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Parents Involved in Community School v. Seattle School District No. I.: An Endorsement of De Facto Segregation?

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PARENTS INVOLVED IN COMMUNITY SCHOOL V. SEATTLE SCHOOL DISTRICT NO. 1: AN ENDORSEMENT OF *DE FACTO* SEGREGATION?

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"IF WE CANNOT END OUR DIFFERENCES AT LEAST WE CAN MAKE THE WORLD SAFE FOR DIVERSITY."

John F. Kennedy[1]

INTRODUCTION

For the past fifty years, our nation has embraced, both willingly and otherwise, the constitutional mandate of dismantling government-imposed segregation of the races within the public school system. In 1954, nine United States Supreme Court Justices unanimously declared that the segregation of public school children based on race was not merely unconstitutional, but that it fostered an inequity that had long been in need of eradication.[2] *Brown v. Board of Education* was a case in which the Supreme Court at long last placed its overdue imprimatur on the affirmation that segregation in public schools was without the bounds of the United States Constitution.[3] Some half of a century later in *Parents Involved in Community School v. Seattle School District, Number 1*, the Court, comprised of nine new Justices, was squarely confronted with the questions that were sure to follow the landmark ruling in *Brown*. If government sanctioned segregation was inherently wrong, was government sanctioned integration inherently right? Was the goal of *Brown* to achieve some aspirational plateau of racial tolerance that can only come about from diversity in our institutions of learning? If the Equal Protection Clause proscribed *de jure* segregation, was the same true for *de facto* segregation? Is racial diversity within the public school system enough of a compelling state interest to warrant the use of race in determining what school a student may attend? This comment attempts to analyze how the Court came to answer the aforementioned questions in the negative, tracing both the legal history and political rhetoric that culminated in one of the most important cases that the Court decided on its 2007 docket.

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1. John F. Kennedy, American University Commencement Address, 10 June 1963, *available at* http://www.americanrhetoric.com/speeches/jfkamericanuniversityaddress.html.
2. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
3. *Id.*

I. SEPARATE BUT EQUAL

From the historic declaration that these united states would from thereafter be independent from the British crown, our nation has condoned, both through law and custom, the inequitable separation of the races in nearly every aspect of American life. Yet, not until the Supreme Court's 1894 ruling in *Plessy v. Ferguson*[4] did the Court finally harmonize the Constitution with the deeply entrenched custom of segregation. In *Plessy*, the Court held that the doctrine of separate but equal was constitutionally sound in that it did not deprive the African American of equal protection of the law.[5] The Court effectively placed the constitutional stamp of approval on a doctrine that would in fact constrain any effort to achieve parity between the races.[6] *Plessy* involved a challenge to a Louisiana law that prohibited the intermixing of the races in railway carriages.[7] Grounded in the Fourteenth Amendment[8] of the U.S. Constitution, the petitioners argued that as African Americans who were barred from the "White Only" section of the train car, they were in fact being deprived equal protection under the law.[9] The Court in *Plessy* thought otherwise. The Court said that segregation itself did not deprive blacks equal protection, as the Louisiana law stated that no person would be permitted to occupy a seat other than the one assigned.[10] In essence, white patrons were not free to use the "Colored" sections of the train either. In one of the most revered dissents in American jurisprudence, Justice Harlan decried the Court's reasoning and articulated the obvious, "[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[11] Thus, in what many today consider a perverse construction of the Fourteenth Amendment, the Court was able to reconcile the promise of equality with the reality of segregation.

II. *BROWN V. BOARD OF EDUCATION*

In the years following *Plessy*, legislatures, both federal and state, slowly moved toward more egalitarian notions of equality.[12] In 1954, the U.S. Supreme Court at last dealt a blow to one of the oldest and most guarded bastions of inequity still within our nation's boundaries. *Brown v. Board of Education* said that, at least

4. Plessy v. Ferguson, 163 U.S. 537 (1896).
5. *Id.* at 543.
6. *Id.*
7. *Id.* at 540.
8. U.S. CONST., amend. XIV, § 1. ("No State shall...deny to any person within its jurisdiction the equal protection of the laws").
9. *Plessy*, 163 U.S. at 542.
10. *Id.* at 537.
11. *Id.* at 557 (Harlan, J. dissenting).
12. *See, e.g.*, Sweat v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950).

in public elementary schools, "[s]eparate education facilities are inherently unequal."[13]

In *Brown*, the Supreme Court, through Chief Justice Earl Warren, overruled the long-lived canon codified in *Plessy*.[14] A compilation of five separate cases, *Brown* challenged the laws in Kansas, South Carolina, Virginia, and Delaware that, like seventeen other states and the District of Columbia, operated under a segregated school system.[15] In *Brown*, the Court flatly rejected the "separate but equal" doctrine once and for all in the American public elementary and high school settings. The Court confronted the narrower argument with regard to segregation in schools. The Court considered whether "segregation of children in public schools solely on the basis of race...deprive[s] the children of the *minority* group of equal educational opportunities?"[16] Reading the Fourteenth Amendment not as some "color-blind" manifestation granting equality to all, but rather as a tool specifically designed by its framers to relieve the most vulnerable in our society, the Court serendipitously reached that conclusion which had eluded it for so long. In *Plessy*, the Court reasoned that the Equal Protection Clause is not offended by segregation as it applied equally to whites and blacks alike.[17] That rationale would find no sanctuary in the *Brown* decision. As was obvious to all persons of even the most remedial competence, "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children .... Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[18]

III. *BROWN* IN ACTION

Segregation was deeply entrenched in our nation's laws and customs. If it can be said that *Brown* finally killed the laws, the customs were slower to die. Following the decision in *Brown*, that segregation was unconstitutional, the Court had to decide how it would implement the mandate. The Supreme Court found itself in the unprecedented situation of having to force municipalities and school boards to comply with the directive. The Court opted to issue a proclamation that schools that once were segregated should take steps to integrate "with all deliberate speed."[19] This amorphous command left it to the imaginations of the local governments, many of whom the decision was aimed at, to construe its meaning. With the ambiguous language used by the Court, the segregated school districts were given time to develop methods of undermining the mandate.[20] In Virginia, for example, Prince Edward County simply closed all of the public schools in what was

13. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
14. *Id.*
15. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 257 (Vintage 1977).
16. *Brown*, 347 U.S. at 493 (emphasis added).
17. *Plessy*, 163 U.S. at 554.
18. *Brown*, 347 U.S. at 497.
19. Brown et. al. v. Bd. of Educ. et al, 349 U.S. 294, 301 (1955).
20. *Id.*

known as the Massive Resistance to the U.S. Supreme Court's ruling in *Brown*.[21] For five years, the Board of Supervisors for Prince Edward County refused to appropriate any funding for public education.[22] Not until 1964 did the state of Virginia finally submit to the contention that white and black students were going to attend school together.[23]

IV. *DE JURE* SEGREGATION AND EQUAL PROTECTION

It has been argued that at the heart of *Brown* was the demise of *de jure* segregation[24]; which is segregation specifically imposed by law. This interpretation allowed for a construal of *Brown* that did not call for integration, but rather desegregation. Thus, how to effectuate *Brown* became a point of contention for both sides.

As the country pushed forward in the years following the *Brown* decision, differences in its implementation arose simultaneously. For example, in North Carolina, affirmative efforts were underway to bring integration about by means of busing black students to all white schools, even though the black students were not within the geographical boundaries set out by the local board to warrant attendance of the school.[25] In response to this, the North Carolina General Assembly passed an Anti-Bussing law that stated, in pertinent part, that:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."[26]

Basing its rationale on the ruling in *Brown*, that race-consciousness was unconstitutional when applied to the public school system, the North Carolina legislature negated any effort to remedy past discrimination by way of bussing programs.[27] In *North Carolina State School Board v. Swann*, the Supreme Court affirmed a lower court's ruling that parts of the law enacted by the North Carolina legislature were obstructive to the constitutional guarantees mentioned in *Brown*.[28] North Carolina's attempt to circumvent desegregation efforts by announcing that student assignments should be "color blind" in light of the *Brown* decision was disingenuous to say the least. At this point, there were no laws on the North Caro-

21. Griffin v. County Sch. Bd., 377 U.S. 218, 221 (1964).
22. *Id.*
23. *Id.*
24. *De jure* segregation is that type of segregation that is permitted by law. BLACK'S LAW DICTIONARY (8th ed. 2004).
25. N.C. State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).
26. *Id.* at 44.
27. *Id.*
28. *Id.*

lina books that required segregation of the races in public schools.[29] Yet, the socioeconomic lines that had been drawn by years of forced segregation and racial discrimination would prove to secure the result that many segregationists desired. Rejecting the argument of the state, the U.S. Supreme Court awarded wide latitude to the local school board that instituted the bussing program.[30] The Court said of local school boards that:

> "[s]chool authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall."[31]

In *N.C. State Bd. of Educ. v. Swann*, the Court gave local governments the ability to ensure racial balance, arguably the main goal of *Brown*, in districts throughout the country where *de jure* segregation was in effect.[32] The Court realized that in order for past discrimination and segregation to fully be remedied, race could not simply be ignored. In fact, to ensure racial parity in the public school system, measures would have to be taken in which race would be specifically considered.

What the Court did not specifically address in *Swann*, the central issue that was in question in *Parents Involved in Community Schools*, was the issue of affirmative efforts to ensure racial balance in systems in which *de jure* segregation did not previously exist. Efforts to abate or proactively avoid *de facto* segregation that occurs without the force of law have been largely thwarted in recent years.[33] Under the blanket of the Fourteenth Amendment, opponents of such race-balancing programs argue that the Equal Protection Clause strictly prohibits the cognizant use of race by the government in any and all circumstances.[34] Clearly, the Court has held that when remedying past *de jure* discrimination, governments can use race as a factor in those efforts.[35] Yet, there has been less judicial support for attempts to affirmatively spread balance in areas that have not traditionally been affected by *de jure* segregation.

The Court has held that "when *de facto* discrimination is at issue our tradition has been that the remedial rules are different."[36] Without a compelling state interest, such as past *de jure* discrimination, the state government cannot use race as a

29. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).
30. *Id.* at 45.
31. N.C. State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).
32. *Id.* at 46.
33. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
34. *Id.*
35. *Id.* at 2796 (Kennedy, J., concurring in part and concurring in the judgment).
36. *Id.*

determining factor in student assignments.[37] The Court has held that "remedying past societal discrimination does not justify race-conscious government action."[38] Therefore, even to alleviate the manifestation of segregated schools that come about by housing patterns or other socioeconomic phenomena, a state cannot use race as a factor in achieving its goal.[39] In *Parents Involved*, the Chief Justice stated that the Equal Protection Clause required that race not be used by the Seattle School District.[40] The dissent disagreed with the constitutional interpretation of the Fourteenth Amendment given by the Court.[41] Laws that are created to include rather than exclude members of a particular race, in the dissent's view, deserve a different level of analysis.[42] It has been argued that the Fourteenth Amendment was created by its framers for the specific purpose of securing equality for those who were emancipated from slavery.[43] At no point could it have been thought that a "color-blind" society was to emerge based upon the verbiage of the amendment.[44] Arguing for the Seattle School District's voluntary integration program, a number of Reconstruction-era historians and scholars stated that "[t]he Seattle and Louisville integration policies are fully consistent with both the goals of the Reconstruction project and the means Congress deemed permissible to effectuate those goals."[45]

V. AFFIRMATIVE ACTION

With the advent of Affirmative Action[46] programs across the country, opponents have, as in the *Swann* cases, used the Fourteenth Amendment to deny the ability of school systems to achieve a racial balance within the academic environment.[47] In *Regents of the University of California v. Bakke*,[48] the U.S. Supreme Court forced the University of California at Davis School of Medicine (hereinafter, "UC Davis") to admit a white student that had previously been rejected. UC Davis had an Affirmative Action program that used race as a determining factor when selecting participants for admission to medical school. Allan Bakke was denied admission even though his test scores and other academic credentials were higher

37. *Id.* at 2763.
38. *Id.* at 2758.
39. *Id.* at 2775 (Thomas, J., concurring).
40. *Id.* at 2751.
41. *Id.* at 2815 (Stevens, J. dissenting).
42. *Id.*
43. JEFFERY ROSEN, THE SUPREME COURT. THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 125 (Times Books 2006).
44. Plessy v. Ferguson, 163 U.S. 537, 559 (1896).
45. Brief for Historians as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 2005 U.S. Briefs 908, 910.
46. JETHRO LIEBERMAN, THE EVOLVING CONSTITUTION 42 (Random House 1977) ("Affirmative Action is the name given to a controversial set of policies that at bottom rests on the proposition that government may constitutionally take race or some other suspect classification into account as long as in so doing it intends to benefit one group rather than harm another.")
47. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
48. *Id.*

than some of the black students that were admitted.[49] The school reasoned that the program was needed to "(i) reduc[e] the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,...; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."[50] The Court in *Bakke* was 4-4 on whether race could be considered under the Equal Protection Clause absent proof of past *de jure* segregation or discrimination based on race, with the ninth deciding vote declining to weigh in on this specific issue.[51]

In *Grutter v. Bollinger*,[52] the Court upheld the University of Michigan Law School's program that considered race as one of many factors amongst its applicants. The Court held that the program was narrowly tailored enough and achieved a compelling interest in diversity, while not offending the Fourteenth Amendment.[53] This holding is noteworthy for a number of reasons, namely that unlike the *Parents Involved* case, *Grutter* upheld the racial classification of students in a merit based system.[54] That is to say that race could actually displace some other evaluative criterion in the selection process, such as grade point average, entrance test scores, and the like.[55] In *Parents Involved*, there was no such merit based system in place in which race supplanted some other meritorious criteria.[56]

VI. STRICT SCRUTINY

In order for a race-conscious program such as the one implemented in Seattle to be deemed constitutional, it must survive the test of strict scrutiny.[57] In order to pass this level of judicial review, "the school [district] must demonstrate that their use of such classifications is 'narrowly tailored' to achieve a 'compelling' government interest."[58] In *Adarand Constructors, Inc. v. Pena*, the Supreme Court articulated the rule that in all equal protection claims of suspect classifications, whether rooted in either the Fifth or Fourteenth Amendment, the state action against which the claims are brought are to be subjected to this higher level of evaluation.[59] As stated, in order to be deemed constitutional, a government program that utilizes race as a criterion for the reception of services must show that the program serves a compelling state interest.[60] In education, the desire to foster a diverse student population has not necessarily been deemed a compelling state interest to the point that

49. *Id.* at 269.
50. *Id.* at 306.
51. *Id.* at 339.
52. Grutter v. Bollinger, 539 U.S. 306, 382 (2003).
53. *Id.* at 310.
54. *Id.*
55. *Id.* at 371 (Scalia, J., concurring in part and concurring in judgment).
56. *Parents Involved*, 127 S. Ct. at 2818 (Breyer, J., dissenting).
57. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
58. *Parents Involved*, 127 S. Ct. at 2738.
59. *Adarand*, 515 U.S. at 200.
60. *Id.* at 224–25.

a school board can use the race of a student in its admissions program.[61] This indeed was the central point of the *Parents Involved* argument. The plaintiff argued that absent past *de jure* segregation, there was no compelling state interest to provide a racially inclusive student body.[62]

The converse argument to that is simply that the state does have an interest in both creating and maintaining a student body that comports with basic notions of racial equity. The test, according to the majority in *Parents Involved*, is unwavering and makes no distinction between those programs that are intended to include and those intended to exclude.[63] In previous cases dealing with racial classifications, the U.S. Supreme Court has said that "a government interest in student body diversity 'in the context of higher education' is 'compelling.'"[64] This reasoning would lead one to the conclusion, as it did the lower district court and the Ninth Circuit in the *Parents Involved* case, that the Seattle program indeed served a compelling interest.[65] In *Grutter* v. *Bollinger*, the U.S. Supreme Court dealt with a set of facts similar to those in *Parents Involved.* In *Grutter*, a student was denied admission to the University of Michigan School of Law and subsequently brought suit alleging that minority students were given higher preference for admission even though her academic credentials surpassed those of some of the minority admittees.[66] Defending the University's diversity program, the Court acknowledged "that diversity is essential to its educational mission."[67]

The compelling interest in *Grutter*, a diverse student body, seems more than analogous to the interest articulated by the Seattle School District. Yet, the strict scrutiny test is applied in two different ways by the Court. The only compelling interest that would provide sanctuary for the integration program in Seattle is that of remedying some past *de jure* segregation.[68] The Court in *Parents Involved* reconciles this discrepancy by distinguishing between the totality of the diversity programs.[69] In *Grutter*, the Court maintains that the University of Michigan used race as one of many criteria to achieve its objective of a diverse student body, not merely race alone.[70]

There is also an argument to be made that the test for strict scrutiny is not the same for all racial classification cases. The dissent in *Parents Involved* points out that "no case ... has ever held that the test of "strict scrutiny" means that all racial classifications, no matter whether they seek to include or exclude, must in practice be treated the same."[71] The observation of race-based programs is not a static one. As the Court said in *Grutter*, and restated in the dissent of *Parents Involved*,

61. *Parents Involved*, 127 S. Ct. at 2757.
62. *Id.* at 2738.
63. *Id.*
64. *Id.*
65. *Id.* at 2746.
66. *Grutter*, 539 U.S. at 317.
67. *Id.* at 327.
68. *Parents Involved*, 127 S. Ct. at 2783.
69. *Id.*
70. *Grutter*, 539 U.S. at 330.
71. *Parents Involved*, 127 S. Ct. at 2816 (Breyer, J. dissenting).

"[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[72]

VII. THE *PARENTS INVOLVED* DECISION

The Seattle School District No. 1, which had not operated a *de jure* segregated school system in its past, had in place a program that allowed incoming high school students to choose from within the district which school they would attend from a selection of schools of which they were eligible to attend.[73] From 1999 to 2001, the school district had in place an affirmative integration program that attempted to maintain a racial balance within the high schools of the school district.[74] When a school becomes oversubscribed, the district relies on a number of factors to act as "tie-breakers" to determine which school the student will attend.[75] For instance, if the student has a sibling that already is in attendance at the oversubscribed high school that the student has chosen, he or she will be given initial preference. Absent a sibling already in attendance, another such tie-breaker, and the one which commenced this litigation, was the use of the race of the student as a determinant for which school the student will be assigned.[76] The school district's white/non-white make-up was forty-one percent to fifty-nine percent, respectively.[77] "If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls 'integration positive', and the district employs a tie-breaker that selects for assignment students whose race 'will serve to bring the school into balance.'"[78] Voluntarily, the school district distributed the students accordingly to achieve a racial balance that was indicative of a fully unitary school environment by reflecting "the racial composition of the school district as a whole."[79] Yet, as stated previously, since the school district had not mandated *de jure* segregation of the races in the past, it was argued that the school district "neither is constitutionally compelled [n]or permitted to undertake race-based remediation."[80] Even for a school that has operated *de jure* segregated schools in the past, once it is found to be unitary, or fully integrated to the extent of the law, even voluntary use of race in school assignments is unconstitutional in the K-12 public school setting.[81]

The paradox that is created seems obvious. On the one hand, when school districts have operated *de jure* segregated schools, affirmative integration is not only constitutional, it can be (and often times is) judicially mandated.[82] On the other,

72. *Id.* at 2817 (quoting *Grutter*, 539 U.S. at 326–27).
73. *Id.* at 2746.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Parents Involved*, 127 S. Ct. at 2747.
78. *Id.*
79. *Id.*
80. *Id.* at 2768 (Thomas, J. concurring).
81. *Id.*
82. *Id.* at 2752.

voluntary affirmative integration programs are unconstitutional in school districts that have not operated under the auspices of segregation or are unitary.[83] The Court seems to come to the widely held view that integration is a positive goal and that school districts that were, in their past, in contrast to this basic tenet of equality, can be ordered to use race as a means of achieving that goal.

In the 2000-2001 school years, five of the ten Seattle School District No. 1 high schools were oversubscribed.[84] Three of these high schools were "integration positive" schools in that the racial make-up of the schools was greater than fifty-one percent white.[85] This resulted in minority students being more preferred for enrollment than white students and, in fact, white students were denied enrollment based solely on their race.[86] Yet, the program was not designed to transfer only minority students to schools with higher student populations.[87] If a school had more than the proportional amount of minority students and was oversubscribed, white students were then given preference over minority students for assignment.[88] The parents of students who were denied admission to the oversubscribed school of their choice because the school was not what the district considered "in racial balance," formed Parents Involved in Community Schools (hereinafter, "Parents Involved")[89] in order to challenge the integration policy on Equal Protection grounds, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act.[90]

In the lower district court, the court ruled in favor of the Seattle School District's motion for summary judgment, finding that the integration program was narrowly tailored and did in fact advance a compelling state interest, thus, surviving the strict scrutiny required by *Adarand*.[91] The Ninth Circuit Court of Appeals initially reversed the district court ruling, only to withdraw that opinion and remove its injunction against the school district while it certified the question on the state law to the Washington State Supreme Court.[92] The Washington Supreme Court found that the state law was not violated by the school district's integration program because the law was meant to prohibit government programs that gave preferential treatment to lesser qualified candidates over more qualified ones based solely on their race.[93] The Ninth Circuit then reversed the district court ruling on federal constitutional grounds, only to have an en banc Ninth Circuit decision overrule the panel, thus holding that the integration program was constitutional.[94]

Parents Involved argued that it had "an interest in not being 'forced to compete for seats at certain high schools in a system that uses race as a deciding factor in

83. *Id.* at 2738.
84. *Parents Involved*, 127 S. Ct. at 2746.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. It has not been ascertained by the author of this article if the racial make-up of *Parents Involved in Community Schools* is all-white or a mix of white and non-white parents.
90. *Parents Involved*, 127 S. Ct. at 2748.
91. *Id.* at 2751.
92. *Id.* at 2759.
93. *Id.* at 2748.
94. *Id.* at 2759.

many of its admissions decisions.'"[95] What is meant by "compete" seems ambiguous. All parties seem to stipulate that the criterion for admission at the oversubscribed schools is not based on some evaluated performance or act.[96] In fact, it would appear as though there is a complete lack of competitive opportunity for assignment as students are assigned by their race. And it is the use of race, in order to promote a more diverse and integrated learning environment, which the school district argues is a compelling state interest.[97]

The U.S. Supreme Court, through the Chief Justice, articulated the burden for strict scrutiny that the school district must overcome in order to vindicate its race-based program.[98] In order to survive strict scrutiny, "the school [district] must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest."[99] The Court has said that in the context of public education, there are two interests that validly qualify as compelling. Remedying the effects of past *de jure* segregation has been deemed a compelling interest, yet without a showing of past segregation, "the Constitution is not violated by racial imbalance in the schools."[100] The Seattle School District had not in its past, nor did it argue that it had, operated segregated schools for white students and minority students.[101]

What the School District did argue is that the Supreme Court's ruling in *Grutter* held that diversity "in the context of higher education" was a compelling state interest that would withstand the strict scrutiny of the Court.[102] The Court countered with the observation that in *Grutter*, "[t]he diversity interest was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.'"[103] The differences between *Grutter* and the case at bar are plain to see. In *Grutter*, the student was denied admission to law school,[104] a highly competitive environment where admission to any institution is anything but guaranteed. In *Parents Involved*, the students were guaranteed admission into a Seattle School District high school, with the only variable being which district high school they would attend.[105] The consequences in *Grutter* were that a student may not be able to attend law school at all, as opposed to the law school of their choice. Further, there are greater academic and admission requirement discrepancies amongst our nation's law schools than within the Seattle School District.[106] In *Grutter*, the individual was denied admission to the University of Michigan School of Law,[107] a

95. *Id.* at 2751.
96. *Id.* at 2746.
97. *Parents Involved*, 127 S. Ct. at 2738.
98. *Id*, at 2748.
99. *Id.* at 2742.
100. *Id.* at 2752 (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)).
101. *Id.* at 2747 (stating that "Seattle has never operated segregated schools").
102. *Id.* at 2753.
103. *Id.*
104. Grutter v. Bollinger, 539 U.S. 306 (2003).
105. *Parents Involved*, 127 S. Ct. at 2748.
106. In order to attain acceptance to law school, applicants must complete, with a competent score, the LSAT. *See generally* http://www.lsac.org/LSAT/about-the-lsat.asp.
107. *Grutter*, 539 U.S. at 312.

highly regarded legal institution. It would be of little consolation to be admitted to a school of lesser reputation and prestige. Yet the Court in *Grutter* upheld the University of Michigan's diversity program as furthering a compelling interest.[108] The *Grutter* case consisted of a highly selective school that was determining whether or not a student would be granted admission. Conversely, the Seattle School District granted all students within their geographic boundaries admission to high school without competition, with the only limitation being on the location of the school.[109]

The Court speaks of the "highly individualized, holistic review" that was used in the *Grutter* case with regard to its diversity program.[110] Yet the pivotal difference between the two cases seems to be exactly what was being denied: admission as opposed to location. The Court argues that unlike *Grutter*, this case does not take race as a single element among a broader array of factors, and in the current case, "when race comes into play, it is decisive by itself."[111] However, this rationale ignores the fact that in a *Grutter*-like situation, as with any program that uses race as a dynamic, all other factors being equal, race would patently be decisive by itself.

The majority argues that there is a bright line between *de jure* segregation and racial imbalance due to *de facto* segregation--the latter being beyond the remedy of the constitution; and the former being the exception to the general rule that racial classification in the public school setting are unconstitutional.[112] Yet, if one reads the opinion of *Brown v. Board of Education* to mean what it expressly says, that segregated schools are inherently unequal, then the means represent very little. Schools that are segregated by law, by custom, or by some other socioeconomic means all result in segregated schools, only one group of which requires constitutional remediation. Justice Thomas, in concurring with the majority decision, writes boldly that "racial imbalance is not segregation."[113] Yet, in the same breath he concludes that racial balance is simply integration.[114] This semantic contradiction is precisely what the dissent argues is being used to support the notion that the Fourteenth Amendment of the U.S. Constitution demands the dissolution of a program designed to include members of the underrepresented class in the academic setting.[115] Justice Thomas' concurrence indeed makes no distinctions between *de facto* and *de jure* segregation.[116] Announcing only that segregation is the state mandated operation of a dual educational system, he concludes that racial imbalance, presumably no matter how skewed, is not deserving of the protections of the law.[117] Without a prior "history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to elimi-

108. *Id.* at 306.
109. *Parents Involved*, 127 S. Ct. at 2748.
110. *Id.* at 2763.
111. *Id.* at 2753.
112. *Id.* at 2761.
113. *Id.* at 2768 (Thomas, J., concurring).
114. *Id.*
115. *Id.* at 2797 (Stevens, J., dissenting).
116. *Parents Involved*, 127 S. Ct. at 2769 (Thomas, J., concurring).
117. *Id.*

nate segregation and its vestiges."[118] Surely, the majority holds that not only is there no legal obligation, but there is no legal right.[119]

The dissent argues that "the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude."[120] At the very heart of *Brown* was the implication that blacks were inferior to white students, both in the school facilities in which they studied and in their ability to learn within the walls of those facilities.[121] Prior to *Brown*, racial classifications were used to subordinate a class of society.[122] The dissent contends that the prohibition against racial classifications in the school setting was intended at its very core to stop efforts aimed at exclusion rather than inclusion.[123] The irony in invalidating a program aimed at granting equal opportunity to the races by way of the Equal Protection Clause does not go unnoticed by the dissent. Justice Stevens decried the majority opinion in stating that:

> "Rejecting arguments [in *School Comm. of Boston* v. *Board of Education*[124]] comparable to those that the plurality accepts today, that court noted: 'It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.'"[125]

The dissent argues that since the inception of mandated integration, there has been a line between the use of a racial criterion to exclude rather than include.[126] Those programs that are intended to act as *inclusive* should, according to the dissent, be treated differently than those designed to exclude with regard to judicial review in order to keep with the spirit of *Brown*.[127]

VIII. IN THE WAKE OF *PARENTS INVOLVED*

Both sides of the argument draw dismal conclusions with respect to the implementation of the opposition's theory. The majority argues that if we are to adhere to the proposition that school boards or the like are free to use racial criteria in determining such things as school assignments, the prospect for misuse cannot be

118. *Id.* at 2771.
119. *Id.*
120. *Id.* at 2798 (Stevens, J., dissenting).
121. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
122. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).
123. *Id.*
124. Sch. Comm. of Boston v. Bd. of Educ., 227 N.E.2d 729 (Mass. 1967).
125. *Parents Involved*, 127 S. Ct. at 2798 (quoting Sch. Comm. of Boston v. Bd. of Educ., N.E.2d 729, 733 (Mass. 1967)).
126. *Id.* at 2815 (Breyer, J., dissenting).
127. *Id.*

ignored.[128] How far into the classroom could administrations, under the guise of integration, utilize race to manipulate such things as behavior and association? If the school board could dictate the racial balance for the school itself, could they affirmatively construct the racial balance of individual classes? Suppose the school felt that in the interests of diversity, the implementation of a plan whereby each high school locker alternated between minority and non-minority students. Could the school prescribe the racial make-up of the football team? How about the lunchroom tables? Does the school have a compelling interest in seeing that they too are diverse? These are the possible scenarios that the majority conceivably holds could indeed come to fruition if the Seattle program, and similar ones, are allowed to stand.

On the other side, if we contend that the law will not permit the use of race as a criterion in school assignment, save for past *de jure* discrimination, how can the law protect us from *de facto* segregation? Chief Justice Roberts boldly writes that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[129] This supposition may seem rather utopian if not disingenuous on its face. Surely, the Chief Justice was writing about discrimination imposed by the state. But what is left over is that deeply rooted custom that has lingered well past the *Brown* decision. The socioeconomic lines that have created well-defined divides amongst the races do in fact exist today. Neither side disputes that. Yet what the majority holds and the dissent fears is that an ever growing population subjugated to *de facto* segregation will have no substantive remedy at law.[130] And if the premise that segregation is inherently unequal, whether *de facto* or *de jure*, then, if we hold true to the words in *Brown*, we are creating an inherently unequal body of academia.

The future reality lies with the ruling, until changed. Yet, the majority argument, that an unchecked use of race-conscious assignments in schools could lead to abuse by those who's intentions might not "remain as good as Justice Breyer's"[131], presupposes that the race-conscious school assignments will at some point in time go unchecked. Nothing in the dissenting opinion seems to argue that school boards or local governments should be given unbridled power to use race-conscious means to achieve any objective. In contrast, the dissent contends that a level of judicial oversight is needed even in the most innocent of cases.[132]

CONCLUSION

A school system's voluntary endeavor to achieve parity, to champion diversity, and to affirmatively seek not to slip into the dark recesses of our imbued national past is something that warrants admiration instead of rebuke. There is something quite disingenuous in the argument that the very law that was used to strike down

128. *Id.*
129. *Id.* at 2768.
130. *Id.* at 2769 (Thomas, J., concurring).
131. *Id.* at 2788 (Kennedy, J., concurring in part and concurring in judgment).
132. *Id.* at 2828 (Breyer, J., dissenting).

the not-so-archaic shackles of segregation can be utilized to see that the purpose of that battle is never achieved.

The majority seems to come to the conclusion that the Seattle School District's integration program denies students, both black and white, of equal protection guaranteed by the Fourteenth Amendment in so much that they can be denied admission to the school of their choice solely due to their race. Yet if the district had operated a *de jure* segregated school in the past, the same denial resulting from the same integration program would be, at least to the majority, more palatable.[133] The dissent in *Parents Involved* accused the majority of rewriting history in its interpretation of *Brown* and other civil rights cases that have come before the Court.[134] Indeed, the majority, in Justice Thomas' concurrence, goes so far as to compare the dissent's plea for upholding the Seattle School District's integration plan to the arguments made by the segregationalists in *Plessy*.[135] The Fourteenth Amendment was created to protect the equal rights of the least of our citizens.[136] As Justice Harlan so aptly wrote in his dissent in the Civil Rights cases, "[a]t every step in this direction the nation has been confronted with class tyranny...."[137]

133. *Id.* at 2769 (Thomas, J., concurring).
134. *Id.* at 2798 (Stevens, J., dissenting).
135. *Id.* at 2783 (Thomas, J., concurring).
136. *Id.*
137. U.S. v. Stanley, 109 U.S. 3, 62 (1883) (Harlan, J. dissenting).