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Race-Conscious Student Assignment Plans After Parents Involved: Bringing State Action Principles to Bear on the De Jure/ De Facto Distinction

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Michael L. Wells*

Introduction

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[1] a sharply divided Supreme Court struck down two race-conscious school assignment plans aimed at achieving greater racial integration of the public schools. While the case has many facets,[2] it is an especially apt choice for this symposium since the communitarian-liberal

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1. 127 S. Ct. 2738 (2007).

2. *See*, for example, the variety of perspectives from which the case is examined in the *Harvard Law Review*'s issue on the Supreme Court's 2006 Term. 121 HARV. L. REV. 1 (2007). Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 87-94 (2007), argues that the "Capabilities Approach" to constitutional interpretation favors race-conscious integration efforts and criticizes the holding in *Parents Involved*. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007), examines Justice Kennedy's evolving views on race-conscious government programs and maintains that his opinions "invite us to abandon our monolithic stories about race and think about equal protection in domain-centered terms." *Id.* at 130. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007), focuses on the impact of the decision on efforts to integrate the public schools, arguing that "this decision does not change much on the ground," *id.* at 132, but that "it takes away some hope" for the future. *Id.* at 133. Judge J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158 (2007), expresses deep skepticism of race-conscious remedies and defends Chief Justice's plurality opinion and Justice Thomas's concurring opinion.

Another recent article broadly criticizes the Court for its rulings in *Parents Involved* and other recent cases, characterizing the conservative majority as "an unbreakable phalanx bent on remaking constitutional law by overruling, most often by stealth, the central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed." Ronald Dworkin, *The Supreme Court Phalanx*, 54 N.Y. REV. BOOKS, Sept. 27, 2007, at 92, 92.

dichotomy helps to illuminate a critical issue on which the Justices diverged. Communitarians typically fault classical liberalism for favoring the individual over the community as a whole.[3] In *Parents Involved*, for example, both Chief Justice Roberts' majority opinion and Justice Kennedy's concurrence accord considerable respect to the individual's right against discrimination on the basis of race, however beneficial the school districts' goals may be.[4] Taking the side of the four dissenters,[5] a communitarian critic may object that avoiding racial isolation deserves more weight than the majority accords it. Moreover, placing the problem in historical context bolsters the case for these student assignment plans: current segregation is due, at least in part, to earlier government decisions.[6] Given this history, communitarians may argue that the school districts' interest in achieving racial integration into the community as a whole should carry the day.[7]

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3. The fairness of this characterization is open to debate, for "liberalism" comes in many varieties, some of which are more individualistic than others. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1-2 (2d ed. 1998). The libertarian wing would raise no objection to the notion that liberalism favors the individual over the community. Libertarians vigorously defend the primacy of the individual over the community and squarely reject the communitarian critique. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974) (arguing that "no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall *social* good."). But many liberals seek to have it both ways, holding that one can begin from individualistic premises and nonetheless give great weight to communitarian values. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 195-206 (1986) (discussing "the obligations of community"). Nonetheless, communitarians find fault with liberalism's individualistic premises. *See, e.g.*, SANDEL, *supra* note 3, at 147-52 (arguing, on page 151, that "the moral vocabulary of community in the strong sense cannot in all cases be captured by a conception that in its theoretical basis is individualistic.") (internal quotation marks omitted).

4. *See* 127 S. Ct. at 2751-52 ("when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny" because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification") (internal quotations marks and citation omitted); s*ee also id.* at 2792 (Kennedy, J., concurring) (distinguishing these student assignment plans from other means of pursuing integration, such as "strategic site selection of schools," that "are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race.").

5. The dissenters in *Parents Involved* were Justices Breyer, Stevens, Souter, and Ginsburg. *See* 127 S. Ct. 2738 (2007).

6. *See, e.g.*, Nussbaum, *supra* note 2, at 90 (charging that "Chief Justice Roberts' rosy picture of an available 'non-racial' way of educating children is simply unrealistic in the light of history and current realities.") (footnote omitted).

7. *See* 127 S. Ct. at 2801-11 (Breyer, J., dissenting). In this part of his opinion, Justice Breyer documents the history of efforts to remedy past discrimination through race-conscious remedies, in Seattle, Louisville, and elsewhere. He concludes that "[t]hese facts and circumstances help explain why in this context, as to means, the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice." *Id.* at 2811. (Breyer, J., dissenting).

The Justices' opinions in *Parents Involved*, of course, do not frame the problem in terms of communitarian values versus individual-centered liberalism. Nor should we expect them to do so, for constitutional doctrine rarely borrows so directly from political philosophy. Instead, in the Court's school integration lexicon, the state's responsibility to remedy segregation is addressed by the distinction between de jure (i.e., state-supported) segregation and de facto segregation (i.e., segregated schools for which the state is not responsible).[8] All the Justices agree that a race-conscious remedy can be justified for a school district subject to a current court order finding government-sponsored segregation.[9] The issue dividing the two sides is whether race-conscious student assignment plans can avoid or survive "strict scrutiny"[10] absent a current court order mandating that a deliberately segregated school system be dismantled. The majority and Justice Kennedy rule that, at least in the cases that have thus far come to the Court, such plans cannot stand.[11] The four dissenters would rule that they can.[12]

The content and the legal implications of the de jure/de facto distinction deserve attention in this symposium because of the role the distinction plays in *Parents Involved*, because it has shaped school desegregation rulings for over thirty years, and because it clashes with communitarian theory.[13] Communitarians tend to reject sharp distinctions between practices for which the state is responsible (such as de jure segregation) and those for which it is not (such as de facto segregation). They hold that such distinctions are fundamentally flawed because the individual is, in part, a creation of the community.[14] Thus, in

8. *See id. at* 2761 (plurality opinion).

9. *See id.*

10. Until recently, this term had received little extended attention in the scholarly literature. For an illuminating discussion remedying that gap, *see* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

11. *See Parents Involved*, 127 S. Ct. at 2752.

12. *See id.* at 2834-36 (Breyer, J., dissenting).

13. While this Article concentrates on the de jure/de facto distinction, another litigation strategy should also be noted. Justice Kennedy (whose vote was decisive) would rule that a school district facing a challenge to the use of race in assigning students can prevail by showing either (a) that the program is narrowly tailored to serve a compelling state interest, *see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring); *see also id.* at 2796 (Kennedy, J., concurring) ("when de facto discrimination is at issue . . . [t]he State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here"), or (b) that it is justified as a remedy for de jure segregation, *see id.* at 2789 (Kennedy, J., concurring). The two are analytically distinct, in that (a) does not require a showing of de jure segregation, while (b) does not require a compelling state interest.

In this Article, I put aside (a) in order to focus on (b), the "remedy for de jure segregation" theory.

14. *See* SANDEL, *supra* note 3, at 150 (stating that for members of a community,

The Partial Constitution, Cass Sunstein questions the distinction the Court draws between state and private action.[15] Rather than identifying separate realms of government and private behavior, he maintains that the Court picks and chooses among government activities, labeling some of them state action and others not, depending on whether a given activity falls on one side or the other of "a particular baseline, establishing the normal natural, or desirable functions of government."[16] Unsurprisingly, he goes on to reject the distinction between de jure and de facto discrimination.[17] For this reason, he and other communitarians would likely disapprove of the sharp de jure/de facto distinction drawn by the *Parents Involved* majority and endorse Justice Breyer's dissenting view.

Taking *Parents Involved* as a starting point, this Article looks ahead to the future of litigation over student assignment plans. By striking down the Seattle and Louisville plans, the decision may "require hundreds of school districts to rethink race-based policies that they use voluntarily to desegregate schools."[18] At the very least, the 5-4 ruling almost certainly did not put an end to race-conscious integration plans or to the filing of challenges against them,[19] for Justice Kennedy gave only qualified support to the ruling against these plans.[20] Justice Roberts' plurality opinion, Justice Kennedy's separate opinion, and Justice Breyer's dissent all discuss the relevance of the de jure/de facto

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"community describes not just what they *have* as fellow citizens but also what they *are*, . . . not merely an attribute but a constituent of their identity.").

15. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 72 (1993).

16. *Id.*

17. *See id. at* 79-80 (stating that the distinction "rests on artificial premises," as "[t]he notion of de facto segregation suggests that segregation simply happened; it is just 'there.'").

18. Jess Bravin & Daniel Golden, *Court Restricts How Districts Integrate Schools*, WALL ST. J., June 29, 2007, at A10. *See also* Joseph Pereira, *School Integration Efforts Face Renewed Opposition*, WALL ST. J., October 11, 2007, at A1. The latter article is mainly concerned with resistance to school integration efforts in Milton, Massachusetts. Despite newspaper accounts like these, it is not at all clear that the ruling will have much direct effect on efforts to integrate public schools. *See* Ryan, *supra* note 2, at 146-47 ("I count fewer than thirty districts that have plans similar to those in effect in Seattle and Louisville, where students are given a broad choice among regular public schools and where that choice is constrained by racial guidelines. The number may be as low as ten.") (footnotes omitted).

19. *See* Tamar Lewin, *Across U.S., a New Look at School Integration Efforts*, N.Y. TIMES, June 29, 2007 at A19 (reporting that, after *Parents Involved*, "[m]any lawyers said the 5-to-4 ruling would not end a half century of litigation over school desegregation but rather reignite it, as school districts turn to alternative methods for achieving diversity.").

20. *See* Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 3 (2007) (arguing that on the critical question of whether race may be taken into account at all, Justice Kennedy would join the four dissenters).

distinction to race-conscious integration plans like those adopted in Seattle and Louisville.[21] The plurality, led by Chief Justice Roberts, took the view that the absence of a current desegregation order in either system distinguished these cases from precedents authorizing race-conscious remedies for de jure segregation.[22] For the dissenters, the history of litigation over efforts to integrate the schools in the two cities was sufficient to render the de jure/de facto distinction "meaningless in the present context."[23] Justice Kennedy avoided the issue by simply noting that "[t]he cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from de jure actions."[24]

The issues left open by *Parents Involved* are illustrated by the following hypothetical. Suppose a school district adopts a race-conscious student assignment plan even though it is not obliged to do so by a current court order to desegregate the schools. When the scheme is challenged, the school district attempts to defend its plan by showing a history of government involvement in maintaining segregated schools. We know from *Parents Involved* that, barring a change of mind, there are four votes on either side of this issue.[25] Justice Kennedy's position is critical.[26] Would Justice Kennedy join the Roberts' wing, rejecting race-conscious remedies absent a current order, or would he, on another set of facts, join Justice Breyer to form a new majority? Can a convincing case be made for a more flexible approach to the whole matter of prior government involvement, one that borrows from the views expressed by Justice Breyer and the other dissenters, but does not fully adopt them?

In this Article, I argue for a more flexible approach and offer grounds on which Justice Kennedy, and perhaps others, may be persuaded to reject the uncompromising Roberts position without careening all the way over to the Breyer view. The core proposition I advance is that the de jure/de facto distinction serves as the Court's tool for distinguishing between state and private action in the school integration context. As in other state action cases, the constitutional values at stake on either side of the de jure/de facto issue are, on one side, (a) the constitutional principles served by extending constitutional restraints into the arguably private sphere, and, on the other side, (b) the

21. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2741-2768 (2007) (plurality opinion); *id.* at 2788-2797 (Kennedy, J., concurring); *id.* at 2800-2837 (Breyer, J., dissenting).

22. *See id.* at 2761-62 (plurality opinion).

23. *Id.* at 2802 (Breyer, J., dissenting).

24. *Id.* at 2796 (Kennedy, J., concurring).

25. *See generally Parents Involved,* 127 S. Ct. 2738.

26. *See* Ryan, *supra* note 2, at 136-37 (explaining the importance of Justice Kennedy's views going forward).

value of maintaining a private sphere free of legal constraints on private behavior.[27]

This Article argues that none of the Justices in *Parents Involved* adequately addressed the task of ranking and accommodating these competing constitutional values. Looking ahead, in future student assignment cases, it further contends that these values would be better served by a less categorical approach. The Court ought to steer a middle course between the positions taken by the plurality and Justice Breyer. This Article identifies a number of factors, ignored by all the opinions in *Parents Involved*, that should guide the Court in constructing such a doctrine in this area. I suggest, for example, that a distinction could have been drawn between the Louisville case, in which there had been an earlier finding of de jure segregation,[28] and the Seattle case, in which there had never been such a finding.[29] Though the court order mandating integration had since been lifted in Louisville,[30] the history provides strong support for approving the current voluntary race-conscious plan. I also defend Justice Kennedy's distinction between race-conscious programs that target specific individuals and those that address school siting, attendance zones, and other such measures.[31]

More specifically, Part I discusses the historical and analytical foundations of the de jure/de facto distinction. The distinction serves two aims: to enforce the Court's substantive equal protection principle that only purposive discrimination violates equal protection,[32] and to separate cases where there is sufficient state action to warrant a finding of constitutional illegality from those where there is not.[33] Part II examines the Justices' treatment of the de jure/de facto distinction in the various *Parents Involved* opinions. For all the bitter disagreements among them, the Justices seem to share a common faulty premise. All ignore the roots of the distinction in the flexible, context-specific state action doctrine, treating it instead as a kind of switch that is either turned on or off. Starting from the premise that the de jure/de facto distinction operates, in part, as a means of implementing the state action requirement of the Fourteenth Amendment, Part III raises objections to both the majority's bright-line de jure/de facto distinction and the dissent's refusal to draw any distinction at all. My aim is to show that there are grounds for Justice Kennedy, and perhaps other Justices as

27. *See infra* Part IV.
28. *Parents Involved,* 127 S. Ct. at 2749.
29. *Id.* at 2747.
30. *Id.* at 2749.
31. *See id.* at 2792 (Kennedy, J., concurring).
32. *See infra* text accompanying notes 58-62.
33. *See infra* text accompanying notes 63-72.

well, to take a less rigid approach in future cases. Part IV proposes such a middle course, arguing that a range of policy considerations should be brought to bear on the issue of whether the segregation in a given school district should be characterized as de jure or de facto. Accordingly, Justice Breyer is right to reject the plurality's crude version of the de jure/de facto distinction, but he goes too far in arguing that the distinction is "meaningless." There are good reasons to distinguish between state and private action, even in the school segregation context, and some of these may support at least part of the outcome in *Parents Involved*, if not the plurality's reasoning.

I. The De Jure/De Facto Distinction

A. Doctrinal Foundations

In the Court's lexicon, the term de jure refers to segregation brought about by state action undertaken with the aim of achieving or maintaining segregation.[34] De facto signifies segregation that is the product of housing patterns or general societal discrimination rather than deliberate acts by government.[35] Thus, "the differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate."[36] A finding of de jure segregation may be crucial to upholding a race-conscious program. The black letter rule is that, without any further special justification, race-conscious remedies may be imposed to root out de jure segregation, but not the de facto version.[37] The significance of state responsibility for segregation has deep roots in the law of school integration. *Brown v. Board of Education* established that governments violate the Equal Protection Clause when they purposely segregate the public schools by race.[38] *Green v. County School Board*[39] and *Swann v. Charlotte-Mecklenburg Board of Education*[40] held that governments found to have practiced de jure segregation must do more than stop their illegal practices. They are also

34. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 474 (1992) ("under the former *de jure* regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race.").

35. *See* 127 S. Ct. at 2802 (Breyer, J., dissenting).

36. Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 208 (1973) (emphasis added).

37. As for race-conscious plans where the segregation is de facto, the plan must serve a compelling state interest and survive strict scrutiny. *See supra* note 13 and accompanying text.

38. 347 U.S. 483, 493 (1954).

39. 391 U.S. 430, 439 (1968).

40. 402 U.S. 1, 15 (1971).

obliged to "eliminate from the public schools all vestiges of state-imposed segregation,"[41] and if they "fail in their affirmative obligations . . . the scope of a district court's equitable powers to remedy past wrongs is broad."[42] *Swann* held that this power may include imposing such race-conscious remedies as busing students across the school district in order to achieve integration.[43]

Up to this point, the Court had left open the legality of "de facto segregation—racial imbalance resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns."[44] *Keyes v. School District No. 1*[45] answered this question by distinguishing between the constitutional status of de jure and de facto segregation. *Keyes* states that the plaintiff can win by showing de jure segregation in part of a school system without "proving the elements of de jure segregation as to each and every school or each and every student within the school system."[46] This reasoning implies that de facto segregation would not violate the Equal Protection Clause. Later cases confirm this reading of the *Keyes*, ruling that court orders against school districts that had purposely segregated students in the past should be lifted or modified once remedial efforts have eliminated the vestiges of the prior de jure segregation.[47]

In *Parents Involved*, both the plurality and Justice Kennedy relied on the de jure/de facto distinction. Chief Justice Roberts' plurality opinion observed that "[t]he distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations."[48] Because the latter "does not have constitutional implications,"[49] cases upholding race-conscious measures to remedy judicial findings of de jure segregation had no bearing on the plans challenged in *Parents Involved*. Justice Kennedy considered "the difference between de jure and de facto segregation" to be "of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting

41. *Id.*
42. *Id.*
43. *See id.* at 22-31.
44. Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 275 (1972).
45. 413 U.S. 189 (1973).
46. *Id.* at 200.
47. *See e.g.*, Freeman v. Pitts, 503 U.S. 467, 494 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 246-51 (1991).
48. 127 S. Ct. at 2761 (plurality opinion).
49. *Id.* (citation and quotation marks omitted).

from race discrimination."[50] He noted that prior cases "recognized a fundamental difference between those school districts that had engaged in de jure segregation and those whose segregation was the result of other factors. School districts that had engaged in de jure segregation had an affirmative constitutional duty to desegregate; those that were de facto segregated did not."[51] Since "the remedial rules are different" for de facto discrimination, "[t]he State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here."[52] Justice Kennedy went on to explain that in de facto cases the government must show that its plan is narrowly tailored to achieve the compelling state interests in diversity and in avoiding racial isolation.[53]

By contrast, Justice Breyer questioned the normative force of the de jure/de facto distinction in evaluating the Seattle and Louisville plans. He called attention to the complex racial histories of these cities.[54] In both school districts, the systems were highly segregated in fact for a long time.[55] The segregation was the result of a combination of factors, some governmental and some not.[56] These histories rendered the de jure/de facto distinction "meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction."[57]

B. Policies Underlying the De Jure/De Facto Distinction

The de jure/de facto distinction rests on two separate rationales. One rationale derives from the "purpose to discriminate" rule set forth in *Washington v. Davis*.[58] In that case the Court rejected the notion that racially discriminatory *effects* of government policy violate equal protection.[59] The challenger must show a *purpose* to discriminate on the basis of race.[60] Though *Davis* was decided four years after *Keyes*, it is nonetheless appropriate to link the "purpose to discriminate" rule and the de jure/de facto distinction. In fact, the Court did so in *Davis* itself, citing *Keyes* along with other cases as authority for the "purpose"

50. *Id.* at 2794 (Kennedy, J., concurring).
51. *Id.* at 2795 (Kennedy, J., concurring).
52. *Id.* at 2796 (Kennedy, J., concurring).
53. *See id.* at 2796-97 (Kennedy, J., concurring).
54. *Id.* at 2802-11 (Breyer, J., dissenting).
55. *Id.* at 2802-07 (Breyer, J., dissenting).
56. *Id.* at 2802-11 (Breyer, J., dissenting).
57. *Id.* at 2802 (Breyer, J., dissenting).
58. 426 U.S. 229 (1976).
59. *Id.* at 242.
60. *See id.* at 239.

doctrine.[61] *Davis* characterized *Keyes* as a case in which the Court emphasized that "the differentiating factor between De jure segregation and so-called De facto segregation . . . is *purpose* or *intent* to segregate."[62]

The role of de jure/de facto in school segregation doctrine cannot be justified solely as a means of enforcing the "discriminatory purpose" rule, however. The Court's rulings indicate that the distinction serves another purpose as well, though one that is less clearly articulated in the opinions. In *Keyes*, the Court recognized that a showing of purpose to discriminate is not sufficient to establish current de jure segregation.[63] The reason is that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention."[64]

Another group of school segregation cases drive this point home. These cases deal with requests by school districts to dissolve or modify desegregation decrees entered many years ago. In *Freeman v. Pitts*, the Court held that a decree may be modified upon a showing of faithful compliance, even though vestiges of de jure segregation remain.[65] Echoing *Keyes*, the Court reasoned that as the causal link between a past purpose to discriminate and current segregation grows more attenuated, the case for continued judicial supervision weakens.[66] The reason it grows weaker cannot be found within the logic of the discriminatory purpose rule, for in all cases of this type a court has, at some point in the past, already identified a discriminatory purpose. Rather, the problem is that with the passage of time remedial measures have done their work, conditions have changed, and other factors now count more in explaining current segregation. Since the constitutional claim may fail on de facto grounds even if the purpose requirement is satisfied, the de jure/de facto distinction must rest, in part, on some other rationale.

Besides signaling "discriminatory purpose," the de jure/de facto distinction is the Court's tool for enforcing the "state action" doctrine in the school segregation context. The Fourteenth Amendment provides that no state may deny equal protection to any person.[67] That language has given rise to a complex doctrine separating state action from private

61. *Id.* at 240.
62. *Id.* at 240 (citing *Keyes*, 413 U.S. 189, 208) (emphasis added).
63. 413 U.S. 189, 208.
64. *Id.* at 211.
65. 503 U.S. 467, 491 (1992); *see also* Bd. of Educ. v. Dowell, 498 U.S. 237 (1991) (addressing similar issue).
66. *Id.* at 495-96.
67. U.S. CONST. amend. XIV, § 1, cl. 4.

conduct. Beginning from the language and purposes of the Bill of Rights and the Fourteenth Amendment, the Court has held that all but a few constitutional rights are held only against governments and not against private individuals.[68] That principle in turn gives rise to a need to mark the boundaries between consequences properly attributable to private conduct and those for which the state is responsible. For example, *Freeman* said that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications."[69] This is so even if the state has in the past purposely segregated the public schools. It appears that a case may fall on the de facto side of the distinction even if, but for earlier purposive segregation, the schools would not be segregated today. *Freeman*'s stress on the "attenuated" link between earlier purposive acts and current segregation implies that the reason advocates of continued supervision lose is not the lack of a "but for" link.[70] Analogizing to tort law, the Court requires not merely "but for" causation but proximate causation as well. Thus, "[t]he school district bears the burden of showing that any current imbalance is not traceable, in a *proximate* way, to the prior violation."[71] In other words, the imbalance must be linked to the state in some meaningful way. Importantly, fixing meaningful links between state conduct and significant injury is precisely the work the state action doctrine performs in other areas of constitutional law.[72]

II. Proving De Jure Segregation

None of the Justices in *Parents Involved* dispute the purposeful discrimination rule or the need for a link between purposeful discrimination and current segregation in order to justify a race-

68. The only unambiguous counterexample is the Thirteenth Amendment, which forbids private slavery as well as state-sponsored slavery. *See* Civil Rights Cases, 109 U.S. 3, 20 (1883) (Thirteenth Amendment forbids slavery whether it is state-sponsored or not). For a recent affirmation of this point, *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

69. 503 U.S. at 495.

70. *See id.* at 496 ("As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.").

71. *Id.* at 494 (emphasis added).

72. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n 531 U.S. 288, 295 (2001) ("[w]hat is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity."). *See also* Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99, 107-11 (arguing for this view of state action).

conscious plan.[73] The hard question raised in cases like *Parents Involved* is one that both tort theory and *Freeman* would call a proximate cause issue: just how substantial does the link need to be in order to prove de jure segregation? Accordingly, in what follows I put aside the purposeful discrimination requirement for the sake of concentrating on the "proximate cause" question that divided the Court in *Parents Involved*. In examining this issue, it is helpful to first distinguish between the two school districts, for they faced somewhat different hurdles. With regard to Seattle, there had been no judicial finding of de jure segregation.[74] As for Louisville, in 1975 a federal court ruled that the school district had engaged in de jure segregation and enjoined the school district to take remedial action.[75] The order was lifted in 2000, upon a determination by the federal judge overseeing the school district's desegregation efforts that the effects of prior discriminatory practices had been eliminated.[76] The de jure/de facto issue was whether, in these circumstances, the school districts could defend their plans under the principle that race-conscious remedies may be employed as a remedy for de jure segregation.

A. How the Justices Divided in Parents Involved

For Justice Roberts the lack of a judicial finding of de jure segregation in Seattle and the judicial determination that "Jefferson County had eliminated the vestiges of prior segregation" sufficed to show that the cases involved only de facto segregation.[77] Justice Kennedy agreed with this conclusion, but gave a subtly different reason. For him, it was enough that "[t]he cases here were argued upon the assumption and came to us on the premise that the discrimination in question did not result from de jure segregation."[78] Justice Breyer's dissent took issue with the majority's distinction between de jure and de facto segregation.[79] Despite the lack of lower court findings of de jure segregation, he would have decided the Louisville and Seattle cases by following precedents that approved race-conscious remedies for de jure segregation. Both cities "began with schools that were highly segregated in fact."[80] A federal court had already found de jure segregation in

73. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
74. *Id.* at 2747.
75. *Id.* at 2749.
76. *See id.* at 2761 (plurality opinion); *id.* at 2796 (Kennedy, J., concurring).
77. *Id.* at 2761 (plurality opinion).
78. *Id.* at 2796 (Kennedy, J., concurring)
79. *Id.* at 2802 (Breyer, J., dissenting).
80. *Id.* at 2802 (Breyer, J., dissenting).

Louisville, though the decree was dissolved some years later.[81] In Seattle, there was no judicial finding of de jure segregation, but plaintiffs in earlier litigation had made an allegation to that effect, and "the parties settled after the school district pledged to undertake a desegregation plan."[82] Each city had thereafter undertaken desegregation plans that included race-conscious elements. Despite the lifting of the Louisville order, Justice Breyer treated the earlier finding of de jure segregation as a sufficient ground for questioning the utility of the de jure/de facto distinction in this setting.[83] As for the Seattle plan, Breyer explained that it was only happenstance of the earlier litigation that "a prior federal court had not adjudicated the matter,"[84] which justified treating it as de jure segregation.[85] He concluded that the histories of both cities "make clear the futility of looking simply to whether earlier school segregation was de jure or de facto in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of 'race-conscious' criteria."[86]

The dispute between the majority and dissenting justices in *Parents Involved* boils down to the question of what kind of evidence a school district must present in order to establish the "state-sponsored segregation" predicate for approval of a race-conscious remedy. The specific issue that divided the Justices can be restated in narrower terms than the ones the Justices employed: in order to meet the state action requirement, does the school district have to show (a) a judicial finding of (b) current purposeful segregation? One might hold that (a) is necessary but (b) is not, in which case the Louisville plan would withstand scrutiny but Seattle's would fail.[87] The plurality implicitly took the view that both (a) and (b) are needed.[88] The dissent would require neither.[89]

Justice Kennedy's position is less clear. He may agree with the

81. *See id.* at 2806-09 (Breyer, J., dissenting).

82. *Id.* at 2802-04 (Breyer, J., dissenting).

83. *See id.* at 2810 (Breyer, J., dissenting) ("No one here disputes that Louisville's segregation was *de jure*.").

84. *Id.* (Breyer, J., dissenting) (Justice Breyer makes the point indirectly, by means of a series of rhetorical questions: "No one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto*? *De jure*? A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated, just as in 1956 a memo for the School Board admitted?").

85. *See id.* (Breyer, J., dissenting).

86. *Id.* (Breyer, J., dissenting).

87. Of course, the second defensive strategy—showing that a plan is narrowly tailored to serve compelling state interests—would still be available to Seattle.

88. *See Parents Involved*, 127 S. Ct. at 2756-57 (plurality opinion).

89. *See id.* at 2816 (Breyer, J., dissenting).

plurality, as he expresses strong approval of the de jure/de facto distinction.[90] Yet the reason he gives for characterizing the segregation as de facto is a wholly formal one. He states that "[t]he cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from de jure actions."[91] What is more, he declares that "[w]here there has been de jure segregation, there is a cognizable legal wrong, and the courts *and legislatures* have broad power to remedy it."[92] Admittedly, the quoted language is not necessarily inconsistent with Chief Justice Roberts' demand for a prior judicial finding of purposeful discrimination before a legislature undertakes a race-conscious remedy. But the language—and particularly its reference to what "legislatures" may do if there has "been" unlawful discrimination—permits another reading. Justice Kennedy may mean to say that no prior judicial finding is needed in order to trigger the "remedy for state-sponsored segregation" theory, so long as a school district defending its plan against a challenge it offers sufficient proof of past purposeful discrimination.

This way of reading Justice Kennedy's statement finds support elsewhere in his opinion. Justice Kennedy points out that "[t]he distinction between government and private action . . . can be amorphous both as a historical matter and as a matter of present-day finding of fact."[93] Moreover, he cites *Richmond v. J. A. Croson Co.*,[94] as a case that "reinforced the difference between the remedies available to redress de facto and de jure discrimination."[95] In evaluating race-conscious city contracting rules, *Croson* distinguished between plans intended to overcome "societal discrimination" (which would face an especially high hurdle) and discrimination in which the government was a passive participant (which would more easily survive an equal protection challenge).[96] The crucial point for present purposes is that *Croson* did not require a prior judicial finding that government had participated in the discrimination as a predicate for assigning a plan to the latter rather than the former category.[97]

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90. *See id.* at 2795-96 (Kennedy, J., concurring).

91. *Id.* at 2796 (Kennedy, J., concurring).

92. *Id.* (emphasis added).

93. *Id.* at 2795. *See also* Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 115 (2007) (arguing that, in this passage and the sentences that surround it, Justice Kennedy "concedes that it is impossible to draw a clear line between de jure and de facto discrimination and admits that the distinction is a useful legal fiction.").

94. 488 U.S. 469 (1989).

95. *Parents Involved*, 127 S. Ct. at 2795 (Kennedy, J., concurring).

96. *See* 488 U.S. at 497.

97. The key part of Justice O'Connor's opinion is Part III.B., 488 U.S. at 498-506, which won support from a majority of the Justices, including Justice Kennedy. *Croson*

B. The Prior Cases

Both Chief Justice Roberts and Justice Breyer claimed that precedent favored their positions. Justice Breyer attacks the notion that race-conscious measures cannot be upheld absent a judicial finding of current de jure segregation.[98] His reasoning begins with Louisville then moves to Seattle.[99] First, he rejects the proposition that dissolution of the Louisville injunction justifies shifting Louisville from the de jure to the de facto hopper.[100] In so doing, the dissenters implicitly question the Court's holdings that earlier desegregation decrees should be dissolved or modified when the effects of prior purposive segregation policies have become sufficiently "attenuated."[101] Second, with regard to Seattle, Justice Breyer gives little weight to the lack of a judicial finding of de jure segregation.[102] For support Justice Breyer relies on *Swann*,[103] where the Court said, in dicta:

> School authorities are traditionally charged with broad 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 educational policy is within the broad discretionary powers of school authorities.[104]

McDaniel v. Barresi,[105] a case handed down the same day as *Swann*, provided more ammunition for Justice Breyer's thesis.[106] In *McDaniel*, the Court approved the use of race-conscious measures to achieve desegregation efforts adopted in Clarke County, Georgia, without a prior judicial finding of de jure segregation.[107] Justice Breyer reasons that Seattle should be permitted to do the same. In summary, the dissenters would hold in the Louisville case that the difference between a system

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did of course require that the city produce convincing evidence of earlier government involvement in discrimination. *See* 488 U.S. at 500 ("when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals."). At the same time, *Croson* held that race-conscious remedies could be employed without a prior *judicial* finding of wrongdoing. *See id.* at 509.

98. *See Parents Involved*, 127 S. Ct. at 2811 (Breyer, J., dissenting).
99. *See id.* at 2801-02 (Breyer, J., dissenting).
100. *See id.* at 2811 (Breyer, J., dissenting).
101. Freeman v. Pitts, 503 U.S. 467, 496 (1992).
102. *See Parents Involved*, 127 S. Ct. at 2810 (Breyer, J., dissenting).
103. *See id.* at 2811-12 (Breyer, J., dissenting).
104. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).
105. 402 U.S. 39 (1971).
106. *See Parents Involved*, 127 S. Ct. at 2812 (Breyer, J., dissenting).
107. *See McDaniel*, 402 U.S. at 41-42.

that is currently under federal judicial supervision pursuant to a desegregation order and one that has been under such supervision earlier is vanishingly small. As for Seattle, the difference between a system that a court has found to be de jure segregated and one that has avoided the chance of such a finding by settling the lawsuit is, for the dissenters, equally insubstantial. This approach serves to blur, if not ignore, the de jure/de facto distinction.

While Justice Breyer felt no need to maintain a strong de jure/de facto distinction, Chief Justice Roberts' plurality opinion puts great weight upon it,[108] perhaps more than it can bear. With regard to Seattle, he points out that the above-quoted passage from *Swann* is dicta,[109] and that in *McDaniel* "there was no doubt that the county had operated a 'dual school system,'" so that a race-conscious remedy was appropriate under settled doctrine.[110] Turning to Louisville, he criticizes Justice Breyer for having "fail[ed] to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation."[111]

III. State-Action Doctrine and the De Jure/De Facto Distinction

A fair assessment of the early cases surveyed by Justice Breyer is that in deciding them the Court took for granted that Southern school districts in the Jim Crow era practiced de jure segregation.[112] In the early cases, the Court was preoccupied with undoing a century of state-sponsored white supremacy and did not give much, if any, thought to the

108. *See id.* at 2761 (plurality opinion).

109. *See id.* at 2762.

110. *Id.* at 2761. Justice Roberts does not seem to reconcile his treatment of *McDaniel* with his earlier insistence that only the existence of a current judicial order would support "the compelling interest of remedying the effects of past intentional discrimination." *Id.* at 2752.

111. *Id.* at 2761. The disagreement between the *Parents Involved* plurality and dissenters reflects general disarray in the affirmative action cases as to the role of remedial findings. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values With Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1670-75 (2001). He concludes that the "affirmative action decisions have left in their wake a host of doctrinal uncertainties," and that "none of the cases spells out definitively when or how remedy-supporting findings must be made." *Id.* at 1674.

112. *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 137 (2007). According to Professor Ryan, "at the time of *Swann* anyone trying to describe the 'law' would have concluded with a great deal of confidence that voluntarily seeking to achieve a racial balance in schools was perfectly constitutional." *Id.* No doubt this is true. Nonetheless, two years later in *Keyes*, the Court cast doubt on that description by drawing, for the first time, the de jure/de facto distinction. *See* Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 208 (1973). With that distinction in place, it became possible to argue that the validity of race-conscious assignment turned on whether the segregation was de jure or de facto.

validity of race-conscious plans adopted decades later in circumstances like those in Louisville and Seattle. Before *Parents Involved*, the Court had not decided whether the de jure requirement could be met by linking current school segregation in cities with histories like Louisville and Seattle to earlier government support for segregation. The issue remains open after the 4-4 split between the plurality and the dissent, combined with Justice Kennedy's equivocal opinion.

The normative issue of how to define the scope of de jure segregation as a matter of constitutional principle deserves attention, for it will surely resurface in future cases. Furthermore, at least one crucial vote—that of Justice Kennedy—remains up for grabs. Perhaps other Justices can be persuaded to consider the problem more carefully than they may have in *Parents Involved*, particularly because the issue was not squarely presented by the litigants in that case or considered in the lower court opinions.

A. De Jure Segregation as State Action

The "proximate cause" prong of the de jure requirement turns on whether segregation can be fairly attributed to the state, even though the state's purposive discrimination took place in the more or less distant past. For the sake of identifying the issue that divides the plurality and the dissent in *Parents Involved*, it is helpful to begin with three possible responses to this question: "always," "never," and "sometimes." *Freeman v. Pitts*[113] strongly implies that the Court's answer is not "always." There the Court upheld a lower court's decision to partially relinquish judicial control of a school system that had been subject to a desegregation order for some years.[114] The Court explained that "[o]nce the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors."[115] The plurality in *Parents Involved* seems to believe the answer is "never."[116] The dissent may believe that, despite *Freeman*, the answer is "always," and certainly would endorse "sometimes."[117]

Caution is called for in ascribing a definitive answer to this question

113. 503 U.S. 467 (1992).

114. *See id.* at 471.

115. *Id.* at 494.

116. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2761 (2007).

117. *See id.* at 2810-11 (Breyer, J., dissenting). *Freeman* is not necessarily to the contrary. That the school district is "under no duty to remedy imbalance that is caused by demographic factors," Freeman v. Pitts, 503 U.S. 467, 494 (1992), does not compel the conclusion that the school district is *precluded* from undertaking such a project.

to either the plurality or dissent, because neither group gave reasons for its choice. We know how they come out in *Parents Involved*, but without more explanation it is impossible to know how a somewhat different case would be resolved. The lack of explanation is typical of cases on the de jure/de facto distinction. Over the past thirty-five years, the de jure/de facto principle has received only fragmentary attention from the Supreme Court. Nowhere in the case law is there a systematic analysis of this principle that sets forth a comprehensive rationale for dividing the cases up in this way or a set of rules for assigning cases to one category or the other.

For this reason, one must look outside the de jure/de facto cases to understand what is at stake in *Parents Involved* and similar cases and what considerations bear on their proper resolution. A basic problem with the Court's "de jure/de facto" vocabulary in school-related race cases is that it obscures the close kinship of the "state responsibility" aspect of the de jure/de facto principle and the more general "state action" principle that lies at the heart of constitutional law. Indeed, in almost all cases other than school race cases—whether they arise under the First Amendment, the Fourth Amendment, the Fifteenth Amendment, the Equal Protection Clause, or other clauses of the Fourteenth Amendment—the Court usually analyzes these state responsibility problems under the doctrinal rubric of state action.[118]

The point is not that state action doctrine pays no attention to doctrinal context. On the contrary, each substantive context, including school segregation, gives rise to distinctive state action issues. Nonetheless, we have a general framework of state action doctrine and a set of policy considerations that help guide state action analysis. Given the Court's inattention to the distinctive state-action concerns that crop up in school segregation cases, there is a need to shed light on those concerns, bring them to bear on the equal protection issues that will likely arise in future student assignment litigation, and thereby offer aid to courts obliged to struggle with the application of the de jure/de facto distinction going forward.

B. Interest Balancing and State Action

In my view, the plurality in *Parents Involved*, with its crisp distinction between situations in which de jure segregation may or may not be found, fails to take account of the full range of considerations bearing on whether the state action requirement can be met in cases of this type. Justice Breyer's dissent, with its willingness to find the

118. *See* Wells, *supra* note 72 (for discussion of such cases).

requisite state action in the mere fact that Seattle settled litigation against it years ago, may commit the same error.[119] In effect, the two sides disagree about (a) *how much* state action is needed to trigger application of the Fourteenth Amendment and (b) whether the finding of state action needs to be made in the first instance by a court. For the dissent, virtually any indication of past purposeful discrimination suffices, including claims of state action made in earlier litigation that did not result in a judgment or any other judicial determination.[120] For the plurality, nothing short of a judicial finding of current purposeful discrimination seems sufficient.[121]

For all their differences, the two sides seem to share a common premise: that "state action" is a thing or quality that can be separated from the substantive dispute and that may or may not be present in sufficient quantity. Both Justice Breyer's argument[122] and the responses from Chief Justice Roberts[123] and Justice Kennedy[124] reflect this recurring theme in state action doctrine. Kathleen Sullivan and Gerald Gunther report that, for at least the past fifty years, "most of the cases are preoccupied with the search for adequate elements of the 'state.'"[125] For example, in *Moose Lodge No. 107 v. Irvis*, the Court said that there is an "essential dichotomy" between state and private action,[126] and in some of its post-*Moose Lodge* cases it tried to make sharp distinctions between the two.[127] The majority's treatment of the de jure/de facto distinction in *Parents Involved* echoes this theme.[128]

Though several cases can be cited as authority for the "essential

119. Justice Breyer's reasoning does, however, leave open the possibility that he favors a more flexible approach. In this regard it is noteworthy that Justice Breyer wrote the Court's opinion in Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001), where the Court said that "[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity." *Id.* at 295.

120. *See Parents Involved*, 127 S. Ct. at 2803-04 (Breyer, J., dissenting).

121. *See id.* at 2761 (plurality opinion).

122. *See id.* at 2835 (Breyer, J., dissenting).

123. *See id.* at 2761 (plurality opinion).

124. *See id.* at 2796 (Kennedy, J., concurring).

125. Kathleen Sullivan & Gerald Gunther, CONSTITUTIONAL LAW 893 (15th ed. 2004). *See, e.g.*, Tulsa Prof'l Collection Serv. Inc. v. Pope, 485 U.S. 478, 485 (1988) (holding that "[p]rivate use of state sanctioned private remedies . . . does not *rise to the level* of state action.") (emphasis added).

126. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).

127. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (school that receives over 90% of its funding from the state is not a state actor); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's sale of property belonging to another is not state action).

128. *See* 127 S. Ct. at 2752 (treating the de jure/de facto distinction as a sharp line between situations in which there is a current court order finding state-sponsored segregation and situations in which there is no current court order to that effect).

dichotomy" approach to state action,[129] the effort to draw such distinctions ignores the purpose of the state action doctrine and misconceives the state action inquiry. By restricting the scope of constitutional guarantees, the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed."[130] In more abstract terms, the state action problem is this: on the one hand, in every case that raises a state action issue, someone seeks to assert a constitutional right, and some of the values underpinning that right would be served by extending "state action" to cover the situation at hand. On the other hand, the party resisting the effort to extend the reach of "state action" asserts constitutional values as well. Usually private individuals or entities rely on the constitutional value of liberty, which is preserved by limiting the scope of judicial interference with their affairs. The Court must choose between the two, on a context-by-context basis.[131]

As Professor Frederick Schauer has observed, state action "[is] not . . . a descriptive term intended to be taken literally, but . . . the label for the conclusion reached after the decision not to decide in a certain category of cases."[132] Some cases recognize this more clearly than others. For example, in *Brentwood Academy v. Tennessee Secondary School Athletic Association* the Court wisely avoided recourse to the "essential dichotomy" rhetoric of some earlier opinions.[133] Instead, it recognized that the "ambit [of the Fourteenth Amendment] cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed."[134] Competing constitutional values are at stake in state action cases, and outcomes depend on "normative judgment" among them.[135] The aim of the doctrine is not to distinguish one level of state involvement from another, but to determine which set of values—those served by extending a constitutional provision or those

129. *See Moose Lodge*, 407 U.S. at 172; Burton v. Wilmington Parking Auth., Inc., 365 U.S. 715, 721 (1961); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

130. Edmondson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) (quotation marks and citation omitted). *See also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

131. *See* Wells, *supra* note 72, at 109-10 (describing the value choices demanded by state action cases).

132. Frederick Schauer, *Acts, Omissions, and Constitutionalism*, 105 Ethics 916, 922 (1995).

133. *See* 531 U.S. at 295.

134. *Id.*

135. *Id.*

furthered by curbing its reach—should prevail in a given set of circumstances.

If the *Parents Involved* plurality means to assert that the state is not present in the case absent a judicial finding of purposive discrimination, it ignores reality. The state is virtually *always* present in one way or another, and the normative judgment summed up by "state action" cannot turn on the purely procedural matter of whether a court has found the requisite trigger.[136] Consider, for example, the housing patterns that are said to reflect de facto segregation. In fact, as Professor Ryan and others have documented, "every level of government—local, state, and federal—has . . . played an integral and underappreciated role in fostering residential segregation by race, and there has never been a concerted effort by courts or legislatures to remedy past housing discrimination."[137] At the same time, the extent that *Parents Involved* dissenters think that *any* state involvement is sufficient to satisfy the state action principle, they too misunderstand the point of state action doctrine.

Given the omnipresence of the state, the Court's primary goal in state action cases should be to distinguish situations in which the Constitution ought to govern from those that it ought not to reach.[138] This analysis will prove challenging, for in any given case, "[w]hat is fairly attributable" to the state "is a matter of normative judgment, and the criteria lack rigid simplicity."[139] Moreover, the state action doctrine consists of an ongoing and highly contextual effort to draw governing boundary lines. For example, the Court in *Polk County v. Dodson* rejects "state action" status for the actions taken in litigation by a public defender who is employed by the state.[140] By contrast, *Edmonson v. Leesville Concrete Co.* holds that peremptory challenges made by

136. Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 362-63 (1993). As Professor Alexander explains:

> All private actions take place against a background of laws and have a legal status under those laws. Thus, private actions may be legally forbidden, legally required or legally permitted. If they are legally permitted, moreover, that permission can be cashed out in terms of legal prohibitions and legal immunities. If we couple this fact about private actions—that they occur against a background of various legal duties and immunities, which background gives them their legal status—with another fact—that these various background legal duties and immunities are paradigmatic "state action"—we come to the conclusion that all private action implicates state action. Therefore, no case involving a constitutional challenge can be lacking in state action.

Id.

137. Ryan, *supra* note 2, at 140-41. *See also* sources cited, *id.* at 141, n. 67.

138. *See* Alexander, *supra* note 136, at 364-65.

139. *See Brentwood Academy*, 531 U.S. at 295

140. 454 U.S. 312, 322 n.12 (1981).

lawyers for private litigations in civil litigation *do* constitute state action when the challenges are based on race.[141] The amount of state involvement is higher in *Dodson* than in *Edmondson*,[142] but other factors counted for more in these state action analyses. The strong equal protection value asserted against race-based peremptory challenges carried the day in *Edmondson*,[143] while the independence of the public defender proved decisive in *Dodson*.[144]

Another pair of cases that shows the contextual nature of state action is *West v. Atkins* and *Rendell-Baker v. Kohn*. Under *West v. Atkins* a private doctor brought into a prison once a week to treat patients is a state actor when a prisoner sues for bad care.[145] By contrast, *Rendell-Baker v. Kohn* holds that a private school, financed almost exclusively by public funds and serving students referred to it by the public schools, is not a state actor for purposes of a suit brought by former teachers, who were dismissed for criticizing school authorities.[146] The best explanation for the different outcomes in these two cases is that, in the Court's view, the Eighth Amendment right asserted in *Estelle v. Gamble*[147] is so strong that it should extend to a comparatively broad range of circumstances involving basic competence in the delivery of in-prison care.[148] By contrast, the teachers' First Amendment rights to criticize their employer deserve less weight, particularly when the management of a significantly private entity is at stake.[149] The lesson of these cases is that for state-action purposes, one constitutional right may count for more than another.[150]

Other cases highlight the value of maintaining a private sphere. *Evans v. Abney*[151] rejected an equal protection challenge when a state court allowed property, which had been donated to a city for a whites-only park, to revert to the heirs on account of the impermissibility of city operation of such a park.[152] The Court found it decisive that the donation

141. 500 U.S. 614, 622 (1991).
142. *Compare generally Dodson*, 454 U.S. 312 *with Edmondson*, 500 U.S. 614.
143. *Edmondson*, 500 U.S. at 616.
144. *Dodson*, 454 U.S. at 321-22.
145. 487 U.S. 42, 54 (1988).
146. 457 U.S. 830, 839-43 (1982).
147. 429 U.S. 97 (1976).
148. *West*, 487 U.S. at 54.
149. It is important here to separate the analytical framework from the Court's value choices. One can accept the former without necessarily endorsing all of the Court's judgments. For criticism of the holding in *Rendell-Baker*, *see* Wells, *supra* note 72, at 113-14.
150. *See* William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 5-19 (1961).
151. 396 U.S. 435 (1970).
152. *See id.* at 436.

was the product of private choice by the testator.[153] Thus, "the language of the . . . will shows that the racial restrictions were solely the product of the testator's own full-blown social philosophy."[154] In *Moose Lodge No. 107 v. Irvis*,[155] a six-Justice majority held that a private club that refused to serve blacks was not a state actor on account of its state-issued liquor license.[156] Justice Douglas dissented, arguing that the limited number of liquor licenses made available by the state placed the club in a quasi-monopolistic position.[157] He agreed with the majority, however, that mere state licensure did not make the club a state actor,[158] because the Bill of Rights "create[s] a zone of privacy which precludes government from interfering with private clubs or groups."[159]

IV. Factors Bearing on the State Action Issues in *Parents Involved*

Cases like *Edmonson*, *Dodson*, and *Moose Lodge* illustrate the balancing of substantive values that takes place in many state action cases. By contrast, both sides in *Parents Involved* focused solely on the history of litigation over segregation in the two cities.[160] In the dissent, any trace of state involvement in segregation, including non-judicial settlement of prior litigation in Seattle, seemed to suffice.[161] The plurality, in stark contrast, insisted on a judicial finding of de jure segregation and a current desegregation decree.[162] In future cases that involve race-conscious remedies for school segregation, the aims of state action doctrine would be better served by avoiding these two polar extremes. Neither approach takes account of the full range of considerations that bear on whether a state action exists in a given set of circumstances.

More specifically, the majority looks no further than the acts of officials currently in office when analyzing state action doctrine.[163] Yet

153. *See id.* at 444-46.
154. 396 U.S. at 445.
155. 407 U.S. 163 (1972).
156. *See id.* at 177.
157. *See id.* at 182-83 (Douglas, J., dissenting).
158. *See id.* at 180 (Douglas, J., dissenting).
159. *Id.* at 179 (Douglas, J., dissenting).
160. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
161. *See id.* at 2809-37 (Breyer, J., dissenting).
162. *See id.* at 2741-68 (plurality opinion).
163. *See id.* at 2752. Addressing the Louisville case, the Court acknowledged that Jefferson County's practice of state-sponsored segregation justified the earlier mandatory desegregation order. But it held that once the order was lifted, as it had been several years ago, "Jefferson County had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis." *Id.*

segregated housing patterns that account for segregated schools are often themselves the product of government action, if their causes are traced back far enough. Throughout the United States, governments authorized and protected slavery from the Founding until the Civil War.[164] For another century, many states, and not exclusively Southern states, enforced segregation in schools and elsewhere by force of law,[165] and in this way embedded racist attitudes in the collective psyche. No doubt the passage of time dilutes some of the effects of slavery and its aftermath, but the persistence of segregated housing patterns practically everywhere (except the rural South) should give us pause.

On the other hand, the dissent in *Parents Involved* seems eager to find that any trace of government involvement in segregation is enough to warrant race-conscious remedies.[166] The logic of the dissent, though surely not its aim, would be to cast doubt on all state action limits on the application of constitutional provisions to private actors. If any cause-in-fact is enough to create state action, then virtually all cases finding a lack of state action are called into question. In all areas of law, however, proximate cause limits prevail. Whatever the past sins of governments, and however strong the case for making up for them, there is also value in maintaining a private sphere unencumbered by constitutional constraints.[167] Throughout the history of the state action doctrine, that value has been recognized by Justices across the ideological spectrum.[168] To the extent the logic of the dissent would undermine general state action principles, it should be rejected.

Unlike the all-or-nothing rules favored by both the plurality and the dissent in *Parents Involved*, the balancing of interests framework directs courts to pay close attention to the constitutional values on either side of the state action issue in each particular case. The result would be an approach to race-conscious student assignment plans that gives more weight to the features of the scheme devised by the school district and

164. *See* Slaughterhouse Cases, 83 U.S. 36, 67-68 (1873) (describing slavery in the antebellum period); Prigg v. Pennsylvania, 41 U.S. 536 (1842) (ruling that a federal law, the Fugitive Slave Act, precluded Pennsylvania from punishing persons who recaptured fugitive slaves).

165. *See* Brown v. Bd. of Educ., 347 U.S. 483, 486-93, & nn. 1, 4 (1954) (describing the practice of racial segregation in the public schools).

166. *See Parents Involved*, 127 S. Ct. at 2809-12 (Breyer, J., dissenting).

167. Keep in mind that, in the context of race-based remedies adopted by school districts, the existence of constitutional constraints entails recognition of power on the part of local authorities to use race in assigning students to public schools. From the perspective of the individual who is told what to do, the basic objection to the practice (and the corresponding argument for limits on the scope of remedial authority) is that "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." 127 S. Ct. at 2797 (Kennedy, J., concurring).

168. *See* Wells, *supra* note 72, at 110-11 & n. 72 (collecting sources).

draws more distinctions based on context. Below are some factors that, under the "balancing of constitutional values" approach to state action, may contribute to the resolution of future cases in which school districts seek to defend race-conscious integration plans.[169]

A. The Special Case of Race-Based Equal Protection

Since resolving state action cases requires making choices among competing constitutional values, the substantive context in which a given case arises should have considerable weight in deciding where to draw the state-private line.[170] An especially compelling constitutional value, such as the principle of racial equality enforced by the Equal Protection Clause, may well override libertarian arguments for individual autonomy even in circumstances where a lesser constitutional privilege would not. In this context, we have perhaps the strongest argument for Justice Breyer's expansive view of state action in *Parents Involved*. Of all constitutional issues, the Court has shown greater willingness to find state action in race discrimination cases than in any other. The state action cases thus support a presumption in favor of upholding race-conscious student assignment plans, though perhaps not so strong a presumption as Justice Breyer and his fellow dissenters seem to favor.

In *Terry v. Adams*,[171] for example, a racially-segregated private group, calling themselves the "Jaybird Association," composed of a select subgroup of the Democratic Party in Texas, chose candidates the group would support in primary elections; the selected candidates generally prevailed in those elections.[172] Since the Republican Party was weak or non-existent at the time in Texas, the primary was, in effect, the general election.[173] The state was not formally present in the arrangement, yet the Court found state action.[174] It explained that "[f]or a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth

169. The list of contextual features I discuss here is hardly comprehensive. Others also deserve attention. *Cf.* Gerken, *supra* note 2, at 125-28 (distinguishing the "domain" of school segregation from that of electoral districting; in the latter, Gerken argues, the case for race-conscious remedies may be comparatively stronger).

170. *See* Wells, *supra* note 72, at 107-11 (discussing the impact of substantive context in state action cases).

171. 345 U.S. 461 (1953).

172. *See id.* at 463.

173. *See id.* at 469 ("The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds. . . ."); *see also id.* at 476 (Frankfurter, J., concurring) ("[I]n Texas nomination in the Democratic primary is tantamount to election.").

174. *See id.* at 469-70 (plurality opinion).

Amendment."[175] In *Burton v. Wilmington Parking Authority* the Court found state action in the symbiotic relationship between a city-owned parking garage and a private coffee shop that leased space in the building and that denied service to blacks.[176] In so ruling, the Court stressed the reach of the Equal Protection Clause:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an impossible task which [t]his Court has never attempted. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.[177]

It is noteworthy that the Court in *Burton* spoke pointedly of "state responsibility under the Equal Protection Clause." *Burton* thus does not establish, for example, that the coffee shop owner would be restrained by the Free Speech Clause of the First Amendment in the treatment of his employees and customers.

Terry and *Burton* show that the Equal Protection value of forbidding the subordination of minority races[178] is an especially strong one in the balancing of constitutional principles that is required to resolve state action issues.[179] As a result, these cases offer support for the proposition that past government support for segregation can help to justify a current plan to integrate the public schools by way of a race-conscious program. Consequently, one could in principle defend a race-conscious program like those in Louisville and Seattle without necessarily opening the door to (as yet hypothetical) government programs that employ other suspect or quasi-suspect classifications such as gender or non-marital parentage.[180]

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175. *Id.* at 469.

176. 365 U.S. 715, 724-25 (1961).

177. *Id.* at 722 (internal citations and quotation marks omitted).

178. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1472-73 & n.8 (2004) (describing the "antisubordination principle" in Equal Protection law, which Siegel defines as "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.").

179. *See also* Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of a covenant among property owners forbidding sale of property to a black person is state action).

180. There are, of course, equal protection values on the other side of the ledger as well. *See infra* Part IV.D.

B. Judicial Determinations

Suppose that neither Justice Kennedy nor any member of the *Parents Involved* plurality can be persuaded that the presumption of state action in race cases is strong enough to broadly justify race-conscious student assignment plans. In that event, other considerations come to the fore. One of these is the history of a given school district. The majority seems to assume that the level of state responsibility needed to sustain judicial supervision of a school system under cases like *Freeman v. Pitts*[181] is identical to the level of state responsibility needed to justify a school district's decision to undertake a race-conscious plan on its own initiative.[182] Yet there are grounds on which the two cases may be distinguished.

While the two cases are alike in that both the judge and the school district aim to further the constitutional values embodied in the Equal Protection Clause,[183] there are also striking differences between them. When a court *imposes* a race-conscious plan or refuses to lift a plan imposed earlier, its decision intrudes on other values to a greater extent than when a school district adopts a plan on its own, and for this reason, a state-imposed plan may require greater justification to pass constitutional muster. A federal judicial order not only impinges on private choice, but also displaces local legislative authority.[184] No such displacement takes place when a school district adopts a race-conscious plan on its own. Once a court finds a violation, it *must* impose a remedy, no matter how powerful the considerations are that cut against it.[185] By contrast, political decision makers will be more likely to take these countervailing factors into account, and the costs of these values are correspondingly lower. As a result, it should be easier, other things equal, to justify a finding that even a long-buried history of purposive discrimination, or a subtle, hard-to-prove pattern of official support for segregation, satisfies the "state action" requirement.

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181. 503 U.S. 467 (1992). *See supra* notes 113-115 and accompanying text.

182. *See supra* note 163.

183. *Compare generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) *with* Freeman v. Pitts, 503 U.S. 467, 485 (1992).

184. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) ("Faithful application of the state-action requirement in these cases ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts.").

185. *See Freeman*, 503 U.S. at 485 ("The 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."). The opinion goes on to delineate the various dimensions of a school system and to reaffirm the power of the district courts "to fashion remedies that address all these components of elementary and secondary school systems." *Id.* at 486.

Another distinction between the two cases also warrants consideration. None of the Justices in *Parents Involved* seemed to perceive any constitutionally significant differences between the Seattle and Louisville plans.[186] Yet Seattle may deserve different treatment from Louisville even if there is *some* purposive state involvement in the segregation in both cities, as the dissenters argue,[187] and even though, as the plurality stresses, there is no current desegregation order in force in either city. The 1975 judicial finding of purposive segregation furnishes grounds for finding that Louisville more egregiously, or at least more expressly, violated the anti-segregation value at the core of the Equal Protection Clause. Accordingly, its race-conscious remedial plan could be more readily defended. The link between earlier purposive segregation and the current situation in Louisville may be too "attenuated" to justify continued federal judicial supervision,[188] but nonetheless sufficiently strong to support the politically accountable school district's race-conscious integration scheme.[189] Justice Breyer made a telling point when he observed that, under the majority's reasoning, the race-conscious Louisville integration plan was constitutionally sound the day before federal judicial supervision was lifted and suddenly became illegal the next day.[190] His point has force because we intuitively accept that a proven history of purposive segregation ought to carry weight, despite the majority's formal reasoning to the contrary. No similar line of reasoning is available, however, in support of the Seattle plan.

C. *Distinguishing "Integration" from Core Equal Protection Values*

Another factor to consider is the potentially significant difference between race-conscious integration plans, like those at issue in *Parents Involved*, and the exclusory practices that were repudiated in *Burton* and *Terry*. The whites-only primary election in *Terry* and the whites-only coffee shop in *Burton* were especially strong cases for extending the reach of equal protection into the arguably private realm, because they

186. Although the Justices disagreed on many matters, none of the opinions draws any constitutionally significant distinctions between the two systems. *Compare Parents Involved*, 127 S. Ct. at 2752 (where the majority lumps the Seattle and Louisville cases together) *with Parents Involved*, 127. S. Ct. at 2802 (Breyer, J., dissenting) (where Justice Breyer's dissent does so as well).

187. *See Parents Involved*, 127 S. Ct. at 2809 (Breyer, J., dissenting).

188. *See Freeman*, 503 U.S. at 494-96.

189. In this regard it is worth noting one likely consequence of the holding in *Parents Involved*. A school district that is currently under a court order, and wishes to continue to use race-conscious student assignment plans, may simply refrain from seeking to have the order lifted. *See* Ryan, *supra* note 2, at 147-48.

190. *See Parents Involved*, 127 S. Ct. at 2811 (Breyer, J., dissenting).

concerned *exclusion* of blacks from the democratic process and from public accommodations. Ever since *Strauder v. West Virginia*[191] struck down a law excluding blacks from service on juries, the Court has recognized that putting an end to racial exclusion is the core value enforced by the Equal Protection clause.

Neither the Seattle nor the Louisville case involved racial exclusion. Black children were not kept out of any of the public schools in these cities, nor were they, at least in 2007, precluded from attending school with whites. Justice Breyer's opinion must look elsewhere for the constitutional value by which to defend these race-conscious plans. Repeatedly, he stresses the equal protection value of *integration*.[192] He states that these plans and others like them "represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education* . . . long ago promised,"[193] and that the plurality "undermines *Brown*'s promise of integrated primary and secondary education."[194] He stresses that *Brown* "set the Nation on a path toward public school *integration*."[195]

Of course, one reading of Brown is simply that the state may not *segregate* children on the basis of race.[196] Yet it is fair to infer from *Brown*, and especially from later cases requiring segregated systems to take affirmative steps to bring about integration,[197] that integration of the public schools is itself a constitutional value.[198] That said, it is a separate

191. 100 U.S. 303 (1879). Justice Breyer recognizes this. *See* 127 S. Ct. at 2815 (Breyer, J., dissenting). He infers, quite reasonably, that integration is an equal protection value. Thus, he draws from *Strauder* the proposition that "the basic objective of those who wrote the Equal Protection Clause [was] forbidding practices that lead to racial exclusion." *Id.* (Breyer, J., dissenting). My point is that racial exclusion and "practices that lead to racial exclusion" are not the same thing. Even if both violate the Equal Protection Clause, "eradicating state-sponsored racial exclusion" belongs the core of what that Clause forbids, and "forbidding practices that lead to racial exclusion" is less central.

192. *See* 127 S. Ct. at 2820 (Breyer, J., dissenting).

193. *Id.* at 2800 (Breyer, J., dissenting).

194. *Id.* (Breyer, J., dissenting).

195. *Id.* at 2801 (Breyer, J., dissenting) (emphasis added).

196. For a brief but incisive discussion of the broad and narrow readings of *Brown*, *see* Adam Liptak, *The Same Words, But Differing Views*, N.Y. TIMES, June 29, 2007, at A30.

197. *See, e.g.*, Green v. County School Board of New Kent County, 391 U.S. 430, 441-42 (1968). *See also* Ryan, *supra* note 2, at 152 ("The assumption of those who argued for and supported *Brown* was that prohibiting segregation would bring about integration.").

198. Note, however, that this view is not universally held. Notably, Justice Thomas seems so dispute it. *See Parents Involved*, 127 S. Ct. at 2787 (Thomas, J., concurring) ("In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction.").

question whether the constitutional value of integration should be accorded *as much* weight as the "anti-subordination" value that animates cases like *Terry* and *Burton*. Justice Breyer finds no support for the "integration" value in pre-*Brown* cases.[199] To the extent the intent of the Framers is relevant in ranking constitutional values, integration does not seem to have been a principal concern of supporters of the Amendment.[200] The point here is not to deny that integration of the schools is a constitutional value, but to question its *rank* among equal protection values.[201] Absent current purposive segregation, integration may be a secondary equal protection value, and one that is more easily outweighed by interests on the other side of the "state action" inquiry.[202] On this premise, the Court should be more hesitant to extend equal protection doctrine in this context than it was in *Terry* or *Burton*.

Upon reflection, champions of strong equal protection rights for minorities may find that treating integration as a pre-eminent constitutional value has some disadvantages. In particular, putting too much emphasis on integration may get in the way of creative efforts to remedy the effects of past discrimination. Justice Breyer cites sociological studies showing the benefits of integration,[203] but

199. Before *Brown*, the leading case on the constitutional validity of segregated public facilities was Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding racially segregated railroad cars against an equal protection challenge on the ground that "separate but equal" public facilities are constitutionally unobjectionable).

200. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

201. *See* Juan Williams, *Don't Mourn Brown v. Board of Education*, N.Y. TIMES, June 29, 2007 at A29 ("Desegregation does not speak to dropout rates that hover near 50 percent for black and Hispanic high school students. It does not equip society to address the so-called achievement gap between black and white students that mocks Brown's promise of equal educational opportunity."). In Tamar Lewin and David M. Herszenhorn's article, *Money, Not Race, Is Fueling New Push to Bolster Schools*, N.Y. TIMES, June 30, 2007 at A10, the authors report on similar attitudes among blacks seeking better schools. They quote Ted Shaw, president of the NAACP Legal Defense Fund, who stated:

> A lot of black folks say, "Give us the resources, give us the money, we're tired of chasing white folks, and we don't need integrated schools to have good education. . . . It's hard to tell how much of that is weariness and cynicism with respect to efforts to get racially integrated schools, and I can understand that."

Id. Mr. Shaw then made clear his own continued commitment to integration. *Id.*

202. In the wake of *Parents Involved*, one moderately conservative commentator questioned the practical viability of the integration goal. *See* David Brooks, *The End of Integration*, N.Y. TIMES, July 6, 2007 at A15. For a radically different view, *see* Ryan, *supra* note 2. Professor Ryan, an avowed champion of integration, *see id.* at 133, acknowledges that "the Court over the past half century has sent mixed signals about school integration," *id.* at 139, and does not hide his disappointment with the Court's rejection of the voluntary efforts by Louisville and Seattle, *see id.* at 154-56.

203. *See* 127 S. Ct. at 2820-21(Breyer, J., dissenting).

acknowledges that some studies reach contrary conclusions.[204] For instance, one recent program to help black boys succeed in school is based on the premise that racial and sexual segregation has benefits in certain contexts.[205] Programs of this sort could be thwarted if integration is treated as a trump that overrides other equal protection values.

D. The Costs of an Expansive State-Action Rule

All the factors considered in Sections A through C concern the *nature* of the right at stake and its impact on the state action determination. Other values, however, also must figure into the constitutional calculus. "Even facts that suffice to show public action . . . may be outweighed in the name of some value at odds with finding public accountability in the circumstances."[206] In particular, the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law,"[207] as shown by cases like *Evans* and *Moose Lodge*.[208] Resolving the state-action issue in future cases that test the validity of race-conscious integration plans requires more than an evaluation of the "furthering racial integration" value put forward by Justice Breyer in favor of upholding the Seattle and Louisville schemes. That value must be balanced against the constitutional values asserted by those who challenge the school districts' efforts.

Personal autonomy to live as one pleases, however unattractive the community at large may find the choices, is the main value that stands in the way of expansive state-action rulings.[209] The respect accorded personal autonomy by classical liberalism, manifested in many no-state-action cases, is the root of most communitarian critiques of liberalism.

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204. *Id.* (Breyer, J., dissenting).

205. *See* Winnie Hu, *To Close Gaps, Schools Focus on Black Boys*, N.Y. TIMES, Apr. 9, 2007, at A1. *See also* Jerome E. Morris, *U.S. Allows Racial Gap in Education?*, ATLANTA JOURNAL-CONSTITUTION, July 24, 2007, at A11. Morris argues that,

> [D]esegregation plans will not significantly influence the educational achievement of black children because all school types (whether predominantly white, black, or racially mixed) are failing to academically prepare the majority of black children. . . . Clearly, it is the continued educational neglect of black children—more than 50 years after Brown v. Board of Education—which should be brought before the U.S. Supreme Court, not the constitutionality of desegregation plans.

Id.

206. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303 (2001).

207. Edmondson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) (quotation marks and citation omitted). *See also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

208. *See supra* notes 151, 155 and accompanying text.

209. *See, e.g.*, Evans, 396 U.S. 435 (1970).

Despite communitarian objections, *Evans* and *Moose Lodge* illustrate that autonomy carries weight even though it is not one of the Bill of Rights and may be exercised for a racist purpose.[210]

The claim asserted by the plaintiffs in *Parents Involved* may deserve even more deference than the kind of personal autonomy that carried the day in *Evans* and *Moose Lodge*, because the effect of adopting the dissent's theory of state action would be to authorize school districts to classify students on the basis of race.[211] While the premise for the classification would be the Equal Protection value of promoting integration, the private interest that must be sacrificed—the interest in not "being forced to live under a state-mandated racial label"[212]—is also a powerful Equal Protection value.[213] The presence of a strong private interest counts against finding a state action on which the "remedy for prior state-sponsored segregation" theory depends.[214] But private

210. *See supra* notes 151, 155 and accompanying text.

211. Justice Breyer acknowledges this cost, though he does not specifically identify it. He mentions it in a single sentence of a lengthy opinion, then dismisses it in the next sentence, making no effort to take it seriously. He states "[t]his is not to deny that there is a cost in applying a state-mandated racial label. But that cost does not approach in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2836 (2007) (Breyer, J., dissenting) (citation and internal quotation marks omitted).

212. 127 S. Ct. at 2797 (Kennedy, J., concurring).

213. As Judge Wilkinson puts it, "[t]he whole sad saga of the early African American experience teaches that racial decisions by the state remain unique in their capacity to demean. To squeeze human beings of varying talents, interests and backgrounds into an undifferentiated category of race is to submerge what should matter most about us under what should matter least." Wilkinson, *supra* note 2, at 163-64.

214. "Being forced to live under a state-mandated racial label" can have practical consequences. One critic of race-conscious plans claims that "[t]he children of two of the white [Seattle] plaintiffs were not assigned to the schools of their choice and ended up commuting—*four hours a day*. The parents voted with their feet—opting for private schools." Abigail Thernstrom, *Supreme Gibberish*, WALL ST. J., July 2, 2007, at A15.

Sensitive to this concern, Justice Kennedy distinguished plans that focus on classifying students by race, which he finds dubious, and those that employ other means to achieve more integration, such as "strategic site selection for new schools; drawing attendance zones with general recognition of the demographics of neighborhoods, [and] allocating resources for special programs." 127 S. Ct. at 2792 (Kennedy, J., concurring). For example, even before the ruling in *Parents Involved* Seattle had taken "steps to encourage racial diversity through other means, including placing highly sought after International Baccalaureate and dual-language programs in locations where they are likely to draw a diverse student body." Lewin, *supra* note 19. If such a program were challenged, the "remedy for prior state-sponsored segregation" defense would be stronger than it is in *Parents Involved*, because the private interest on the other side of the state-action balance would be weaker than it is when students are classified on the basis of race. For an illustration of how Justice Kennedy may justify this distinction, *see* Gerken, *supra* note 2, at 119 ("When the state moves from wholesale to retail, from the domain to the individual, Kennedy's libertarian instincts reemerge. Perhaps that is because Kennedy thinks that the state is no longer constructing a space in which students choose

interests in resisting a racial label need to be kept in perspective. My purpose in highlighting it is not to undercut the case for finding the "state action" needed to justify government programs employing race-conscious remedies; rather, it is to identify an important countervailing consideration that counsels caution in devising and implementing such policies.

Conclusion

The plurality and dissenting opinions in *Parents Involved* place eight of the Justices at opposite poles, with four favoring easy approval of race-conscious remedies and the other four placing seemingly insuperable obstacles in their path. Here, as on many current issues, Justice Kennedy holds the decisive vote, and his opinion in *Parents Involved* raises more questions than answers as to where he stands. He, and other Justices as well, would do well to question the wisdom of adhering to one pole or the other. This Article argues that a black letter rule, whether it is the one favored by the plurality or the dissent, fails to account for the range of factors that ought to be considered in analyzing the validity of race-conscious remedies.

The root of the problem is to determine how best to deal with segregation for which government bears some responsibility, on account of its actions in the past, when it is not currently operating a deliberately segregated school system. This is, in turn, a "state action" problem, and

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their own identities. Instead, it is choosing an identity *for* them."). The same is true of programs that do classify students, but do so on non-racial grounds, such as socio-economic status or single-parent households, even if these serve as proxies for race. *See* Jeffrey Rosen, *Can a Law Change Society?*, N.Y. TIMES, July 1, 2007, § 4, at 1, 5. Professor Rosen reports that scholars on both sides of the affirmative action issue "agree that public schools will use proxies for race . . . to achieve their goals." *See* Robert Tomsho, *More Schools Likely to Spur Diversity via Income*, WALL ST. J., June 29, 2007, at B1. By distinguishing between "state intervention that classifies [a student] on the basis of his race," 127 S. Ct. at 2797 (Kennedy, J., concurring), and these less direct means for promoting integration, the Court could achieve an accommodation between liberal and communitarian values, retaining the liberal commitment to personal autonomy while finding ways to promote the communitarian goal of greater racial and social integration. For that matter, the communitarian project may stand a greater chance of success to the extent it can be pursued by means that do not visit government regulation directly on families seeking (what they regard as) the best schools for their children, with all the antagonism and litigation hazards that accompany such programs.

Whether the "state action" doctrine is the appropriate constitutional principle for drawing this distinction is a separate question. It may seem artificial to treat the drawing of school district lines differently from student assignment on the ground that the latter involves state action while the former does not. It appears that Justice Kennedy would simply rule that the former program is more "narrowly tailored" to achieve the compelling state interest in avoiding racial isolation, because it does not intrude as much on the equal protection value of not living "under a state-mandated racial label." 127 S. Ct. at 2796-97 (Kennedy, J., concurring).

its resolution should reflect the flexibility and highly contextual analysis that is characteristic of cases applying state action doctrine. Instead of an all-or-nothing rule, a context-specific approach better reflects the array of factors that bear on the wisdom and fairness of a particular race-conscious remedy for segregated public schools in a particular school district. In this way, the Court can give due regard to both the worthy communitarian goal of integrating the public schools and the equally worthy individual right against discrimination on the basis of race.