because of membership in a racial group…[W]hen government makes a benefit available (such as the opportunity to choose one’s high school), it cannot deny that benefit to someone because of her membership in a racial class without infringing her right to equal protection.

[Id.](#)
67 [Parents Involved, 127 S. Ct. at 2761.](#)
plan was that it amounted to no more than a means of achieving racial balancing.\textsuperscript{67} For the plurality, the integration tiebreaker made the other tiebreakers unnecessary because the individual decisions of student assignment always hinged on the integration tiebreaker.\textsuperscript{68} Chief Justice Roberts writes, “Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.”\textsuperscript{69} The plan, by using both a floor and a ceiling in calculating the racial composition of a school, provided that students would only be admitted to assure that the racial makeup of the school was proportional to the district’s racial composition.\textsuperscript{70} For the plurality, this was a clear-cut case of racial balancing.

2. **The Compelling Interest in Diversity in Higher Education is Inapplicable to Secondary Education**

The plurality also commented on the applicability of diversity as a compelling governmental interest at the primary and secondary educational levels.\textsuperscript{71} The plurality recognized that diversity was a compelling interest, but only in the limited context of higher education.\textsuperscript{72} To the plurality, the extension of such an interest to high schools was a perversion of the interest recognized in *Bakke* and *Grutter*.\textsuperscript{73} On this point, the Chief Justice opines, “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 the university environment, universities occupy a special niche in our

\textsuperscript{67} Id. at 2755. The Chief Justice writes, “In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.” Id.
\textsuperscript{68} Id. at 2757.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 2753.
\textsuperscript{72} Id. The Chief Justice writes, “The specific interest found compelling in *Grutter* was student body diversity ‘in the context of higher education.’ The diversity interest was not focused on race alone, but encompassed ‘all factors that may contribute to student body diversity.’” Id. (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 337 (2003)). See J. Harvie Wilkinson III, *The Seattle and Louisville Cases: There is No Other Way*, 121 Harv. L. Rev. 158, 160 (2007) (characterizing the plurality opinion as “limit[ing] the nonremedial state interest of diversity to the expressive interests unique to higher education”).
\textsuperscript{73} *Parents Involved*, 127 S. Ct. at 2754.
constitutional tradition.’” Chief Justice Roberts made abundantly clear in his opinion that he read this interest as necessarily limited to the context of higher education.

3. Public Policy Prohibits the Perpetuation of America’s Racial Divide Through the Use of Racial Classifications in Education

The plurality details that, underlying the use of racial classifications in public education, is a public policy concern that such race-based classifications serve no legitimate purpose, but rather perpetuate the existing racial divide in America. The problem with using race as a means of determining student assignment to schools is broader, for the plurality, than merely its failure to satisfy a legally imposed standard. The Chief Justice outlines this public policy concern when he writes:

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”

A student assignment plan that has the potential for determining the makeup of a school’s student body on the basis of the students’ race alone serves no legitimate legal or public policy purpose. For the Chief Justice, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” To the plurality, Seattle’s plan clearly discriminates on the basis of race.

---

74 Id. (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).
75 Id.
76 Id. at 2757.
77 Id.
78 Id. (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).
79 Id. at 2768. See Wilkinson, supra note 72, at 162 (declaring that the plurality should have taken the public policy argument one step further and “acknowledged…the tragic elements of the African American experience in this country and how that history can be reconciled with the Court’s present-day equal protection argument”).
80 Parents Involved, 127 S. Ct. at 2768.
B. The Four-Justice Dissent Upholding the Plan in Its Entirety

1. Seattle Plan Reflects the Spirit and Promise of Brown

Justice Breyer, writing for the dissent, takes umbrage with the plurality’s admonition that Seattle’s plan is unconstitutional. One of the main foci of the dissent is that the Seattle plan is consistent with the 50-plus years of Supreme Court precedent since Brown.81 The dissent argues that Brown and its progeny stand for the legal principle that school boards can take race-conscious measures to rectify disparate racial conditions within school districts.82 Justice Breyer writes, “Courts are not alone in accepting as constitutionally valid the legal principle that Swann enunciated…that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so.”83 To the dissent, Brown requires judicial deference to local schools boards and administrators who are in the best position to implement plans consistent with the best needs of particular school boards.84

2. Race-Conscious Education Plans Should Be Viewed Contextually

The dissent also rebuts the proposition set forth by the plurality that racial classifications in public education will perpetuate the racial divide in America by arguing that any race-conscious plan must be viewed in context.85 The use of race in the arena of public education is not necessarily fatal to the plan implementing such racial classifications. While the plurality focuses on the risks of using such racial classifications, the dissent furthers the point that the

---

81 Id. at 2822 (Breyer, J., dissenting). See Mark E. Wojcik, Race-Based School Assignments After Parents Involved in Community Schools, 95 Ill. B. J. 526, 526 (2007) (stating that the dissenting opinion of Justice Stevens characterizes Chief Justice Roberts’ plurality opinion’s reliance on Brown as a “cruel irony”).
82 Parents Involved, 127 S. Ct. at 2816 (Breyer, J., dissenting).
83 Id. (Breyer, J., dissenting).
84 Id. (Breyer, J., dissenting).
85 Id. at 2819 (Breyer, J., dissenting). The dissent argues:
If one examines the context [of Seattle’s plan] more specifically, one finds that the districts’ plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.
Id.
risks can be outweighed in specific contexts, and that the local school boards are the most capable judges of when racial classifications are proper.\textsuperscript{86} Justice Breyer writes, “[A] legislature or school administrators…could…properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks [the plurality] mention[s], for example, helping to end racial isolation or to achieve a diverse student body in public schools.”\textsuperscript{87} The main thrust of the dissent, focuses on continuing the spirit of \textit{Brown} by acknowledging that racial classifications serve an important purpose in public education, and in a particular context, by deferring to the best judgments of school boards.

3. \textbf{Seattle Plan Survives Strict Scrutiny}

In applying strict scrutiny to the Seattle plan, the dissent accepts the premise that diversity in public school classrooms satisfies the compelling governmental interest prong.\textsuperscript{88} The dissent then indicates that the efforts of the Seattle school board in fashioning its plan showed a good faith effort to narrowly tailor its means of achieving classroom diversity. This argument rests on the dissent’s theory that there were no less restrictive means the school board could use to implement a plan aimed at achieving diverse classrooms. Justice Breyer makes this point clear when he writes, “[P]lans that are less explicitly race-based are unlikely to achieve the board’s ‘compelling’ objectives.”\textsuperscript{89} Given the broad range of the racial classifications used, as well as the school board’s widespread consultation of interested parties before implementation of the plan, the dissent believes that the school board satisfied the prerequisites for the use of race-based classifications in its student assignment plan.

\textsuperscript{86} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{87} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{88} See \textit{id.} (Breyer, J., dissenting) (recognizing diversity in the classroom as the primary goal of the Seattle plan without commenting on the plurality’s argument that the main purpose of Seattle’s plan was to achieve racial balancing within the school system).
\textsuperscript{89} \textit{Id.} at 2826 (Breyer, J., dissenting).
C. The Kennedy Concurrence – Recognizing Diversity as a Compelling Interest

1. The Interest in Diverse Classrooms is Legitimate and Compelling

While joining parts of the plurality written by Chief Justice Roberts, Justice Kennedy wrote separately to identify significant aspects in which he differed from the plurality. One of the most important distinctions Justice Kennedy makes is that diversity in the classroom is a compelling governmental interest at all levels of public education. Justice Kennedy argues that the plurality’s opinion does not take into account the importance of preserving the integration of public schools mandated by *Brown*. He also advances a similar viewpoint to the dissent on the responsibility of state and local actors in determining the best course of governing local public education. The most important aspect of Justice Kennedy’s concurrence is the idea that “Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.” This departure from the plurality is significant in that it is the only attempt by the Court to fashion a workable standard by which race-based classifications in student assignment plans are to be judged.

2. Seattle Plan is Not Sufficient to Meet Narrow Tailoring

Justice Kennedy’s main issue with the Seattle plan, and seemingly the reason he did not join with the four dissenting justices to form a majority, is that the Seattle plan goes too far in using race as a factor in student assignment. Justice Kennedy does not believe that the Seattle plan reflected the least restrictive use of race in order to further the interest of diversity in the

---

90 *Id.* at 2792 (Kennedy, J., concurring). Justice Kennedy writes, “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.” *Id.*

91 *Id.* at 2791 (Kennedy, J., concurring). Justice Kennedy declares, “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…profoundly mistaken.” *Id.*

92 *Id.* at 2792 (Kennedy, J., concurring). Justice Kennedy states, “[State and local authorities] 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.” *Id.*

93 *Id.* at 2789 (Kennedy, J., concurring).
classroom. That race could be the sole determinant in student assignment, for Justice Kennedy, meant that there was a clear benefit given to students based solely on their race. This is a race-specific measure, rather than a general use of race, that Justice Kennedy believes brings about the plan’s unconstitutionality. Justice Kennedy writes, “The State must seek alternatives to the classification and differential treatments of individuals by race, at least absent some extraordinary showing not present here.”94 Had Seattle’s plan took race into account as a part of a more generalized, individual approach to student assignment, Justice Kennedy’s problems with Seattle’s plan would have been solved.

V. Proposing a Solution

A. The Major Flaws in Seattle’s Open Choice Plan

The potential for race to be the only determinative factor for student assignment in Seattle’s plan indicates that the main goal sought by the school district was racial balancing within its schools. That it was possible for race to be the sole factor in student assignment made Seattle’s plan more similar to the plan the Court prohibited in *Gratz* rather than to the plan the Court upheld in *Grutter*. Assuming the school district could show that this truly was an attempt at achieving diversity in the classrooms, rather than racial balancing, the structure of the plan still belies its constitutionality. The Court does not recognize racial diversity alone as a compelling interest. The diversity sought by the plan should be holistic, allowing for the use of individualized review processes.

B. The Major Flaws in the *PICS* Opinion

1. Workable Standard

There is no clear majority holding in *PICS*, leaving questions as to what the actual standard is for the use of race in public school student assignment plans. While the plurality

94 *Id.* at 2796 (Kennedy, J., concurring).
opinion indicates race should never be used as a factor in determining student assignment in public schools, the concurring opinion of Justice Kennedy recognizes diversity in the classroom as a compelling governmental interest, leaving open the door to creating a student assignment plan that satisfies strict scrutiny with the use of race as a plus factor.

2. Confusion Over Diversity as a Compelling Interest

The plurality insists that diversity is only a compelling interest when it comes to higher education. The plurality relies upon language in *Grutter* recognizing that the university setting is unique within society. The plurality does not believe that the diversity interest in higher education extends to lower levels of education. However, the concurring and dissenting opinions recognize that diversity can be a compelling governmental interest at any level. Given the importance of education to society, and recognizing the spirit and promise of *Brown*, the governmental interest in diversity within the arena of public education is, for a majority of the Court, compelling. Using the recognition of diversity in the classroom as a compelling governmental interest at all levels of education, the goal is to come up with a plan using a race-based classification that satisfies narrow tailoring. Accomplishing this task means devising a student assignment plan that passes constitutional muster while using race as a factor.

C. Diversity as a Compelling Interest in Secondary Education

There is a clear distinction between the classroom setting in institutions of higher education and the classroom setting in public high schools. While it is easy to see the differences, the similarities are not as readily apparent. Diversity at the higher education level consists of students from a broad array of backgrounds coming together in the marketplace of

---

ideas to share experiences and learn from the experiences of others. Proponents of diversity in higher education believe that the increasingly global marketplace will benefit from a workforce exposed to as many backgrounds and experiences as possible. Thus, it was easy for the Court in *Grutter* to find diversity as a compelling governmental interest. Various amici in that case supported the idea that increasing the wholesale diversity of the law school’s student body would have substantial benefits to the public. Antagonists to the belief that the benefits of diversity can be and should be extended to lower levels of education argue that it is impossible to quantify the benefits of diversity to high school-aged children. However, the major flaw in that argument is to say that only students in higher education institutions will learn from the different experiences of others or will contribute their own unique experiences to the classroom.

It is hard to fathom that the benefits derived from a diverse educational experience at the higher education level would be greater than the benefits derived at the high school level. Diverse classrooms at the higher education level increase the readiness of those students to take part in an increasingly diverse world. It seems, *a fortiori*, that planting the seeds of diversity earlier in the educational experiences of students would increase this readiness. Public schools provide the arena for the formulation of the most basic and fundamental beliefs and values of

---

99 See Wilkinson, *supra* note 72, at 182 (arguing that the focus of public primary and secondary schools should not be attaining diversity within the classrooms until the quality of the education received in those schools is first improved). Judge Wilkinson writes, “Diversity for all its value is not the be-all and end-all, and it will not begin to provide children what they need to succeed if the basic elements of instruction are otherwise lacking.” *Id.* But see Edwards, *supra* note 95, at 974 (indicating that the poor quality of inner-city education is at least correlative to the increase in de facto segregation of public primary and secondary schools).
100 *Grutter*, 539 U.S. at 330.
101 See Edwards, *supra* note 95, at 966 (explaining that “having a critical mass of students from different groups helps break down expectations that often are based on racial stereotypes”); Lia B. Epperson, *True Integration: Advancing Brown’s Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV 175, 216 (2005) (arguing that the context of public primary and secondary education makes the interest in diverse classrooms even more compelling than the interest in higher education).
students. Furthermore, increasing the likelihood that students gain more diverse educational experiences earlier in their educations increases the chances for greater diversity once those students are ready to enter the institutions of higher education. Integration of secondary schools based on a diverse set of factors opens the door to the possibility of students from various backgrounds and upbringings learning from and teaching their peers through everyday interactions. The focus of the arguments against is too often solely on the differences between the classroom settings of each level, rather than on the benefits derived from diversity in the classrooms.

There are those who believe that it is not possible to apply the *Grutter* framework to public secondary education. While the admissions process to institutions of higher education is one of selection, the admissions process to public secondary schools is one of assignment. Increasing the number of standards used for determining student assignment likely will increase the time and resources local school boards must dedicate to the student assignment process. However, a school board that decides to implement a plan with the purpose of diversifying its high school classrooms should be prepared for the burden associated with such a plan. An important function of school boards is to implement plans tailored to best achieving the purpose the boards enunciate. A school board that wishes to seek more diverse educational experiences for its students should be apprised of the efforts necessary to carry out this purpose. To be wary of an educational plan focused on diversity in the classroom merely because it requires more

---

102 Epperson, *supra* note 100, at 217. Professor Epperson writes, “Public elementary and secondary schools have the unique role of imparting civic values to students at a critical age.” *Id.*
103 Edwards, *supra* note 95, at 977-78.
104 *Id.* Judge Edwards pinpoints the positive results that can be attained from diverse classrooms when he writes, “The desirability of different experiences and perspectives is their power to cast light on various nuances of human existence.” *Id.* at 977.
105 See Archer, *supra* note 10, at 654 (stating that “the Bakke and Grutter approaches to narrow tailoring do not translate mechanically to the pre-collegiate levels of public education”); Wilkinson, *supra* note 72, at 172 (stating that even the slightest use of race in the education context will create a problem of drawing lines for the maximum extent to which race can be a factor).
effort than a plan that is not focused on achieving such a goal is a shirking of the responsibilities school boards inherently possess.

D. A Grutter Plan to Meet Narrow Tailoring

1. Race as a Plus-Factor Rather Than as a Singularly Determinative Factor

The primary downfall of the Seattle plan was the potential for race to become the sole factor in determining student assignment. Reliance on race as the only factor is the reason why the Seattle plan failed to pass the narrow tailoring prong of the strict scrutiny test. The way to fix this problem is to devise a plan that meets the standards enunciated in Grutter. As Justice Kennedy writes, “If those students [in Seattle] were considered for a whole range of their talents and school needs with race as just one consideration, Grutter would have some application.” The plan in Grutter met the narrow tailoring prong of strict scrutiny because of its holistic, individualized review process. As a matter of practicality, some believe that such a process cannot be applied to high schools. However, Seattle’s plan showed that it is possible to establish a student assignment plan based on a set of criteria similar to those used in Grutter. The only difference between Seattle’s plan and the Grutter plan in terms of structure is the weight given to individual factors. A school board can allow for race to be used as a plus-factor along the lines of the plan in Grutter. This will require removal of the strict “integration positive” test implemented by the Seattle school board. However, the goal of wholly diverse

---

106 See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2790-91 (2007) (Kennedy, J., concurring) (arguing that while the Seattle plan offers an array of factors other than race, it fails to distinguish why the racial categories of white and nonwhite satisfy the constitutional burden of strict scrutiny).
107 See id. at 2791 (Kennedy, J., concurring) (declaring that the race factor implemented by Seattle is not sufficiently narrowly tailored).
108 See id. at 2793 (Kennedy J., concurring) (“‘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.’”).
109 Id. at 2794 (Kennedy J., concurring).
110 See Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (establishing that the holistic review process of the University of Michigan Law School is exactly the type of narrowly tailored admissions plan that satisfies strict scrutiny).
111 See Wilkinson, supra note 72, at 160 (arguing that strict application of Grutter to the unique context of higher education is appropriate).
classrooms throughout the school district can be achieved without reliance on the “integration positive” model.

2. Diversifying Student Bodies Through Stated Interests or Academic Performance

The fact that student assignment to high schools is not merit based like college or graduate school admissions does not mean that similar criteria cannot be used. In college and graduate admissions, a bloc of students will be denied admission because the merits of what they have to offer are not consistent with the merits of the incoming class a school wishes to admit. However, all high school-aged children will be admitted to some high school within a school district. By judging students based on a broad set of factors, a school board will be in a better position to determine to which schools particular students should be assigned. For example, if a school district maintains a high school devoted to preparing its students for careers in the field of science, the school district may then decide to judge a student’s performance in science classes, as well as that student’s stated interest in entering a scientific career, as positive factors for assigning this student to the science-oriented high school. If this high school becomes oversubscribed, merit based criteria can be used in conjunction with other stated factors, including race, family connection, and geographic proximity to determine the best candidates for assignment to this school. Preferences should be given to students who would best achieve the wholly diverse student body a school board wishes to have in a particular school, without relying on a strict percentage of that school’s racial composition.

In determining assignment to a generic high school, a similar test may be implemented. The goal is to assure that the student bodies of each high school within a district are diverse in more ways than just racially. A district implementing an open choice plan such as the one implemented by Seattle, where students list the high schools they wish to attend in order of
preference, should also require students to submit information concerning such factors as career intentions, extracurricular interests such as academic and social club interests, athletic interests, and musical or artistic interests. The review process should then include an analysis of the individual schools along with the individual students. Students who express an interest in music may be assigned to a high school where the music program is better than in other high schools. The school board may also decide to assign a student to a high school where the music program is not on par with other schools in order to bring about more interest in that school’s music program, or to increase the quality of the program. Using the Grutter standards of individualized review, a school board may implement a student assignment plan where race is but a plus-factor, along with other factors, to determine the best way to diversify the student bodies of schools within the district on more bases than race.

VI. Conclusion

Since Brown, the benefits of diversity in education have been reaped in classrooms all across the country. What the PICS Court made clear, however, was that diversity cannot be based on race alone. Using wholesale diversity as a compelling governmental interest, and an individualized, holistic review process as narrowly tailored means, a school board can implement a student assignment plan that uses race as a plus factor along with other factors in order to pass constitutional muster. Grutter is sufficiently applicable to secondary schools so that the standards upheld by the Court for higher education should be upheld by the Court if challenged in the arena of public education. Assuring that this nation’s public schools offer students the opportunity to learn from and teach their peers based on the diversity of experiences and goals each student has is well within the permissible undertakings of local school boards. Ours is a nation of diversity, brought together by understanding, acceptance, and integration. It is vitally
important to the future of this nation to assure that this central tenet is fostered at the earliest stages of public education, and that school boards are given every opportunity to work towards the common goal of diversifying education at the most basic and fundamental levels.