

## **The Story of *Parents Involved in Community Schools***

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.

-- Chief Justice Roberts, *Parents Involved in Community Schools VI*<sup>1</sup>

There is cruel irony in The Chief Justice’s reliance on our decision in *Brown v. Board of Education*...The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of the white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court’s most important decisions.

-- Justice Stevens, dissenting in *Parents Involved in Community Schools VI*

The story of *Parents Involved in Community Schools v. Seattle School District No. 1* (*Parents Involved*) is very much a story about “black schools” and white schools. It is a story about what constitutes discrimination in contemporary equal protection jurisprudence. And it is a story about the dismantling of voluntary integration plans and the resegregation of American public schools.

The story of *Parents Involved* begins with Kathleen Brose, a PTA member, volunteer music teacher, and active mother of two. In 1999, Kathleen and her 8<sup>th</sup> grade daughter Elizabeth began the exciting high school application process in their school district of Seattle, Washington. Kathleen and Elizabeth had their choice of any of the district’s ten high schools, and could rank as many as they wished in order of their preference.<sup>2</sup> Kathleen wanted her daughter to attend Ballard High School, which had just reopened in 1999 after a \$35 million dollar renovation.<sup>3</sup> Elizabeth ranked Ballard first.<sup>4</sup> But when Elizabeth finally got her high school assignment in April 2000, she and her mother learned she was not assigned to her first choice, Ballard.<sup>5</sup> She was also not assigned to her second choice, Roosevelt High School, or her third choice, Nathan Hale High School.<sup>6</sup> Elizabeth was assigned to her fourth choice school, Franklin High School.<sup>7</sup>

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<sup>1</sup> *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. 701 (2006). In 1998, Seattle adopted a high school admissions plan that allowed incoming 9<sup>th</sup> graders to choose from any of the district’s ten high schools.

<sup>2</sup> *Id.* at 711. In 1998, Seattle adopted a high school admissions plan that allowed incoming 9<sup>th</sup> graders to choose from any of the district’s ten high schools.

<sup>3</sup> Julie Peterson, *Modernizing Program Raises Hope—New Ballard High School Will Showcase Latest in Technology*, *The Seattle Times*, October 8, 1998. The original Ballard High School was demolished in 1997, and a completely new school was built, with truly spectacular amenities including a genetics lab, two-story student commons area, tournament class gym, art-court and greenhouse, 8,200 square foot library with capacity for 18,000 books, TV production studio space, and notably, more bathrooms for girls than boys.

<sup>4</sup> Kathleen Brose’s Story, available <http://www.piics.org/page9.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Kathleen was outraged that Elizabeth was not assigned to the newly rebuilt Ballard High School.<sup>8</sup> But Elizabeth was not the only student in Seattle who eagerly anticipated assignment to Ballard.<sup>9</sup> Extending across 13 acres of land, a modern marriage of brick, glass, and solar panels, the newly rebuilt Ballard was an exciting addition to the Seattle School District.<sup>10</sup> Nestled between horse chestnut and Dutch elm “heritage trees” planted when the school was first built at the turn of the 20<sup>th</sup> century, Ballard’s classrooms look out onto an expansive panoramic view of the city.<sup>11</sup> Cherry blossoms adorn the courtyards and walkways to the state of the art science labs and gorgeous athletic facilities. In contrast, Kathleen described Franklin High School as a “heavily black school with lower test scores.”<sup>12</sup> She believed her daughter had been discriminated against in the high school application process, and that discrimination was the reason for Elizabeth’s assignment to her fourth choice high school.

But why did Kathleen Brose believe her daughter was the victim of discrimination? The legal claims brought by Kathleen and her organization, Parents Involved in Community Schools (PIICS), represent public acceptance of the rhetoric of colorblindness, and beliefs that anti-classification principles should govern Equal Protection jurisprudence. The story of *Parents Involved* demonstrates the adoption of these convictions beginning with the history of school choice and its relationship to legalized housing discrimination in Seattle, the adoption of Washington State’s anti-affirmative action law Initiative-200, and the Supreme Court’s series of decisions affirming and promoting colorblindness in antidiscrimination law.

### **The History of Choice Plans in Seattle Schools**

...the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

-- Seattle School Board Statement Reaffirming Diversity Rationale, 1999

Thus, succinctly stated, the board's purpose in adopting its current open choice policy is to mitigate the historical effects on its high schools of the residential segregation of Seattle's

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<sup>8</sup> *Supreme Court Revisits Race in Public Schools*, PBS Newshour, December 4, 2008, [http://www.pbs.org/newshour/bb/law/july-dec06/scotus\\_12-04.html](http://www.pbs.org/newshour/bb/law/july-dec06/scotus_12-04.html).

<sup>9</sup> 82% of Seattle 8<sup>th</sup> graders ranked Ballard, Nathan Hale, Roosevelt, Franklin and Garfield as their first choice school. *Parents Involved in Community Schools I*, 137 F. Supp. 2d 1224, 1226 (W.D. Wash. 2001).

<sup>10</sup> Peterson, *supra* note 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 8. Ms. Brose’s description fails to include that Franklin High School, like Ballard, had also undergone substantial renovations. Originally constructed in 1911, Franklin’s facilities included stunning coffered ceilings, rich terra cotta detailing, brass clocks, and huge windows. But by the 1980’s the school had many structural issues, including asbestos, a crumbling foundation, and a leaking roof. The School District planned to demolish the building, but the Seattle Landmarks Preservation Board and community members lead efforts to save the school through renovation. Franklin was renovated to meet seismic codes, and now includes an 80,000 square foot addition.

neighborhoods, and to allow all students the opportunity to benefit from the pedagogical and socio-cultural values a racially diverse school offers.

-- District Court Judge Barbara Jacobs Rothstein, *Parents Involved In Community Schools I*, 137 F. Supp. 2d 1224, 1233 (W.D. Wash, 2001).

The school integration plan challenged in *Parents Involved*, and the community and circumstances from which the case evolved are intrinsically linked to a history of legalized racial segregation and discrimination in Seattle. At first glance, Seattle may appear vastly different from Little Rock, Birmingham, or Jackson but racial segregation was prevalent in Seattle during the Civil Rights Era, and continues to be today. Legalized housing discrimination in Seattle created a segregated public school system, which was challenged by Civil Rights advocates. As a result, the Seattle School District adopted voluntary school integration measures, through a variety of configurations, the most recent of which was the high school assignment plan challenged by Kathleen Brose and PIICS.

#### *Legalized Housing Discrimination in Seattle Created a Segregated School System*

After the 1954 decision in *Brown v. Board of Education*, the Seattle School Board began collecting demographic data about the racial makeup of its schools.<sup>13</sup> In 1957, the first year Seattle collected these data, the School Board found 5% of its 91,782 students were Black<sup>14</sup>, and 81% of these Black students were concentrated in nine of the city's 112 schools.<sup>15</sup> These discrepancies in racial concentration were even more obvious in the city's high schools; six of ten high schools enrolled five or less Black students each.<sup>16</sup> The racial make-up of Seattle's public schools reflected segregated housing patterns in the city.

Seattle is divided east to west by the Lake Washington Ship Canal, which connects Seattle's Lake Washington to Puget Sound. The Ship Canal in 1911 was a tiny log flume, and is now an 8-mile urban waterway, traversed by sailboats, kayaks, and fleets of industrial ships. Blue heron, gulls, beaver, Canada geese and migrating salmon add to the majestic view of the Ship Canal.<sup>17</sup> The waterfront is peppered with fine seafood restaurants and Golden Gardens Park, a beautiful site on the northern side of the Canal.<sup>18</sup> But the Ship Canal has a purpose beyond providing passage to vessels. It also acts as a geographic boundary which some refer to

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<sup>13</sup> Douglas Judge, *Housing, Race and Schooling in Seattle: Context for the Supreme Court Decision*, *Journal of Educational Controversy*,

<http://www.wce.wvu.edu/resources/cep/ejournal/v002n001/a014.shtml>.

<sup>14</sup> I use the term "Black" throughout this paper for the reasons articulated by Professors Kimberlé W. Crenshaw and Cheryl I. Harris. Professor Crenshaw states, "Blacks, like Asians, Latinos, and other 'minorities' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1332 n.2 (1988). Professor Harris states, "the use of the upper case and lower case in reference to racial identity has a particular political history... 'White' has incorporated Black subordination; 'Black' is not based on domination." Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1710 n.3 (1993).

<sup>15</sup> Judge, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Seattle: Lake Washington Ship Canal*, <http://traveldk.com/seattle/dk/highlight/lake-washington-ship-canal>.

<sup>18</sup> *Id.*

as the city's "Mason-Dixon" line; a border between the mostly white neighborhoods in the north and the ethnic minority neighborhoods in the central and southern area of the city.<sup>19</sup> Housing discrimination in Seattle made the Ship Canal a racial dividing line.<sup>20</sup> These housing patterns continue in Seattle today, as a majority of white residents reside in the northern, historically affluent area of the city, and a majority of Black, Asian, Hispanic and Native American residents live in the southern area of the city.<sup>21</sup>

Segregation in Seattle, reflected in the racial-make up of Seattle public schools, resulted from discriminatory housing practices in the city. Until 1968, it was legal to discriminate against minorities when renting or selling real estate in Seattle.<sup>22</sup> The enforcement of restrictive covenants in Seattle, and other discriminatory acts like realtors agreeing not to show houses to people of color and red-lining by banks (denying credit to minorities), confined Black residents to the central area of Seattle.<sup>23</sup> In 1961, the Seattle branch of the NAACP requested the passage of an ordinance prohibiting housing discrimination.<sup>24</sup> Representatives of the Seattle Real Estate Board and Seattle Apartment Operators' Association opposed the legislation, and in 1962, the Mayor and City Council refused to support an anti-discrimination housing ordinance, even at the recommendation of the Mayor's Citizen's Advisory Committee on Minority Housing.<sup>25</sup>

In response to the City Council's inaction to ending housing discrimination, Philip L. Burton, on behalf of the Seattle branch of the NAACP, threatened the Seattle School Board with a lawsuit to force desegregation in the district's schools.<sup>26</sup> The School Board and NAACP settled out of court in 1963, and the School Board adopted a program allowing students to voluntarily transfer between schools. However, the district did not provide transportation for students who wished to transfer, so few students of color transferred to schools in the northern part of the city, and even fewer white students chose to transfer to schools south of the Ship Canal.<sup>27</sup> The same year, The Seattle Human Rights Commission<sup>28</sup> drafted an open housing ordinance, but the City Council declined to pass the ordinance.<sup>29</sup> Instead, the City Council placed the open housing ordinance on the ballot for a March 1964 vote, but the ordinance was defeated by a vote of 115,627 to 54,448.<sup>30</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Cassandra Tate, *Busing in Seattle: A Well Intentioned Failure*, September 7, 2002, [http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file\\_id=3939](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=3939).

<sup>21</sup> *Parents Involved in Community Schools I*, 137 F. Supp. 2d 1224 at 1225.

<sup>22</sup> *The Seattle Open Housing Campaign, 1959-1968*.

<http://www.cityofseattle.net/cityarchives/exhibits/openhous/default.htm>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> NAACP Seattle Branch, HistoryLink File #695,

[http://www.historylink.org/\\_content/printer\\_friendly/pf\\_output.cfm?file\\_id=695](http://www.historylink.org/_content/printer_friendly/pf_output.cfm?file_id=695).

<sup>27</sup> Tate, *supra* note 20.

<sup>28</sup> The Seattle Human Rights Commission was created after July 1963 protests and a sit-in at the Mayor's office. The protests were held to bring attention to the Mayor and City Council's inaction in passing anti-discrimination housing legislation. *Supra* note 22.

<sup>29</sup> *Id.*

<sup>30</sup> Opponents of the ordinance claimed it violated their property rights as "forced housing" legislation. *Id.*

Frustrated by the failure of efforts to end legalized housing discrimination, the NAACP supported a 1966 boycott of Seattle's Central Area schools to protest continued school segregation.<sup>31</sup> Housing discrimination in Seattle continued to be legal until April 19, 1968, when an open housing ordinance was passed unanimously by the City Council, and was signed by the Mayor.<sup>32</sup> While the 1968 open housing ordinance was an important and necessary piece of Civil Rights legislation in Seattle, it could not undo the prior decades of housing discrimination that created a highly segregated school system.

### *The Seattle Plan for Mandatory Desegregation*

Recognizing the lasting legacy of housing discrimination, Seattle's school board undertook measures in the 1970s to create "diverse and equal educational opportunities" for all students in the district, instead of relying solely on neighborhood school assignments that would replicate the racial make-up of segregated housing patterns in the city.<sup>33</sup> While the Seattle School District was never subject to court ordered desegregation plans, the pressure from potential litigation from Seattle Civil Rights groups prompted the district to explore "voluntary" school desegregation efforts in order to avoid litigation.<sup>34</sup> In 1977, another threat of litigation by the Seattle branch of the NAACP prompted the school board to adopt the Seattle Plan for mandatory desegregation, a busing program that included every school in the district (65% of the district's student were white in 1977, and a school was considered "racially imbalanced" where more than 55% of the students were children of color).<sup>35</sup> The school board approved the plan in a six to one vote, and in 1978 became the largest American city to voluntarily adopt efforts to desegregate through mandatory busing.<sup>36</sup>

While there was no violence in response to the mandatory busing program, an anti-busing initiative was sponsored by the Citizens for Voluntary Integration Committee and passed with 61% of the city's voters in 1978.<sup>37</sup> During the first year of the mandatory busing plan, the percentage of white students enrolled in the District's schools dropped to 55%.<sup>38</sup> The District created gifted student programs and other option programs aimed to appeal to middle-class parents in response to this "white flight."<sup>39</sup> This solution was not entirely successful, as white students were the primary participants in the option programs, creating segregated classrooms in technically integrated schools.<sup>40</sup> The United States Supreme Court declared the anti-busing initiative unconstitutional in a 1982 opinion, but support for mandatory district wide busing diminished.<sup>41</sup>

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<sup>31</sup> *Supra* note 26.

<sup>32</sup> *Supra* note 22.

<sup>33</sup> *Parents Involved in Community Schools I*, 137 F. Supp. 2d 1224 at 1225.

<sup>34</sup> David Wilma, *Seattle School Board Votes to End Mandatory Busing for Desegregation in Elementary Schools on November 1996*, March 22, 2001, [http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File\\_Id=3127](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File_Id=3127).

<sup>35</sup> *Tate Supra* note 20.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* The number of schools offering "option" programs to appeal to middle-class parents increased from 27 in 1977 to 57 in 1982.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

### *Controlled Choice Plan*

By the late 1980s, the Seattle busing plan continued to be a source of contention and debate. Critics of mandatory busing were initially primarily white parents who wanted their children to attend schools in their homogeneous neighborhoods.<sup>42</sup> However, criticism of the busing program expanded to include Black parents and white liberals who initially supported the busing plan.<sup>43</sup> Critics of the busing plan were concerned it unfairly burdened children of color, diminished public confidence in public schools, created circumstances in which some schools under-enrolled and others over-enrolled, and was too costly.<sup>44</sup> In 1988, The Seattle School Board responded to mounting criticism and introduced a “controlled choice” plan, which allowed parents to select schools for their children “from within a prescribed cluster of schools—as long as their choice maintained racial balance.”<sup>45</sup> The plan allowed parents to rank their preferred schools, but the district gave preference to students whose race would help create racial balance in schools.<sup>46</sup>

By 1995, one of the most vocal critics of mandatory busing was John H. Stanford, the first Black Superintendent of Seattle Schools who served from 1995 until his untimely death in 1998.<sup>47</sup> A former Army general, Stanford took the position of Superintendent without any prior experience in the field of education. Stanford was regarded a no-nonsense administrator, and is remembered for instituting multiple reforms to the Seattle school district. In 1995, Stanford addressed the School Board with findings from a study of mandatory busing, citing that more minority children were bused than white children, and claiming that children who were bused performed worst in school, regardless of their race or economic status.<sup>48</sup> Under Stanford’s leadership, Seattle School Board ended mandatory busing and voted unanimously in November 1996 for a plan to increase student enrollment in neighborhood schools.<sup>49</sup>

### *Seattle’s Tie Breaker System in High School Assignments*

After the end of mandatory busing in Seattle in 1997, the district sought to encourage voluntary integration by making each of the district’s ten high schools unique by offering programs attractive to students and parents, as a means to equalize the attractiveness of the high

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Sanjay Bhatt, *Seattle Tradition of School Choice Faxes Ax*, The Seattle Times, May 9, 2005.

<sup>47</sup> Tate, *supra* note 20. Stanford was diagnosed with leukemia in 1997, and passed away in 1998 after a difficult battle against the cancer.

<sup>48</sup> Dick Lilly, *Minorities Hurt Most by Busing, Says Seattle Study, Change in Neighborhood Related to Lower Test Scores*, The Seattle Times, November 2, 1995. Stanford’s findings included reading scores on standardized tests for low-income elementary school students were 5 percentage points higher for students in neighborhood schools when compared to students who were bused to schools outside their neighborhoods, 1892 minority students were bused from South Seattle to North Seattle but only 497 white students were bused from North Seattle to South Seattle (more minority students complied with mandatory busing than white students). However, this correlation hardly shows causation.

<sup>49</sup> Dick Lilly, *Seattle to End Busing—School Board Drops Race-Based System*, The Seattle Times, November 21, 1996.

schools.<sup>50</sup> However, there were still large discrepancies in the desirability between the ten high schools.<sup>51</sup> In the 2000-01 school year, five of the ten high schools, Ballard, Nathan Hale, Roosevelt, Garfield and Franklin were oversubscribed (meaning there were not enough spaces to accommodate all of the students who ranked the school as their first choice).<sup>52</sup> 82% of the district's students selected one of the five oversubscribed schools as their first choice, and only 18% picked one of the other five schools as their first choice.<sup>53</sup> To combat the issue of oversubscription, the district employed a series of four tiebreakers to determine student assignments.<sup>54</sup>

The first step in the district's tiebreaker was sibling preference; if the student had a sibling already enrolled at the school they were granted admission.<sup>55</sup> The second tiebreaker depended on the school's racial composition.<sup>56</sup> Seattle classified students as either white (comprising 41% of the district's students) or nonwhite (59% of the district's students, which includes all other racial groups).<sup>57</sup> Seattle's plan deemed a school "integration positive" if its student composition was not within ten percentage points of the district's overall 41% white, 59% nonwhite balance.<sup>58</sup> For an "integration positive" school, the district's second tiebreaker selected students whose race served "to bring the school into balance."<sup>59</sup> The third tie breaker concerned geographic proximity of the school to the student's residence, admitting the closest students first.<sup>60</sup> The geographic tiebreaker assigned 70-75% of 9<sup>th</sup> grade admissions.<sup>61</sup> The fourth tiebreaker was a lottery to assign any remaining seats, but the lottery was virtually never used because the geographic tiebreaker assigned nearly all of the district's students.<sup>62</sup>

In the 2000-01 school year only three oversubscribed high schools, Ballard, Franklin and Nathan Hale, were integration positive—meaning the enrollment of white students in the previous school year was greater than 51%.<sup>63</sup> More nonwhite students received placement at an oversubscribed integration positive school by way of the racial tiebreaker, 107, 27, and 82, respectively.<sup>64</sup> The district utilized the tiebreakers to determine student assignments for these three schools, but the district increased the "integration positive" threshold to 15% and the racial balance tiebreaker was used only for the three oversubscribed and integration positive schools.<sup>65</sup>

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<sup>50</sup> *Parents Involved in Community Schools*, 426 F.3d 1162, 1169 (9th Cir. 2005).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Parents Involved in Community Schools VI*, 551 U.S. at 711-12. The sibling tiebreaker determined between 15 and 20 percent of the student assignments for 9<sup>th</sup> grade students.

<sup>56</sup> *Id.* at 712.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Parents Involved in Community Schools V*, 426 F. 3d at 1170.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

In 2000-01 only 307 students were affected by the racial tiebreaker.<sup>66</sup> 209 of these students were assigned to a school that was one of their choices, and only 52 students were ultimately assigned to a school they had not listed as a preference and would not have otherwise been assigned.<sup>67</sup>

Elizabeth Brose wanted to attend Ballard, but instead was assigned to her fourth choice school, Franklin. Kathleen stated, “She [Elizabeth] was told basically, ‘You had no value to us, except your skin color. We don’t care if it’s going to be a burden to have you get on that school bus every day.’”<sup>68</sup> Kathleen felt “absolutely betrayed” that her child was denied admission to her first three ranked schools, and this was the catalyst behind *Parents Involved*, in which the Seattle school district’s racial tiebreaker was challenged as a violation of Washington’s anti-affirmative action law, and the Equal Protection Clause of the Fourteenth Amendment.

### **Washington’s Anti-Affirmative Action Law**

[Washington law] prohibits reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant. It does not prohibit the Seattle School District's open choice plan tie breaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant.

-- Judge Chambers, *Parents Involved In Community Schools III*<sup>69</sup>

That Elizabeth Brose was simply denied her first choice in schools does not seem like a plausible discrimination claim. But her mother stated, “It’s wrong. It’s illegal. To me, it’s immoral. This is the United States. We do not discriminate.”<sup>70</sup> It may appear that Kathleen Brose was conflating a sense of entitlement with an Equal Protection claim. However, Elizabeth Brose was assigned to Franklin High School two years after Washington State adopted an anti-affirmative action initiative.

In 1998, Initiative 200 was introduced as a ballot initiative to eradicate affirmative action in Washington State. Ward Connerly, a Black businessman and former University of California Regent, replicated his successful efforts in passing California Proposition 209 by sponsoring Initiative 200 (I-200) in Washington.<sup>71</sup> The text of Washington’s I-200 states,

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.<sup>72</sup> “State” includes but is not limited to “any city, county, public college or university, community college, school

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<sup>66</sup> *Parents Involved in Community Schools VI*, 551 U.S. at 733.

<sup>67</sup> *Parents Involved in Community Schools VI*, 551 U.S. at 733-34.

<sup>68</sup> *Supra* note 8.

<sup>69</sup> 72 P.3d 151, 166 (Wash. 2003).

<sup>70</sup> *Supra* note 8.

<sup>71</sup> Connerly has also successfully promoted anti-affirmative action campaigns in Michigan, Nebraska, and Arizona.

<sup>72</sup> 1998 Election: State Ballot Measures- Complete Text of Initiative 200 Available: [http://www.sos.wa.gov/elections/1998/i200\\_text.aspx](http://www.sos.wa.gov/elections/1998/i200_text.aspx).



district, special district, or other political subdivision or governmental instrumentality of or within the state.<sup>73</sup>

Connerly promoted I-200 as an anti-discrimination law, but his opponents argue the language of I-200 and similar initiatives “is a deliberate tactic to mislead voters into believing the initiative would provide opportunities for all citizens, and end discrimination.”<sup>74</sup> In fact, Connerly speaks loudly against affirmative action, and has stated, “Once affirmative action is abolished, whites will treat blacks as equals.”<sup>75</sup>

Reflecting on his former position as a University of California Regent and his role abolishing affirmative action in university admissions, Connerly said, “the use of race and ethnicity in college admissions was morally wrong and unconstitutional.”<sup>76</sup> To the question of why he opposes affirmative action, Connerly stated, “My uncle never got beyond a third grade education, but there was never a day in his life that he didn’t work and respect himself as a man. He told me no one can give you anything. You have to earn it yourself. There were students at the University of Michigan holding signs saying our society is racist, and you have to almost cry because they have so little confidence in themselves that their whole future is contingent upon what people give them.”<sup>77</sup> Connerly’s rhetoric focuses on eliminating preferential treatment in order to reach equality. He stated, “Equality is not bad public policy; it’s good public policy. We have a cultural equality in this nation. We’re trying to perfect that experiment—that noble American experiment in which all of us, as American citizens, will be treated equally, without regard to our skin color, our ethnicity, our sex, our national origin.”<sup>78</sup>

Connerly used his non-profit, the American Civil Rights Institute (ACRI), to promote I-200. In 1996, Connerly and Dusty Rhodes, a former Goldman Sachs vice-president and founder and director of the conservative think tank Project for the Republican Future, founded ACRI to continue anti-affirmative measures following the passage of Prop 209 in California. ACRI was “created to educate the public on the harms of racial and gender preferences” and “seeks to affect a cultural change by challenging the ‘race matters’ mentality embraced by many of today’s so-called ‘civil rights leaders’.”<sup>79</sup> Connerly’s ACRI contributed over \$80,000 for “educational” television commercials and \$128,000 for radio commercials.<sup>80</sup> ACRI was bound by IRS regulations for charitable groups, which forbid advocating a position on the ballot measure, but

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<sup>73</sup> *Id.*

<sup>74</sup> Anjali Thakur, *Consequences of Ward Connerly’s Anti-Affirmative Action Initiatives*, <http://www.lwvmi.org/Old%20Site/documents/ConnerlyconsequencesforMI.pdf>.

<sup>75</sup> Oscar Eason Jr., *Life in an Affirmative-Action-Free Zone*, *The Seattle Times*, December 4, 1998.

<sup>76</sup> Ward Connerly, *On the Defensive, Quota Defenders Are Having a Tough Time*, April 15, 2005, <http://old.nationalreview.com/document/connerly200504150756.asp>.

<sup>77</sup> Rachel Hartigan Shea, *Racing to End Preferences*, *U.S. News & World Report*, July 13, 2003.

Connerly’s critique of the Michigan students’ assertion that our society is racist is particularly troubling because it indicates that he believes that racism is not a persistent issue in America, and in our public schools. Rejection of social realities, including continuing racial oppression is central in the rhetoric of Colorblindness, and Connerly’s position depicts this viewpoint.

<sup>78</sup> *Equal Opportunity*, October 29, 1998, PBS Online NewsHour available [http://www.pbs.org/newshour/election98/washington\\_10-29.html](http://www.pbs.org/newshour/election98/washington_10-29.html).

<sup>79</sup> *About the American Civil Rights Initiative*, available <http://www.acri.org/about.html>.

<sup>80</sup> David Postman, *I-200 Foes Leading Battle of the Checkbook*, *The Seattle Times*, October 14, 1998.

Connerly's American Civil Rights Coalition was not bound by these regulations. The Coalition donated \$184,000 directly to the campaign supporting I-200.<sup>81</sup>

The introduction of and debate around I-200 in Washington reflected conflicting public sentiment regarding affirmative action, and deeply held beliefs of Washington citizens. In 1994, Katuria Smith, a white University of Washington graduate who claimed she was rejected by the state's law school in 1994 because of reverse discrimination brought a high profile lawsuit against the law school.<sup>82</sup> A direct advocacy advertisement in favor of I-200 featured Smith and the ad asserted: "The UW law school rejected her. Why? She was white; 90 percent of the blacks who enrolled had lower qualifications."<sup>83</sup> This advertisement purposefully courted white women to join Connerly's anti-affirmative action initiative. Ronald Takaki, an Ethnic Studies professor at Berkeley critiqued opponents of Prop 209 in California by making "a strategic mistake by not challenging that the primary beneficiaries of affirmative action in CA were white women."<sup>84</sup> Connerly echoed this sentiment, challenging his opponents in Washington, "In order to win, they have to scare the crap out of white women."<sup>85</sup>

Connerly enlisted John Carlson to act as chairman of the Initiative 200 campaign.<sup>86</sup> Carlson was an ideal leader for I-200. As the president of the Washington Institute for Policy Studies, he co-authored the 1993 Washington Initiative 593 (commonly referred to as "Three Strikes, You're Out"), which sentences individuals convicted of their third violent felony to prison for life with no opportunity for parole, probation or work release.<sup>87</sup> As the host of a conservative Seattle radio talk show, Carlson acted, perhaps improperly, as a spokesperson for his "Three Strikes You're Out" initiative through his radio show as well as his free-lance column, which was featured weekly in The Seattle Times Newspaper editorial page.<sup>88</sup> Carlson's "Three Strikes You're Out" ballot measure was approved by a three to one margin.<sup>89</sup> In 1995, Carlson and another advocate of "Three Strikes You're Out", David Lacourse, introduced and successfully passed Initiative 159 (commonly referred to as "Hard Time for Armed Crime"), which increased prison sentences for felons who commit crimes with guns.<sup>90</sup> Carlson's notoriety in Washington, his position at the Washington Institute for Policy Studies, and his conservative political views made him an ideal leader for I-200. Republican State Representative Scott Smith

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<sup>81</sup> *Id.*

<sup>82</sup> Patarick Mazza, *Northwest Passage? The State of Washington's Initiative 200 is Next Round in National Struggle Over Affirmative Action*, *Diverse Issues In Higher Education*, July 15, 2007.

<sup>83</sup> David S. Broder, *Affirmative Action Gets Key Test in Washington*, *Washington Post*, October 24, 1998.

<sup>84</sup> *Supra* note 82.

<sup>85</sup> David Postman, *I-200 Foes Leading Battle of the Checkbook*, *The Seattle Times*, October 14, 1998.

White women may not recognize the scope and breadth of affirmative action programs, and that they are the primary beneficiaries of affirmative action.

<sup>86</sup> *Supra* note 83.

<sup>87</sup> Terry Tang, *Media Ethics: The Curious Dual Role of John Carlson*, *The Seattle Times*, November 9, 1993.

<sup>88</sup> *Id.*

<sup>89</sup> Daniel W. Stiller, *Initiative 593: Washington's Voters Go Down Swinging*, 30 *Gonz. L. Rev.* 433 (1994-1995).

<sup>90</sup> John White, *Senate Approves 'Hard Time'—Initiative Expected To Win Senate OK*, *The Seattle Times*, January 28, 1995.

joined Carlson as a leader for I-200.<sup>91</sup> And in June 1998, Mary A. Radcliffe, a Black female republican became a spokesperson for the I-200 campaign.<sup>92</sup> Washington voters approved I-200 in November 1998 by 58%.<sup>93</sup>

Kathleen Brose did not vote in favor of I-200.<sup>94</sup> Kathleen believed the anti-I-200 “hype about how it would discriminate against people.”<sup>95</sup> Reflecting on her vote in 1998, Brose described herself as “an uninformed, politically naïve voter biased by political correctness. I was rationally ignorant.”<sup>96</sup> Today, Kathleen believes that the adoption of I-200 has “made it more fair for everyone, not just my children.” Kathleen’s statements incorporate the rationales of I-200, specifically the idea that preferences granted on the basis of race are an illegal form of discrimination, without consideration or appreciation for how race conscious measures seek to remedy or address continuing racial discrimination and inequities. Kathleen was not alone in her opinions, and brought together a group of similarly minded parents, determined to put a stop to the racial tiebreaker in student assignments.

### **Initiation of the *Parents Involved* Lawsuit**

I just thought it was terribly unfair. It was a violation of our children’s Constitutional rights. I just felt that the school district needed to quit focusing on placing kids in schools based on their skin color.

-- Kathleen Brose<sup>97</sup>

The Washington Constitution, therefore, imposes a duty on school boards to operate racially integrated schools, and recognizes the reality that in some cases, to fulfill that duty, a school board may need to take race into account.

-- District Court Judge Barbara Jacobs Rothstein, *Parents Involved in Community Schools I*<sup>98</sup>

The initiation of *Parents Involved* was the result of the active participation of I-200 spokespeople and the support of politically conservative politicians and organizations. John Carlson was centrally involved in organizing the lawsuit against The Seattle School District. In 1999, Carlson reached out to supporters of I-200 by email, looking for children who had been denied admission to schools of their choice because of the racial tiebreaker.<sup>99</sup> Carlson and the I-200 Civil Rights Compliance Committee were seeking children and families to be plaintiffs in litigation to challenge Seattle School District’s use of the racial tiebreaker as a violation of I-

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<sup>91</sup> Tome Brune, *I-200 Supports Diversify Leadership—African American Woman Joins Campaign*, The Seattle Times, June 16, 1998.

<sup>92</sup> *Id.*

<sup>93</sup> *Background on I-200*, available [http://www.acri.org/I-200\\_background.html](http://www.acri.org/I-200_background.html).

<sup>94</sup> Email Interview with Kathleen Brose.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *An Imperfect Revolution Voices from the Desegregation Era*, American RadioWorks, available <http://americanradioworks.publicradio.org/features/deseg/transcript.html>.

<sup>98</sup> *Parents Involved in Community Schools I*, 137 F. Supp 2d 1224, 1233 (W.D. Wash. 2001).

<sup>99</sup> Keith Ervin, *I-200 Backers Planning to Sue Seattle Schools*, The Seattle Times, November 26, 1999.

200.<sup>100</sup> The decision to sue the school district was based on the School Board’s refusal in November 1999 to adopt recommendations to change assignment policies to “downplay racial considerations”.<sup>101</sup>

The recommendations from Superintendent Joseph Olchefske and General Counsel Mark Green were offered at the advice of district attorneys to help defend the school district against legal challenges by applying the racial tiebreaker only to schools where the racial balance deviated more than twenty percent (instead of ten percent) from the district wide average.<sup>102</sup> The School Board President, Barbara Scaad-Lamphere stated that the school board decided to continue to use race as one of several factors in student assignment policy as a signal to “commitment to racial and cultural integration”.<sup>103</sup> She stated, “It’s clear the board really values diversity in our public schools and feels it’s an important aspect of education in Seattle.”<sup>104</sup> However, the school district’s commitment to integrated schools was about to be challenged in court by the newly formed Parents Involved in Community Schools.

### *Kathleen Brose and Parents Involved in Community Schools*

PIICS President, Kathleen Brose, was an active parent in her daughter’s middle school and knew that her daughter Elizabeth would be ranking Ballard along with other students from the communities surrounding the high school. Kathleen knew Elizabeth would be competing with students from the communities of Magnolia (87.4% white in 2000 census) and Queen Anne (88.3% white in 2000 census) for 9<sup>th</sup> grade admission to Ballard because there was no high school in Magnolia or Queen Anne.<sup>105</sup> Kathleen voiced her concerns about Elizabeth’s admission to Ballard to Superintendent Olchefske by both mail and fax, seemingly based on the assumption that her daughter had a right to attend a certain high school, and represented the concerns of middle school parents who worried their children would not be admitted to Ballard High School, notably located north of the Lake Washington Ship Canal.<sup>106</sup>

After Elizabeth was assigned to Franklin, Kathleen subsequently transferred her to Ingraham because Franklin had no orchestra program.<sup>107</sup> Franklin, which Kathleen Brose described as “heavily black”, is located in the Mt. Baker neighborhood, which reported a 52.5% white population in the 2000 census.<sup>108</sup> Kathleen stated that the only students from Queen Anne and Magnolia who were assigned to attend 9<sup>th</sup> grade at Ballard were minority students or students from the north end of Magnolia. Citing that only 7.5% of white students from Blaine middle school in Magnolia were assigned to their first choice school, and that many did not

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Supra* note 4.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* Although Franklin had no orchestra program, a notable musical alum is smooth jazz superstar Kenny G., whose fluency on the alto saxophone has earned global record sales totaling over 75 million.

<sup>108</sup> 2000 Census, Population by Race and Neighborhood District, available [http://www.seattle.gov/dpd/cms/groups/pan/@pan/documents/web\\_informational/dpds\\_007745.pdf](http://www.seattle.gov/dpd/cms/groups/pan/@pan/documents/web_informational/dpds_007745.pdf).

receive their second or third choices, Kathleen stated, “It is clear that we were really treated unfairly.”<sup>109</sup>

Kathleen and other parents began meeting to talk about what action they could take.<sup>110</sup> They complained to the School Board and the press, which helped a few students gain admission to their neighborhood high school.<sup>111</sup> But Elizabeth Brose remained assigned to Franklin High School. Once parents understood there were no options except to bring a lawsuit, some stopped attending meetings and moved on, either accepting their school assignments or enrolling their children in private schools.<sup>112</sup>

Kathleen and the group of parents who continued meeting together were introduced to the law firm of Davis Wright Tremaine by a concerned parent, former Congressman John Miller.<sup>113</sup> Miller contacted the pro bono department of Davis Wright out of concern for his middle school son’s high school admissions.<sup>114</sup> Once this group of concerned parents started discussing the prospect of bringing a lawsuit, many parents stopped attending meetings—only a handful remained.<sup>115</sup> These remaining parents formed PIICS, and Brose became their President. Brose wanted to sue the Seattle School District on behalf of children like her 4<sup>th</sup> grade daughter who might be “denied admission to the high schools of their choice when they apply for those schools in the future.”<sup>116</sup> Brose said, “Frankly, a lawsuit is a scary thing and many people just gave up. Not me! I was too angry to let it go. Every fiber in my body told me to fight this injustice. I can’t explain it. It was just my time to make a difference and step up to the plate.”<sup>117</sup>

Brose and PIICS met their attorney, Harry Korrell, a partner at Davis Wright Tremaine on a sunny Saturday morning at former Congressman John Miller’s home.<sup>118</sup> Korrell brought his infant son to the meeting, and discussed the merits of their case.<sup>119</sup> Kathleen Brose and the other parents were impressed with his knowledge of the law and their chances of success as Korrell told them their children’s civil rights were violated according to I-200, the Fourteenth Amendment, and the 1964 Civil Rights Act.<sup>120</sup> They met a few more times and formulated a plan—which culminated in the initiation of a lawsuit that has had devastating impacts on American public schools through the promotion of colorblind jurisprudence, and the rejection of voluntary integration plans.

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<sup>109</sup> *Supra* note 4.

<sup>110</sup> Email Interview with Kathleen Brose.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* Miller, a member of Parents Involved in Community Schools, and his concerns about the racial tiebreaker affecting his middle school son was represented and specifically cited to in the 2002 9<sup>th</sup> Circuit panel decision.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Parents Involved in Community Schools VI*, 551 U.S. at 718.

<sup>117</sup> Email Interview with Kathleen Brose.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

The Sacramento based Pacific Legal Foundation, a conservative public interest law firm, developed many of the arguments utilized by counsel for PIICS.<sup>121</sup> The Pacific Legal Foundation was created after Justice Lewis Powell, in 1971, wrote a memo to a friend worrying that liberal groups had nurtured specialist lawyers and litigation strategies to defend government regulation.<sup>122</sup> In response, the business community helped create not-for-profit law firms to argue conservative perspectives.<sup>123</sup> The Pacific Legal Foundation was founded in 1973, and is “devoted to a vision of individual freedom, responsible government, and color-blind justice.”<sup>124</sup> Their three major litigation projects aim to promote colorblindness by creating “a nation in which people are judged by the content of their character and not the color of their skin.”<sup>125</sup> The principal attorney for the Foundation, Sharon Browne, believes that the underlying spirit of *Brown* was racial neutrality, not racial integration and that the claims of PIICS address *Brown*’s racial neutrality.<sup>126</sup> Specifically regarding *Parents Involved*, Sharon Browne said, “By using race as a factor... they’re teaching our kids that race matters. That is just plain wrong, and it’s not the type of teaching that our school districts should be doing”.<sup>127</sup>

The Pacific Legal Foundation actively assisted Kathleen Brose and PIICS throughout the litigation. They provided training for Kathleen, as spokesperson for PIICS, on how to conduct herself in front of national media, instructing her how to stay “on task with the same sound bite, ‘We are not against diversity, we are against discrimination’”.<sup>128</sup> Kathleen practiced with the Pacific Legal Foundation, fielding hardball practice questions, and filming her responses on videotape.<sup>129</sup> John Carlson also provided a forum for PIICS to promote its message on his radio show, similar to his approach promoting his ballot initiatives in the early 1990s. He contacted Brose after the lawsuit began, invited her and another PIICS member to be interviewed on his radio show, and spoke on the phone several times.<sup>130</sup>

With the support of the Pacific Legal Foundation, John Carlson and his I-200 Civil Rights Compliance Committee, and their attorneys at Davis Wright Tremaine, PIICS were well prepared to begin their litigation against the Seattle School District. PIICS brought suit in Federal Court on June 18, 2000 claiming the District’s use of the second tiebreaker to maintain racial balance violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act (I-200). Harry Korrell and Daniel Ritter of Davis Wright Tremaine were the attorneys for PIICS.<sup>131</sup> General Counsel Mark Green

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<sup>121</sup> Mark Tushnet, *Who’s Behind the Integration Decision?*, Los Angeles Time, July 7, 2007.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *About Pacific Legal Foundation* available <http://www.pacificlegal.org/page.aspx?pid=262>.

<sup>125</sup> *Id.*

<sup>126</sup> Sharon L. Browne & Elizabeth A. Yi, *The Spirit of Brown in Parents Involved and Beyond*, 63 U. Miami L. Rev. 657, 666, 672 (2008-09).

<sup>127</sup> Jessica Blanchard, *Supreme Court to Hear Seattle Schools Race Case*, Seattle Post Intelligencer, June 5, 2006.

<sup>128</sup> Email Interview with Kathleen Brose.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Harry Korrell-- University of Chicago Alumni Profile available <http://www.law.uchicago.edu/alumni/profiles/harry-korrell>.

and Carol Janes of Seattle law firm Bennett Bigelow & Leedom represented The Seattle School District.<sup>132</sup>

## The Litigation Begins

I started it; I'm going to finish it. I don't want other parents to go through what we went through.  
-- Kathleen Brose, President of Parents Involved in Community Schools<sup>133</sup>

Between 2001 and 2006, *Parents Involved* was brought before four Federal Courts and the Washington State Supreme Court, prior to the Supreme Court's grant of certiorari. The tumultuous journey of *Parents Involved* showcases the controversial aspects of this case, as well as the divergent views regarding voluntary school desegregation efforts.

### *April 2001, Western District of Washington*

United States District Judge for the Western District of Washington, Barbara Rothstein, heard the case against the Seattle School District. President Carter nominated Judge Rothstein, a graduate of Cornell University and Harvard Law School, to the Federal bench in 1980. Judge Rothstein heard PIICS' allegations that the racial tiebreaker violated the Washington Civil Rights Act (Initiative 200), and the Equal Protection Clause of the Fourteenth Amendment. On April 6, 2001 Judge Rothstein granted the school district's motion for summary judgment.<sup>134</sup>

Assessing the state law claim that the racial tiebreaker violates Initiative 200, Judge Rothstein cited Washington case law that dictates the district's use of the tiebreaker did not constitute a "preferential" or "discriminatory" action based on race, under Initiative 200.<sup>135</sup> PIICS argued that the racial tiebreaker conferred a "preference" on certain students to the disadvantage of others, based on a racial classification. Judge Rothstein cited the Ninth Circuit's clarification of school desegregation programs as distinct from racial "preference" programs because they are "not inherently invidious" and "do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group".<sup>136</sup> Citing to the Ninth Circuit, Judge Rothstein determined that I-200 does not apply to programs designed to "overcome racially imbalanced schools", and classified such measures as "reshuffle" programs, where the state neither grants nor denies benefits on the basis of group status.<sup>137</sup> Specifically, Judge Rothstein stated that the term "preference" as used in the Washington constitution, and thus in Initiative 200, has a "legally fixed meaning derived from dozens of years of race discrimination" law and under this definition, the school board's school choice is not a preference.<sup>138</sup>

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<sup>132</sup> *Parents Involved in Community Schools I*, 137 F. Supp. 2d 1224.

<sup>133</sup> Blanchard *supra* note 127.

<sup>134</sup> *Parents Involved in Community Schools I*, 137 F. Supp. 2d 1224 at 1225.

<sup>135</sup> *Id.* at 1229

<sup>136</sup> *Id.* at 1230, citing *C.E.E. v. Wilson*, 122 F.3d at 708 n.16

<sup>137</sup> *Id.* 1230, citing *Associated Gen'l Contractors of Calif. v. San Francisco Unified School Dist.*, the most common examples [of reshuffle programs] are school desegregation cases and programs.

<sup>138</sup> *Id.* at 1232

To address the Equal Protection claim, Judge Rothstein stated that both parties agreed that the court must use strict scrutiny to analyze the plan's constitutionality, because it utilized racial classifications. To survive strict scrutiny, the plan had to 1) serve a compelling government interest and 2) be narrowly tailored to do so.

Judge Rothstein rejected PIICS' assertions that the racial tiebreaker served no compelling interest, and that the government may only use race to remedy past acts of de jure discrimination.<sup>139</sup> She stated the Supreme Court repeatedly recognized the authority of school boards to make voluntary measures "to integrate de facto segregated districts beyond what the Constitution requires."<sup>140</sup> Judge Rothstein held that "achieving racial diversity and mitigating the effects of de facto residential segregation" were compelling government interests. Furthermore, the plans were narrowly tailored because the tiebreaker applied only to schools that were integration positive, and the district did not use race to assign students once a school was in racial balance.<sup>141</sup> Additionally, the racial tiebreaker did not require a specific quota, but instead allowed for a 15% deviation from the 60/40.<sup>142</sup>

Judge Rothstein specifically cited the history of housing discrimination in Seattle as a continuing obstacle to the school district's attempts to "ameliorate the often pernicious consequences of the racial isolation in its schools that would but for those efforts, track the racial segregation of the city's housing patterns." Judge Rothstein recognized the social conditions of Seattle: "Despite the district's efforts, it remains a stark reality that disproportionately, the schools located in the northern end of the city continue to be the most popular and prestigious, and competition for assignment to those schools is keen. The school board has decided that in order to afford all of the city's students- including those from predominately minority south Seattle- access to these more popular schools, it must employ a tiebreaker mechanism that elevates race over proximity to determine who may attend these schools."<sup>143</sup>

In her reasoning and holding, Judge Rothstein, by considering the social realities of racial discrimination in Seattle, utilized an antisubordination framework—dismissing PIICS' anticlassification arguments. Displeased with the District Court's holding, PIICS appealed the case to the Ninth Circuit.

#### *December 2001, Ninth Circuit Panel*

On December 4, 2001, the appeal from the District Court was argued before a three-judge panel at the Ninth Circuit.<sup>144</sup> Judge Thomas M. Reavley of the Fifth Circuit<sup>145</sup> (nominated to the

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<sup>139</sup> *Id.* at 1233, plaintiffs citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>140</sup> *Id.* at 1233, citing *Washington v. Seattle Sch. Dist. No. 1*, 258 U.S. 457, 460 (1982), wherein the Supreme Court reinstated the Seattle School District's authority to bus students to cure de facto racial imbalance resulting from housing segregation and *Keyes v. School Dist. No. 1*, 413 U.S. 189, 242 (1973) declaring school boards would be free to initiate further plans to promote school desegregation, and may exceed minimal constitutional standards in promoting the values of an integrated school experience.

<sup>141</sup> *Id.* at 1238

<sup>142</sup> *Id.* at 1238-39

<sup>143</sup> *Id.* at 1225-26

<sup>144</sup> *Parents Involved in Community Schools II*, 285 F.3d 1236 (9th Cir. 2002)



Federal bench by President Carter in 1979) sat by designation, joined by Diarmuid F. O'Scannlain<sup>146</sup> (nominated by President Reagan in 1986) and Susan P. Graber<sup>147</sup> (nominated by her Yale law school classmate President Clinton) both of the Ninth Circuit.<sup>148</sup> Judge O'Scannlain delivered the decision of the panel.

PIICS brought the appeal contending that the racial tiebreaker violated Initiative 200, and because the Washington courts had not yet construed the provision, the panel undertook its analysis as they believed the Supreme Court of Washington would.<sup>149</sup> The panel began by applying general rules of statutory construction to the ballot initiative's language, specifically noting the unique interpretation of voter initiatives requires "construing the meaning of an initiative...as the average informed law voter would read it."<sup>150</sup> The panel determined that an average lay voter would understand "preference" as "selecting someone or something over another or others."<sup>151</sup> Applying this definition to the high school assignment process, the panel stated, "the racial tiebreaker grants an advantage or preference on the basis of race: members of one group are selected for admission, while members of another are not, solely on the basis of race."<sup>152</sup>

The panel criticized Judge Rothstein's reasoning as flawed because nothing in the Washington constitution requires the Seattle school district to provide racially diverse schools, rather districts have only permissive authority to adopt programs designed to achieve racial diversity and may not adopt programs that are in any way unauthorized by state law.<sup>153</sup> O'Scannlain's opinion reversed the District Court decision, concluding that the school district's efforts to ensure racial diversity in its high schools "must give way" to the voters of Washington,

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<sup>145</sup> Originally from Texas, Judge Reavley attended the University of Texas, and Harvard Law School. He returned to Texas where he practiced law for seven years before becoming Texas secretary of state, and then went into private practice for nine years, until taking his first position as a judge. Judge Reavley married Fifth Circuit chief judge Carolyn Dineen King in 2004, and they are the first married couple to ever serve together on a federal appellate court.

<sup>146</sup> Distinguished by his distinctive name, Judge O'Scannlain is the Manhattan-born son of Irish immigrants, and his first language growing up was Gaelic. Judge O'Scannlain is a graduate of St. Johns, Harvard Law School, and University of Virginia Law School (L.L.M.) He considers himself the luckiest member of the entire federal appellate judiciary, in terms of the ease of his confirmation. President Reagan called him while he was in the shower on August 8, 1986, and his hearing on September 10 lasted about 20 minutes. Known as the "Conservative Cougar" of the Ninth Circuit (he was the Oregon Republican chairman from 1983-1986, which is how he first met Ronald Reagan), he is cited as the 14-ranked "feeder judge" (in reference to how frequently his clerks go on to clerk for the Supreme Court). His judicial opinions are often in opposition to those of Ninth Circuit liberal, Judge Reinhardt.

<sup>147</sup> Born in Oklahoma, Judge Graber is a graduate of Wellesley College and Yale Law School. She practiced law in New Mexico, Ohio and Oregon before she became a judge. Judge Graber is the first female judge from Oregon to serve on the Ninth Circuit, and was confirmed by the U.S. Senate in a 98-0 vote.

<sup>148</sup> *Parents Involved in Community Schools II*, 285 F.3d 1236 (9th Cir. 2002).

<sup>149</sup> *Id.* at 1243.

<sup>150</sup> *Id.* at 1244.

<sup>151</sup> *Id.* at 1244.

<sup>152</sup> *Id.* at 1244.

<sup>153</sup> *Id.* at 1248.

who adopted I-200, and in doing so concluded that the benefits of racial diversity may not be achieved by a process that grants preferential treatment to any individual on the basis of race.<sup>154</sup>

The three-judge panel granted an injunction preventing the school district from using the racial tiebreaker in making high school assignments on April 26, 2002.<sup>155</sup> However, the litigation could not be resolved before the next school assignment period for the 2002-03 school year, and on June 17, 2002 the Ninth Circuit withdrew, vacated the injunction, and certified the state-law question to the Washington State Supreme Court.<sup>156</sup>

#### *June 2003, Washington State Supreme Court*

The Washington State Supreme Court was asked by the Ninth Circuit to determine whether Washington Law under I-200 prohibits all race-conscious state action.<sup>157</sup> Justice Chambers authored the opinion of the Washington Supreme Court, joined in concurrence by Justices Ireland, Madsen, Bridge, Johnson, Smith, Alexander and Owens. Justice Sanders dissented.

In answering the question of whether Washington law prohibits all race-conscious programs, the court defined reverse discrimination as programs that “grant preferential treatment to less qualified persons over more qualified persons based on race” and racially neutral programs as those which “treat all races equally and do not provide an advantage to the less qualified but do take positive steps to achieve greater representation of underrepresented groups.”<sup>158</sup> The court determined the racial tiebreaker applied equally to members of all races, and may limit enrollment opportunity to both minorities and non-minorities, and thus was not preferential treatment based on race.<sup>159</sup> Notably, the court held that to the extent the tiebreaker was race-conscious, it furthered a core mission of public education, which is to provide “equal, uniform” education to all students, and Article IX of the State Constitution requires a duty to provide an education that prepares students for citizenship, which may necessitate steps to provide a racially integrated education system.<sup>160</sup>

#### *July 2004, Ninth Circuit Rehearing*

The same Ninth Circuit panel (Judges Reavley, O’Scannlain, and Graber) assembled following the Washington Supreme Court’s determination that the racial tiebreaker was not prohibited by Washington law, to determine whether the use of race in student assignments

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<sup>154</sup> *Id.* at 1252. O’Scannlain’s opinion focused on the hardships that would be endured by two children of Parents Involved in Community Schools members, citing that both students were assigned to Ingraham High School and would have required travel by public bus with lengthy travel times. It should be noted that both children were enrolled in private schools before the appeal.

<sup>155</sup> *Parents Involved in Community Schools*, 2002 Cal. Daily Op. Service, 3684.

<sup>156</sup> *Parents Involved in Community Schools VI*, 551 U.S. 714.

<sup>157</sup> *Parents Involved In Community Schools III*, 72 P.3d 151, 166 (Wash. 2003).

<sup>158</sup> *Id.* at 159.

<sup>159</sup> *Id.* at 164.

<sup>160</sup> *Id.* at 159, 166. The Washington Supreme Court in *De Funis v. Odegaard*, held that the constitution is color-conscious to prevent the perpetuation of discrimination and to undo the effects of past segregation.

violates the Equal Protection Clause of the Fourteenth Amendment.<sup>161</sup> Judge O’Scannlain delivered the opinion, joined by Judge Reavley, while Judge Graber dissented.<sup>162</sup>

O’Scannlain determined the school district had a compelling interest in achieving racial and ethnic diversity, and had satisfied this burden under strict scrutiny.<sup>163</sup> O’Scannlain then looked to whether the tiebreaker was narrowly tailored. He criticized the school district for not earnestly considering adopting other types of diversity-conscious policies that did not rely exclusively on race (home language, eligibility for free or reduced lunch) in order to account for the “wider array of characteristics” that make up “true diversity”, as approved by Justice Powell’s opinion in *Bakke*, and by the Supreme Court in the Michigan affirmative action cases, *Grutter* and *Gratz*.<sup>164</sup> O’Scannlain then cited the school board’s decision in 2000 to adjust the integration positive measure only 5 percentage points instead of the 10 percentage points suggested by Superintendent Olchefske.<sup>165</sup> O’Scannlain classified the district’s decisions as “an unadulterated pursuit of racial proportionality” that could not qualify as narrowly tailored.<sup>166</sup> The Ninth Circuit decision reversed the decision of the District Court, and remanded with instructions to enjoin the school district from using the racial tiebreaker in subsequent high school assignments.<sup>167</sup>

#### *June 2005, Ninth Circuit En Banc*

In June 2005, the Ninth Circuit granted rehearing en banc before Judges Schroeder, Pregerson, Kozinski, Kleinfeld, Hawkins, Fletcher, Fisher, Tallman, Rawlinson, Callahan, and Bea to determine whether the use of an integration tiebreaker violates the Equal Protection Clause.<sup>168</sup> The opinion was delivered by Judge Fisher, and the majority<sup>169</sup> held that the school district had clearly compelling interests in “obtaining the education and social benefits of racial diversity” and in avoiding “racially concentrated or isolated schools” due to Seattle’s segregated housing pattern.<sup>170</sup> The Ninth Circuit disagreed with O’Scannlain, and determined the district’s use of the 15 percent plus or minus trigger point was not a quota, but rather a “context-specific, flexible” measurement designed to attain a critical mass of both white and nonwhite students in each of the high schools.<sup>171</sup> The Ninth Circuit further determined that the district’s consideration

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<sup>161</sup> *Parents Involved In Community Schools IV*, 377 F.3d 949 (9th Cir. 2004). It should be noted the school district voluntarily stopped utilizing the racial tiebreaker after the 2001-02 school year, and chose not to reinstate the tiebreaker after the Ninth Circuit vacated its order of injunction.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 964.

<sup>164</sup> *Id.* at 971.

<sup>165</sup> *Id.* at 975. It should be noted this 1999 School Board vote and 2000 decision was the catalyst for John Carlson’s and his I-200 Compliance Committee’s mission to find parents and children who were affected by the racial tiebreaker in order to bring suit against the school district.

<sup>166</sup> *Id.* at 975.

<sup>167</sup> *Id.* at 988-89.

<sup>168</sup> *Parents Involved in Community Schools V*, 426 F.3d 1162, 1169 (9th Cir. 2005).

<sup>169</sup> Judges Bea, Kleinfeld, Tallman and Callahan dissented.

<sup>170</sup> *Parents Involved in Community Schools V*, 426 F.3d 1169. The Ninth Circuit en banc included an examination of the history of Seattle schools, including housing discrimination, mandatory busing, and subsequent controlled choice plans that far exceeded that of any of the prior decisions on this matter.

<sup>171</sup> *Id.* at 1186.

of race neutral policies, including plans that used poverty as a proxy for race and a lottery system for all students, could not meet the district's goals.<sup>172</sup>

### *2006, Supreme Court Grants Certiorari*

The Supreme Court granted certiorari and heard *Parents Involved* with a companion case, *Meredith v. Jefferson County Board of Education* in 2006. Crystal Meredith, a white parent, brought suit against the Jefferson County school district in the Western District of Kentucky in 2007, alleging the district's voluntary student assignment plan violated the Equal Protection Clause.<sup>173</sup> Jefferson County schools were subject to a court ordered desegregation decree in 1975, and operated under this decree until 2000.<sup>174</sup> The voluntary school assignment plan, assumed by the district in 2001, sought to maintain a minimum Black student enrollment of 15 percent, and a maximum Black student enrollment of 50 percent (34 percent of the district's student population were Black).<sup>175</sup> Meredith brought her case after her son's request to transfer schools was denied on the basis of these racial guidelines.<sup>176</sup> The District Court for Western District of Kentucky found Jefferson County has asserted a compelling interest in maintaining racially diverse schools and the assignment plan was narrowly tailored.<sup>177</sup> The Sixth Circuit affirmed the District Court's decision, and The Supreme Court granted certiorari to hear Meredith's case along with *Parents Involved*.<sup>178</sup> The consideration of elementary and secondary school desegregation within the legal standard for higher education affirmative action, coupled with the Court's promotion of colorblindness, is the context in which *Parents Involved* can best be understood.

## **The Court's Rejection of Anti-Subordination Principles and Adoption of Colorblindness**

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<sup>172</sup> *Id.* at 1188.

<sup>173</sup> *Parents Involved in Community Schools VI*, 551 U.S. 717. Crystal Meredith moved into the Jefferson County school district in August, and sought to enroll her son Joshua McDonald into a school one mile from their home. However, the school's enrollment was full as assignments had been made three months prior, in May. Joshua was assigned to a school farther from their home and Crystal sought to transfer him to a closer school in a different assignment zone. There was space available, but his transfer was denied because the school had reached the "extremes of racial guidelines in the District's current student assignment plan" and Joshua's race would have contributed to the school's racial imbalance.

<sup>174</sup> *Parents Involved in Community Schools VI*, 715-16.

<sup>175</sup> *Id.* at 716.

<sup>176</sup> *Id.* at 716-17.

<sup>177</sup> *Id.* at 717-18. It should be noted that Jefferson County achieved unitary status in 2000, *twenty-seven years after* it was first determined to operate a segregated school system. The voluntary elementary school plan, adopted in 2001, was based on address. Each student was assigned to a "resides" school, which were grouped in clusters. Students were assigned to schools within these clusters based on space and the racial guidelines of the student assignment plan. If a school reached the "extremes of the racial guidelines" a student whose race would contribute to racial imbalance would not be assigned there. School transfers were available, but could be denied because of lack of space or due to the racial guidelines. After undertaking a school desegregation plan that took twenty-seven years to succeed, it is perhaps understandable that Jefferson County denied Meredith's transfer.

<sup>178</sup> Notably, there was no circuit split on issues of voluntary integration plans prompting the Court to grant cert. Perhaps the Court objected to the reasoning of the Circuit courts and granted cert in order to rectify the Circuit court decisions.

The Supreme Court's decision in *Parents Involved* is the most recent in a series of school desegregation and civil rights decisions that promote the notion of colorblindness, rejecting voluntary adoption of race conscious remedies to promote racial integration in public schools. Colorblind Constitutionalism is neither contextual nor historical. It rejects the anti-subordination principles that the Equal Protection Clause was intended to embody, specifically to prevent the state from inflicting status harm against racial minorities.<sup>179</sup> Proponents of colorblindness assert that "race never matters", premised on the fallacy of a color-blind Constitution. The Court's holding in *Parents Involved* can be discerned within the context of civil rights decisions since the mid 1970s, which adopt the rhetoric of colorblindness and reject efforts to remedy historical discrimination through race conscious measures.

### *The Constitution and the Fourteenth Amendment*

Contrary to the pronouncements of colorblindness, the Constitution and the Fourteenth Amendment are color *conscious* documents. The Fourteenth Amendment was designed specifically to address the discriminatory aspects of the race conscious Constitution. The first three words of the Constitution's preamble, "We the people", refer to "the whole Number of free persons."<sup>180</sup> "Free" denoting the exclusion of slaves. The word "slavery" is absent in the text of the Constitution, which refers to slaves as "other persons", "such persons", or a "person held to Service or Labour."<sup>181</sup>

This language was purposeful, specifically designed to make the Constitution acceptable to abolitionists and Northern delegates to the Federal Convention of 1787.<sup>182</sup> While the Constitution did not include language explicitly referring to slavery, the institution of slavery was protected in the document through the three-fifths clause,<sup>183</sup> the prohibition against ending the African slave trade before 1808,<sup>184</sup> and the fugitive slave clause.<sup>185</sup> Additional clauses of the Constitution indirectly guarded slavery, making the Constitution a pro-slavery and race conscious document.<sup>186</sup>

The Fourteenth Amendment was created and passed in order to correct the effects of slavery.<sup>187</sup> The Equal Protection Clause of the Fourteenth Amendment extended the privileges of citizenship to Blacks, and in doing so was a race-conscious remedy to the institution of slavery. During the Reconstruction Era, many Southern states passed Black Codes, limiting the rights of

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<sup>179</sup> Reva Siegel, *Symposium: Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470, 1514-1515 (2004).

<sup>180</sup> U.S. Constitution article 1 § 2, cl. 3

<sup>181</sup> See Paul Finkleman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*. 32 Akron L. Rev. 423 (1999) at 427.

<sup>182</sup> *Id.* See also, Thurgood Marshall, *Reflections on the Bicentennial of the United States*, 101 Harv. L. Rev. 1 1987-88 at 2.

<sup>183</sup> U.S. Constitution article 1 § 2, cl. 3

<sup>184</sup> U.S. Constitution article 1 § 9, cl. 1

<sup>185</sup> U.S. Constitution article 4 § 2, cl. 3

<sup>186</sup> U.S. Constitution article 1 § 8 cl. 4 (allowing Congress to prohibit the naturalization of non-whites), Art. III § 2, cl. 1 (diversity of jurisdiction limiting the right to sue in federal courts to "Citizens" thus excluding slaves and free Blacks, Art. IV § 1 (requiring each state to grant legal recognition to the laws of other states including laws protecting slavery).

<sup>187</sup> See *University of California v. Bakke*, 438 U.S. 265 (1978) (Marshall, J., dissenting).

Blacks to own property and permitting imprisonment for unemployment.<sup>188</sup> Congress responded by passing the Reconstruction Acts and the Civil Rights Acts and establishing the Freedmen's Bureau to support former slaves by providing food, hospitals, land and education.<sup>189</sup> President Johnson vetoed the bill to create the Freedmen's Bureau, objecting to the special benefits to Blacks.<sup>190</sup> Congress overrode Johnson's veto, rejecting his concerns about special benefits, which were a race-conscious remedy.<sup>191</sup> The same Congress that established the Freedmen's Bureau and embraced providing special relief for former slaves also proposed the Fourteenth Amendment. It is therefore illogical to conclude that the Fourteenth Amendment was devised without consideration of race-conscious remedies.<sup>192</sup> The Fourteenth Amendment is not colorblind and was enacted specifically to protect Blacks.<sup>193</sup>

The Fourteenth Amendment was originally understood as an effort to eliminate the racial caste system created and perpetuated by the institution of slavery, not as a means to ban all distinctions made on the basis of race.<sup>194</sup> The equal protection clause does not require that minorities and non-minorities be treated the same when remedying distinct disadvantages.<sup>195</sup> The Court recognized this fundamental element of the Fourteenth Amendment in the Civil Rights Era school desegregation cases.

### *Brown v. Board of Education*

The Supreme Court's celebrated decision in *Brown v. Board of Education* outlawed state mandated racial segregation and provided the legal tenants upon which subsequent desegregation and civil rights cases have been based. The decision in *Brown* conveys anti-subordination principles, declaring the state may not engage in practices that enforce the inferior social status of historically oppressed peoples.<sup>196</sup> The Court cited social realities of discrimination and

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<sup>188</sup> See South Carolina Black Code, December 21, 1865. See 438 U.S. 265 at 390, (Marshall, J., dissenting).

<sup>189</sup> *Bakke*, 438 U.S. 265 at 391, (Marshall, J., dissenting).

<sup>190</sup> See *Id.* at 397, (Marshall, J., dissenting). The bill was "solely and entirely for the freedmen, and to the exclusion of all other persons" Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., 544 (1866).

<sup>191</sup> See *Id.* at 397, (Marshall, J., dissenting).

<sup>192</sup> See Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 Mich. L. Rev. 245 at 271, noting that "Those who read the Equal Protection Clause as rendering all race-cased state action presumptively unconstitutional rely primarily on the specific historical events that precipitated its addition to the Constitution."

<sup>193</sup> See U.S. CONST. amend. XIV, § 1; *Strauder v. West Virginia*, 100 U.S. 303, 307-310 (1880).

<sup>194</sup> Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 Rutgers Race & L. Rev. 362 at 379 (2008).

<sup>195</sup> Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 Mich. J. Race & L. 51 at 72 (1996).

<sup>196</sup> Siegel, *supra* note 179. The question presented in *Brown v. Board of Education* was, "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal educational opportunities?" *Brown v. Board of Education*, 347 U.S. 483 (1954) The framing of this legal question was a strategic choice of the Plaintiffs, who encouraged the Court to protect black children from stigma and self hatred, rather than insisting the Court dismantle de jure segregation. See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*. 91 Journal of Am. History 92 (2004).

segregation, stating, “To separate them [Black students] from others of similar age and qualifications solely because of race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone... Segregation of white and colored children in public schools has a detrimental effect upon colored children.”<sup>197</sup> *Brown* embraces an anti-subordination Constitution that treats race as a socially and legally produced hierarchical system structurally embedded in U.S. society.<sup>198</sup> But while the Court was willing to end legal protection of white privilege, it also declined to guarantee that social systems imbued with white privilege would be dismantled, and similarly declined to recognize that institutional privilege could violate the equal protection rights of Blacks.<sup>199</sup> *Brown* prohibited state-mandated segregation, but the Court refused to address the issues of appropriate remedy in *Brown II*, and instead relegated this task to lower courts to proceed “with all deliberate speed.”<sup>200</sup> The Court specifically stated, “School authorities have the primary responsibility for elucidating, assessing and solving these problems”<sup>201</sup>

Instead of reasserting the anti-subordination principles enunciated in the first *Brown* decision, *Brown II* provided a resistant South with a myriad of ways to delay racial integration, requiring only a “prompt and reasonable start toward full compliance”.<sup>202</sup> In *Brown II*, the Court provided a roadmap for how school districts and lower courts could postpone integration and promote white dominance by offering possible considerations including, “problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.”<sup>203</sup>

Derrick Bell opines that these barriers were erected because the interests of Blacks did not converge with those of whites.<sup>204</sup> He states, “The fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.”<sup>205</sup> Bell isolates a candid and dispiriting reality of the struggle for integration: “racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites.”<sup>206</sup> Thus, the legacy of *Brown* is inconsistent. The Court recognized

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<sup>197</sup> *Brown*, 347 U.S. 494-95 quoting lower court.

<sup>198</sup> Ian L. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 *Stan. L. Rev.* 985, 990 (2007).

<sup>199</sup> Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1751-1753 (1993). “White privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed.”

<sup>200</sup> *Brown v. Board of Education II*, 349 U.S. 294 at 301 (1955).

<sup>201</sup> *Id.* 299.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 300-01. See also Harris, *supra* note 199, “*Brown II* recognized the property interest in whiteness by leaving intact the ability of whites to control, manage, postpone, and if necessary, thwart change.”

<sup>204</sup> Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *Harv. L. Rev.* 518, 523 (1980), “...this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”

<sup>205</sup> *Id.* at 523.

<sup>206</sup> *Id.*

that legalized racial separation was unconstitutional, yet refused to address the government's role in eliminating social inequalities.<sup>207</sup>

This sentiment is reflected in acts of resistance to integration, which in turn perpetuated what Alan Freeman describes as the “perpetrator” perspective for Americans.<sup>208</sup> Media attention to the Civil Rights movement highlighted specific acts of discrimination and racism. News coverage of integration battles brought Governor Faubus’ rant in Little Rock, and “Bull” Connor’s attacks on Blacks with fire hoses and dogs into the homes of Americans through flickering black and white television sets, and on glossy magazine covers. Americans viewing these specific acts of racism were able to fit them within the “perpetrator” mode, as actions of specific perpetrators purposely and intentionally causing harm to identifiable victims, without recognizing that less publicized acts of covert racism were also penetrating the North, spreading like a cancer.<sup>209</sup>

### *Post-Brown Desegregation Cases*

A decade after *Brown*, many American schools remained segregated. In the post-*Brown* years, the Court utilized anti-subordination principles, taking into account social realities and the effects of state mandated segregation in determining school desegregation cases.<sup>210</sup> Recognition of color conscious policies as appropriate remedies to segregation and racial oppression allowed for plaintiffs of color to succeed in cases alleging intentional discrimination.

In 1968, the Court in *Green v. County School Board* defined the standards by which integration efforts were deemed sufficient. The Court determined that the New Kent County remained a “dual system” fourteen years after *Brown*.<sup>211</sup> Dr. Calvin Green, the founding president of the New Kent County Chapter of the NAACP, sued the New Kent County School Board in 1965 for maintaining a racially segregated school system.<sup>212</sup> The district’s “freedom of choice plan” was a sham integration procedure in which Black families had to petition for admittance to attend white schools. This process endangered Blacks who dared to petition with

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<sup>207</sup> See Harris, *supra* note 199 at 1757.

<sup>208</sup> Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 Tul. L. Rev. 1407 at 1412. The “perpetrator” perspective focuses on the behaviors of discriminating individuals, and refuses to find violations of antidiscrimination law in social conditions. Rather, the “perpetrator” perspective will look only to “the actions of specific perpetrators who have purposely and intentionally caused harm to identifiable victims who will be offered a compensatory remedy.” The dominant view in America, the view adopted by the Supreme Court in its recent Civil Rights cases, is the “perpetrator” perspective.

<sup>209</sup> *Id.* at 1418.

<sup>210</sup> See *Id.* at 1411. The position of the Court in this period can be described utilizing what Alan Freeman defines as the “victim” perspective, rooted in “concrete historical experience”, which for Blacks and other racial minorities in America includes slavery, oppression, exclusion, reduced legal status, and cultural stereotyping. The effects of this historical oppression include the residential segregation, unequal educational opportunities, and disproportionately low political power prevalent in American society today. These continued effects become conditions, under which minorities in America live.

<sup>211</sup> *Green et al. v. County School Board of New Kent County et al.*, 391 U.S. 430 at 441 (1968).

<sup>212</sup> *Id.* Virginia attempted to resist integration by passing a “resolution of interposition” in 1956, which stated that the Court’s mandate to integrate was incompatible with the state constitution, and thus inapplicable in Virginia. The New Kent County school board adopted the freedom of choice plan in order to remain eligible for federal financial aid.



the threatening prospect of physical violence and economic sanctions from whites who opposed integration.<sup>213</sup> Three years after the adoption of the “freedom of choice plan”, not a single white child chose to attend the historically Black Watkins school, and 85% of Black children continued to attend Watkins.<sup>214</sup> Justice Brennan writing for the Court specifically stated, “the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”<sup>215</sup>

Dr. Green asserted that President Eisenhower’s famous remarks about all deliberate speed “meant take it slow and not upset the country...put the brakes on all four wheels of *Brown*.”<sup>216</sup> Justice Brennan’s opinion in *Green* seems to recognize the impact “all deliberate speed” had in delaying racial integration in public schools, and attempted to address obstructions to integration by ordering District Court oversight of the case and the school board’s integration plan.<sup>217</sup> Perhaps most importantly, the Court considered social realities of New Kent County and the South more broadly, specifically that the district delayed even it’s first step towards integration through the “freedom of choice plan” for eleven years after *Brown I*, that poverty deterred Black families from choosing formerly all-white schools, and that Black families were threatened with violence and subject to harassment as a consequence of enrolling in white schools.<sup>218</sup> The Court’s decision in *Green* was certainly color conscious and recognized continuing subordination and inequality for racial minorities in both American society and public schools.

Similarly, the Court’s 1971 unanimous decision in *Swann v. Charlotte-Mecklenburg Board of Education* permitted “wide-ranging remedial orders to ensure that segregated or ‘dual’ systems were eliminated.”<sup>219</sup> The NAACP on behalf of Vera and Darius Swann and their a six-year old student, sued the Charlotte-Mecklenburg school district. The District Court ruled in favor of the Swanns and approved the 1965 Charlotte-Mecklenburg school desegregation plan.<sup>220</sup> The Supreme Court upheld the desegregation plan, which included busing, and reaffirmed the Court’s previous pronouncement that school authorities are best equipped to determine and carry out integration policies.<sup>221</sup> The Court stated, “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 an educational policy is within the broad discretionary powers of school authorities”.<sup>222</sup> Chief Justice Burger’s opinion asserted what came to be regarded in school desegregation cases as a general understanding that the policy decisions of how to achieve

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<sup>213</sup> *Reading 1: History of Charles C. Green v. County School Board of New County, VA* available <http://www.nps.gov/nr/twhp/wwwlps/lessons/104newkent/104facts1.htm>

<sup>214</sup> *Green*, 391 U.S. 430 at 442.

<sup>215</sup> *Green*, 391 U.S. 430 at 439.

<sup>216</sup> *Supra* note 213.

<sup>217</sup> *Green*, 391 U.S. 430 at 439.

<sup>218</sup> *Green*, 391 U.S. 430 at 441.

<sup>219</sup> Charles J. Ogletree, Jr. *All Deliberate Speed*, 170 (W.W. Norton & Co. 2004).

<sup>220</sup> *Swann*, 402 U.S. 1 at 7. The desegregation plan sought to remedy the issue that two-thirds of Black students in the district attended schools which were either entirely or 99% Black.

<sup>221</sup> *Swann*, 402 U.S. 1 at 32.

<sup>222</sup> *Swann*, 402 U.S. 1 at 16.

integration were best determined by local communities. This deference to local districts was acknowledged in elementary and secondary desegregation cases, but the autonomy of state universities to establish race conscious admissions policies was challenged in the post Civil Rights years.

### *Bakke and Colorblindness*

By the 1960s, America was amid intense Civil Rights backlash. This anti-civil rights sentiment was pronounced through increased lynchings of Blacks, the murders of the Freedom Riders, and the assassinations of Dr. Martin Luther King and other Civil Rights leaders. In 1968 Nixon ran on a campaign against the Warren Court on issues of race, appealing to the “silent majority” of Northern whites concerned about the impact of desegregation decrees on their societal status.<sup>223</sup> He campaigned in opposition to welfare, busing, quotas and affirmative action, and appointed four Supreme Court Justices to uphold these ideals: Justices Burger, Rehnquist, Powell, and Blackmun.<sup>224</sup> By the 1970s the Supreme Court had changed considerably. The pro-civil rights Warren court was dismantled, replaced with Justices like Rehnquist, whose firmly held anti-civil rights opinions dated at least as far back as his days clerking for Justice Robert Jackson during *Brown I.*<sup>225</sup>

White-flight from urban cities into suburbs, in efforts to avoid public school integration occurred not only in southern cities, but also in northern areas like metropolitan Detroit. Massive resistance to integration efforts like forced bussing were prominent in areas like metropolitan Detroit, where the Supreme Court’s 1974 decision in *Milliken v. Bradley* struck down desegregation plans for Detroit, holding “without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”<sup>226</sup> Additionally, affirmative action programs, created to remedy historic and societal discrimination against minorities, came under attack in the 1970s as white plaintiffs brought suit alleging “reverse discrimination”.

Previous federal and Supreme Courts had upheld the right of state and local governments to implement race-conscious measures to remedy segregation in public elementary and secondary schools by utilizing an anti-subordination framework, which recognizes that Equal Protection is intended to prevent the state from inflicting harm onto minorities. Until the 1970s, race-conscious assignment policies and voluntary desegregation initiatives were not considered “invidious discrimination”.<sup>227</sup> Moreover, challenges to affirmative action in higher education shifted to an anti-classification framework.<sup>228</sup> This transition is particularly notable in the Supreme Court’s 1978 decision in *Regents of the University of California v. Bakke*, which

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<sup>223</sup> Siegel, *supra* note 179.

<sup>224</sup> *Id.*

<sup>225</sup> See Memo by William Rehnquist, law clerk to Justice Robert Jackson entitled, “A Random Thought on the Segregation Cases”. Rehnquist stated, “I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues, [sic] but I think *Plessy v. Ferguson* was right and should be re-affirmed.”

<sup>226</sup> *Milliken*, 418 U.S. 717 at 745.

<sup>227</sup> Siegel, *supra* note 179 at 1514-1515. Citing to *Tometz v. Bd. of Educ.*, 237 N.E.2d 498 (Ill. 1968), *Olson v. Bd. of Educ.*, 250 F. Supp. 1000 (E.D.N.Y.), *Fuller v. Volk*, 230 F. Supp. 25 (D.N.J. 1964), *Morean v. Bd. of Educ.*, 200 A.2d 97 (N.J. 1964), *Balaban v. Rubin*, 199 N.E.2d 375, 377 (N.Y. 1964).

<sup>228</sup> Siegel, *supra* note 179 at 1533.

departed from considerations of anti-subordination, and instead adopted the concept of anti-classification and the reasoning of colorblindness.

In colorblind rhetoric, history is irrelevant.<sup>229</sup> It rejects an examination of social reality, based in historical discrimination and subordination, and instead portrays the explicit use of race as morally and legally wrong,<sup>230</sup> prioritizing individualism over the “substantive claims of historically oppressed groups.”<sup>231</sup> Proponents of colorblindness have successfully attacked and dismantled programs like integration efforts and affirmative action programs that consciously utilize race in efforts to remedy continuing discrimination and racism.<sup>232</sup> Similarly, anti-classification principles assert that equality means a commitment to protect individuals rather than groups from all forms of racial classification, even benign or reverse discrimination. The Court’s adoption of colorblindness begins with *Bakke* and is most recently manifested in *Parents Involved*.

*Bakke* was a challenge to the special admissions program of the Medical School of the University of California at Davis, which allotted 16 of 100 slots for minority applicants.<sup>233</sup> Bakke, a white, male applicant, filed suit alleging the special admissions program “operated to exclude him from the school on the basis of his race,” in violation of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964.<sup>234</sup> The Supreme Court focused exclusively on the validity of the special admissions program under the Equal Protection Clause of the Fourteenth Amendment.<sup>235</sup>

The Court determined that the special admissions program was “undeniably a classification based on race and ethnic background.”<sup>236</sup> Justice Powell utilized colorblindness through the concept of “ethnic fungibility” in his opinion, and stated, “the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups.”<sup>237</sup> Powell described the Fourteenth Amendment as framed in “universal terms”, although conceded that its primary function was to bridge the “vast distance between members of the Negro race and the white ‘majority’.”<sup>238</sup> Powell depicted prior Civil Rights cases as “landmark decisions...in response to the continued exclusion of Negroes from the mainstream of American society” but stated that they “need not be read” as depending on the characterization of “discrimination by the ‘majority’ white race against the Negro minority”.<sup>239</sup>

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<sup>229</sup> Freeman *supra* note 208 at 380.

<sup>230</sup> Ian F. Haney López, *Post Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama* 98 Calif. L.Rev 1023, 1061 (2010).

<sup>231</sup> Powell *supra* note 194 at 365.

<sup>232</sup> See Haney López *supra* note 230 at 1061.

<sup>233</sup> *Bakke*, 438 US 265 at 271.

<sup>234</sup> *Id.* at 277-78.

<sup>235</sup> *Id.* at 281.

<sup>236</sup> *Id.* at 289.

<sup>237</sup> *Id.* at 292.

<sup>238</sup> *Id.* at 293.

<sup>239</sup> *Id.* at 293-94.

Powell's opinion ignored social conditions of persistent racial subordination and the history of underrepresentation of racial minorities in medical school, and asserted that there had been no determination that the "University engaged in a discriminatory practice requiring remedial efforts."<sup>240</sup> Powell adopted anti-classification and colorblindness by prioritizing the individual over concerns for promoting historically underrepresented groups in higher education. He stated that the purpose of the special admissions program to help certain groups "perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."<sup>241</sup> The Court's decision in *Bakke* made the concept of colorblindness part of judicial precedent by insisting that race could not be consciously utilized for promoting racial justice, and must be limited only to remedying past *de jure* discrimination.<sup>242</sup> It is this troubling legal precedent from which *Parents Involved* developed.

### *Grutter v. Bollinger*

In 2003, Justice O'Connor's majority opinion in *Grutter* upheld the University of Michigan Law School admissions policy, which weighed race as one of many factors in deciding admissions. Barbara Grutter, a white applicant, brought the case against the law school alleging that her application was rejected because the law school uses race as a "predominant" factor, giving preference to applicants from certain minority groups.<sup>243</sup> She further alleged that the law school had no compelling interest to justify the use of race and sought an injunction prohibiting the law school from using race in this manner, damages, and an order requiring the law school to grant her admission.<sup>244</sup>

O'Connor expanded upon Justice Powell's holding in *Bakke*, determining that diversity is a compelling government interest, relying heavily on amici briefs citing the importance of diversity in the military and corporate workplaces.<sup>245</sup> Her opinion underlines the importance of preparing students for "work and citizenship", but does not address the promotion of racial diversity in higher education as a means to address persistent racial inequalities, especially in access to students who have come from minority groups who have been historically excluded and underrepresented in higher education and professional programs like law schools.<sup>246</sup> In fact, O'Connor's opinion mentions "inequality" only once.<sup>247</sup>

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<sup>240</sup> *Id.* at 305.

<sup>241</sup> *Id.* at 310.

<sup>242</sup> Finkleman *supra* note 181 at 1425.

<sup>243</sup> *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

<sup>244</sup> *Id.* at 317.

<sup>245</sup> *Id.* at 331.

<sup>246</sup> See Derrick Bell, *Diversity's Distractions*, 103 Colum. L. Rev. 1622, 1625 (2003). "Thus it was diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers, that gained O'Connor's vote."

<sup>247</sup> *Grutter*, 539 U.S. 306, 337-38 (2003). "We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial

The majority determined the law school admissions program was sufficiently narrowly tailored, and O'Connor's opinion emphasized the law school's use of "diversity" giving weight to many factors besides race through a "highly individualized, holistic review". She stressed that the law school includes the "many possible bases" including students who have "lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields".<sup>248</sup> O'Connor's reasoning embraced anti-classification principles, highlighting the "truly individualized consideration" of the law school's admissions plan as in conformity with Justice Powell's colorblind approach in *Bakke*.<sup>249</sup>

It is necessary to recognize that diversity weakens integration. Professor Wendy Parker writes that while the "*Grutter* majority clearly supports the idea of integration, and links diversity to the benefits of integration... the meaning of integration through diversity, unlike school desegregation jurisprudence, is not transformative."<sup>250</sup> As a result, historically white institutions may use diversity and so some minority students are admitted, but not so many as to change the racial identity of the institution.<sup>251</sup> Diversity, compared to affirmative action or desegregation policies, does not seek to challenge the status quo, or create social change. Parker notes that the majority opinion in *Grutter* simply notes that "race unfortunately still matters" without examining or discussing why this is true. Derrick Bell asserts that O'Connor "perceived in the Michigan Law School's admissions program an affirmative action plan that minimizes the importance of race while offering maximum protection to whites and those aspects of society with which she identifies."<sup>252</sup>

Perhaps the most striking component of O'Connor's opinion, beyond the perpetuation of colorblindness, is her assertion that "race-conscious admissions policies must be limited in time" and stating "we expect that twenty-five years from now, the use of racial preferences will no longer be necessary."<sup>253</sup> With this concluding statement, it is clear that Justice O'Connor and the majority of the Court were not willing to recognize societal conditions of continuing racial inequalities or the history of exclusion of members of minority groups from elite institutions of higher education in their upholding of the Michigan Law School's admission policy.<sup>254</sup> The requirements of *Grutter* in assessing higher education admissions policies were utilized by the Court to determine the validity of the Seattle school district's racial-tiebreaker.

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inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."

<sup>248</sup> *Id.* at 338.

<sup>249</sup> *Id.* at 334 .

<sup>250</sup> Wendy Parker, *The Story of Grutter*, Education Law Stories 99 (Foundation Press 2008).

<sup>251</sup> *Id.*

<sup>252</sup> Bell, *supra* note 246.

<sup>253</sup> *Grutter*, 539 U.S. at 343.

<sup>254</sup> It should be noted that Ward Connerly successfully supported a referendum measure similar to Prop 209 and I-200 in Michigan in 2006, after Jennifer Gratz invited him to Michigan by. Gratz, the white plaintiff who sued the University of Michigan for alleged racial discrimination, works for Connerly's ACRI and ACRC as the Director of Research and the Director of State and Local Initiatives, respectively.

## The Supreme Court Decision in *Parents Involved*

The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race. What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?

-- Chief Justice Roberts, delivering the plurality opinion in *Parents Involved in Community Schools*, 551 U.S. 747

...there is no danger of resegregation...at most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation.

-- Justice Thomas, concurring in *Parents Involved in Community Schools*, 551 U.S. 750

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

-- Justice Breyer, dissenting in *Parents Involved in Community Schools*, 551 U.S. 803-804

The Supreme Court's decision in *Parents Involved* further promotes the concept of colorblindness as the preferred approach in evaluating race conscious policies, and severely restricts racial integration as a compelling government interest. Dean of UCLA Law School and Education Law scholar Rachel Moran observes that the holding in *Brown* means either that strict colorblindness is a constitutional requirement *or* that flexible color-consciousness is necessary to achieve racial justice.<sup>255</sup> The plurality opinion embraces the former through the rhetoric of colorblindness by reading the Equal Protection Clause as though it is a part of a color blind Constitution, and ignoring social realities of the continuing effects of historical segregation and racism in order to assert that school districts may not voluntarily undertake integration efforts that are not in specific response to remedying legal segregation.

Harry Korrell and the Davis Wright Tremaine attorneys for PIICS framed their petition for certiorari specifically within the context of *Grutter v. Bollinger*:

- 1) How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger*...?
- 2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?
- 3) May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance between whites and nonwhites in particular schools, or does such racial

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<sup>255</sup> Rachel Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 Ohio St. L. J. 1319, 1322 (2008).

balancing violate the Equal Protection Clause of the Fourteenth Amendment?<sup>256</sup>

Dean Moran notes that until *Parents Involved*, elementary and secondary school desegregation cases utilized a separate logic, distinct from cases considering affirmative action in higher education.<sup>257</sup> Furthermore, the petitioner’s petition for certiorari invokes the rhetoric of colorblindness and invites judicial analysis along an anti-classification framework, stating:

Any racial classification, by any government entity, is presumptively invalid and must be subjected to the strictest judicial scrutiny. That has been for many years the consistent holding of this Court, and the government bears the burden of proving that its racial classification is narrowly tailored to achieve a compelling state interest.

Because it uses racial balancing, the District's program for race-based admissions is ipso facto unconstitutional. Racial balancing prefers one individual to another for no reason other than race and thereby violates the heart of the Equal Protection Clause -- the principle that our Constitution is color-blind.<sup>258</sup>

Justice Roberts, writing for the plurality, first agrees with petitioners, that strict scrutiny is the proper standard of review for race-conscious school assignment policies, citing that strict scrutiny applies to “every racial classification.”<sup>259</sup>

The plurality then looks to whether the school district as a state actor has a compelling interest for utilizing the racial tiebreaker. Citing *Milliken*, Roberts stated that while a compelling interest exists in remedying the effects of past intentional discrimination, the Seattle public schools were never segregated by law, so any use of race “must be justified on some other basis.”<sup>260</sup> Roberts ignored the reality of housing patterns in Seattle, established through a system of legalized discrimination until 1968, and stated that the school board had no interest in remedying segregation from housing patterns... economic conditions and social attitudes.<sup>261</sup> Roberts adopts what Alan Freeman refers to as the “perpetrator” perspective in his insistence that de facto segregation is not a form of “identifiable discrimination”, simply a social condition, and therefore is not a compelling interest and cannot be remedied by voluntary integration efforts, like those of the Seattle school district.<sup>262</sup>

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<sup>256</sup> Initial Brief: Appellant-Petitioner. *Parents Involved in Community Schools*, 2005 U.S. Briefs 908 (August 21, 2006).

<sup>257</sup> Moran, *supra* note 255 at 1322 (2008), noting that the petitioner’s questioned whether the voluntary desegregation plans in Louisville and Seattle could be upheld under the requirements of *Grutter*.

<sup>258</sup> *Parents Involved in Community Schools*, 2005 U.S. Briefs 908 (August 21, 2006).

<sup>259</sup> *Parents Involved in Community Schools VI*, 551 U.S. 729. It should be noted that Judge Kozinki’s concurring opinion in the Ninth Circuit en banc review asserted that the proper standard for review should be rational review, not strict scrutiny.

<sup>260</sup> *Id.* at 721.

<sup>261</sup> *Id.* at 761.

<sup>262</sup> See Powell *supra* note 2194 at 383.

Roberts describes the second compelling government interest under strict scrutiny as diversity in higher education, citing *Grutter*.<sup>263</sup> Roberts summarizes interests of diversity from *Grutter* as extending only to “highly individualized, holistic review” of individuals, not as members of a racial group.<sup>264</sup> Roberts stated that the racial tiebreaker, which he defined as a program that excludes solely on the basis of race, did not fit the individualized and holistic review required by *Grutter*.<sup>265</sup> He stated that the purpose of the using racial classifications is only considered narrow tailoring when it is utilized as one piece of assessing diversity, and that using race as a means to achieve racial balance would be “patently unconstitutional.”<sup>266</sup> Roberts defined the racial tiebreaker as the only factor considered, not within the context of many, and thus is not narrowly tailored to achieve educational and social benefits of diversity.<sup>267</sup> In doing so, Roberts utilized the concept of diversity to exclude race or color consciousness policies.

Roberts described the dangers of allowing racial balancing as a compelling interest, alleging that doing so would “assure that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”<sup>268</sup> But Roberts’ assertion that race should not be relevant in American life is a rejection of a color conscious Equal Protection Clause and Constitution, and ignores the social realities of America, in which race certainly continues to be an important factor. Roberts ends his opinion stating, “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle... the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>269</sup>

The central problem with Roberts’ reasoning is that simply identifying students on the basis of their race, with the intention of remedying the effects of historical and social racism, is not a form of discrimination. Further, strict scrutiny was not the appropriate test. Rather, strict scrutiny should only be used for racial classifications that harmfully exclude, not for racial classifications designed to include, like the Seattle integration plan. The Seattle plan did not confer certain benefits solely on the basis of race. It was simply one of four tiebreakers used to determine school assignments, seeking to rectify persistent racial divisions and inequalities. But by framing the question of *Parents Involved* within the precedent of *Grutter*, the Court considered the racial tiebreaker within the context of diversity—which was a distraction from an explicit discourse about racial disparities and suitable remedies that consider historical and social context in an effort toward inclusiveness.

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<sup>263</sup> *Parents Involved in Community Schools VI*, 551 U.S. 722.

<sup>264</sup> *Id.* at 722.

<sup>265</sup> *Id.* at 758.

<sup>266</sup> *Id.* at 723.

<sup>267</sup> *Id.* at 726.

<sup>268</sup> *Id.* at 730, citing O’Connor, J. in *Croson*.

<sup>269</sup> *Id.* at 748.



Justice Thomas, in his concurrence, similarly relied upon the fallacy of a colorblind constitution as the “essence of *Brown*’s legacy”<sup>270</sup>, and rejected concerns about remedying social inequalities. He dismissed concerns of resegregation in Seattle’s schools, stating “racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.”<sup>271</sup> Thomas stated, “racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices” and reasoned that racial balance is not inevitably linked to unconstitutional segregation, it is therefore not unconstitutional.<sup>272</sup> Thomas disregards that historical fact that many of the housing “choices” made by residents of Seattle in the 20<sup>th</sup> Century were subject to legalized housing discrimination policies, and that subsequent separation along race in Seattle’s schools was the direct result of this government sanctioned discrimination. Thomas bolsters the idea of a colorblind constitution stating, “As a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.”<sup>273</sup> This is a citation to dictum (Justice Harlan’s sole dissent in *Plessy*) and is utilized by Thomas in a fundamentally different way than it was originally employed by Justice Harlan. In *Plessy*, the majority asserted that race has no social meaning in order to find that the requirement of segregated train cars was consistent with the Equal Protection Clause.<sup>274</sup> Harlan’s dissent was a call to recognize the role of race in the subjugation of Black Americans, not to make claim that race conscious government remedies are unconstitutional. Thomas’ distortion of Harlan’s dissent is in furtherance of the colorblind perspective adopted by the Court.

Justice Kennedy’s concurrence attempts to specify ways in which school districts may be able to promote the compelling government interest of diversity, without using race conscious measures like the racial tiebreaker. He stated, “School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods, allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>275</sup> Furthermore, Kennedy stated, “The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens of racial classifications.”<sup>276</sup>

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<sup>270</sup> Moran *supra* note 255 at 1327 (2008).

<sup>271</sup> *Parents Involved in Community Schools VI*, 551 U.S. 748.

<sup>272</sup> *Id.* at 750.

<sup>273</sup> *Id.* at 752.

<sup>274</sup> Cheryl I. Harris, *Symposium Race Jurisprudence and the Supreme Court: Where Do We Go from Here? In the Shadow of Plessy*, 7 U. Pa. J. Const. L. 867, 897-98 (2005).

<sup>275</sup> *Parents Involved in Community Schools VI*, 551 U.S. 789.

<sup>276</sup> *Id.* at 798.

Heather Gerken suggests that Kennedy utilizes a “don’t ask, don’t tell” approach to race-conscious decisionmaking.<sup>277</sup> Specifically, that Kennedy (and other conservative judges) believes that a primary purpose of public schools is to educate future American citizens.<sup>278</sup> Therefore, the state can use race-conscious strategies in order to construct a school environment in which students may learn from each other about race, because this knowledge will make them better citizens.<sup>279</sup> Kennedy’s suggested approaches in his concurring opinion suggest that local school districts, as those entrusted as the most qualified to determine how best to reach the compelling interest of diversity, might use measures like assignments in consideration of economic demographics, or building schools in specific areas in order to achieve a cross section of racially diverse students—not because of a commitment to equal educational opportunity, but rather because of the role schools play in “teaching civil morality”.<sup>280</sup>

Justice Breyer’s dissent, which Justices Stevens, Souter and Ginsburg joined, rejected the plurality’s colorblind approach, and insisted that the Constitution allows school districts like to enact policies with race specifically in mind. He stated, “we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.”<sup>281</sup> Breyer insisted that the purpose of *Brown* and its progeny were to compel desegregation as a means to correct past racial injustice, and also permit voluntary systems that promote diversity and encourage racial integration.

Furthermore, Breyer criticizes the plurality’s rejection of social conditions and prior school desegregation precedent: “The plurality plays inadequate attention to this law, to past opinions’ rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion.”<sup>282</sup> Breyer declared the historical and factual context of these cases is critical, citing that the Supreme Court ordered many school district in post-*Brown* cases to utilize race-conscious practices in order to desegregate, and further the Court trusted local communities with the responsibility to determine the best measures for achieving integration in their schools.<sup>283</sup>

Breyer then argues the Court and school districts should be concerned about resegregation by utilizing extensive statistical data to demonstrate the social reality of resegregation in schools, for example that one in six Black children attend a school that is 99-100% minority.<sup>284</sup> Breyer looked to the history of Seattle, and specifically noted that segregation claims were filed against Seattle, and a segregation complaint was filed with federal OCR, but

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<sup>277</sup> Heather K. Gerken, *Justice Kennedy and The Domains of Equal Protection*, 121 Yale L.J. 104, 106 (2007)

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 119.

<sup>280</sup> *Id.* at 115. Gerken states, “If Kennedy thinks that integration furthers a school’s *educational* mission, he is right to worry about social realities and de facto segregation. And he should also worry about the way that law affects culture—specifically, the way that a rigid mandate of race neutrality would affect the educational culture of our public schools”.

<sup>281</sup> *Parents Involved in Community Schools VI*, 551 U.S. 803.

<sup>282</sup> *Id.* at 803.

<sup>283</sup> *Id.* at 804.

<sup>284</sup> *Id.* at 855.

the district settled, promising to enact a desegregation plan.<sup>285</sup> The tiebreaker grew from these remedial efforts.<sup>286</sup> Breyer’s dissent correctly identified the importance of social realities in Seattle, where housing segregation led to de facto school segregation, and recognized that the voluntary efforts of Seattle school district to remedy these social inequalities was not unconstitutional.

Justice Breyer’s dissent accurately identified the ways in which the plurality subverted the purpose of *Brown*, to provide integrated schools for American children, by discarding precedent, rejecting historically relevant conditions of inequality, and the societal realities of Seattle and other urban cities. The Court’s decision in *Parents Involved* has restricted the ability for local school boards to voluntarily undertake race conscious integration plans, altering the school compositions in Seattle and elsewhere.

### **Public Schools in the Aftermath of *Parents Involved***

I knew years ago we would go to the Supreme Court. I believed so much in what we are doing I just felt we had to win.

-- Kathleen Brose<sup>287</sup>

In the wake of *Parents Involved*, school districts are faced with the difficult task of avoiding race conscious measures in promoting school integration programs, and public sentiment is adopting what the Supreme Court has insisted—that colorblindness is the appropriate guide in Equal Protection jurisprudence. Since the Court’s decision in 2007, Seattle’s schools have change markedly. Other school districts, like Berkeley have successfully negotiated integration plans that seek to create integrated schools while withstanding judicial scrutiny. But we also see the impact of *Parents Involved* as the rhetoric of colorblindness pervades public sentiment, and local governing bodies decide to dismantle integration efforts.

### *Seattle’s Current School Choice Plan*

The Seattle School District abandoned the racial tiebreaker at issue in *Parents Involved* after the 2001-02 school year, and chose not to reinstate the tiebreaker after the Ninth Circuit vacated its order of injunction.<sup>288</sup> The current school assignment plan for Seattle, adopted for the 2010-11 school year, allows students and families to apply to any Seattle public school, however, families are not guaranteed a seat at any school.<sup>289</sup> The current school assignment plan cites The Supreme Court’s ruling in *Parents Involved*, stating that Court “affirmed that there is a compelling interest in creating diverse student populations and that students and society at large benefit from integrated public schools.”<sup>290</sup>

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<sup>285</sup> *Id.* at 806.

<sup>286</sup> *Id.* at 819.

<sup>287</sup> Michael Rollins, *U.S. Supreme Court Decision Goes Against Seattle School Integration Program*, OregonLive.com, June 28, 2007.

<sup>288</sup> *Parents Involved In Community Schools IV*, 377 F.3d 949.

<sup>289</sup> Seattle Public Schools Current Student Assignment Plan, available [http://www.seattleschools.org/area/newassign/current\\_assignplan.html](http://www.seattleschools.org/area/newassign/current_assignplan.html)

<sup>290</sup> Seattle Public Schools Assignment Plan Background, available [http://www.seattleschools.org/area/newassign/faq\\_background.html](http://www.seattleschools.org/area/newassign/faq_background.html)

In the current assignment process, Seattle school district still uses a sibling tiebreaker, granting preference to students with a sibling already attending their chosen school. For high school assignments, there is no neighborhood preference—the entire district is treated as a single region.<sup>291</sup> High school assignments use lottery as a final tiebreaker to determine school assignment.<sup>292</sup>

Racial demographics of Seattle’s high schools have changed drastically between 2000, the last full school year in which the district used the racial tiebreaker, and 2010. These are demographic data collected by Seattle Public Schools.<sup>293</sup> Please see section *Seattle’s Tie Breaker System in High School Assignments* above for a detailed discussion regarding the demographics in 2000 and the racial tiebreaker.

<b>High School</b>	<b>% White Students in 2000</b>	<b>% White Students in 2010</b>
<i>Ballard</i>	58.2	67.3
Cleveland	10.5	4.6*
<i>Franklin</i>	22.9	4.1**
Ingraham	30.2	32.6
<u>Nathan Hale</u>	60.3	57.0
<u>Roosevelt</u>	52.7	63.0
<i>Garfield</i>	46.6	37.5
Center School	Established in 2001	71.2
Nova	N/A	74.1

- Schools in *italics* were oversubscribed in 2000
- Schools underlined were integration positive in 2000
- \*33 white students in a school of 738 total students
- \*\*53 white students in a school of 1301 total students
- In 2010, white students in the District comprised 41.0% of total students
- In 2000, white students in the District comprised 40.0% of total students

Ten years after the district’s abandonment of the racial-tiebreaker, schools like Ballard, Ingraham and Nathan Hale show moderate changes in the percentage of white student enrollment. It should be noted that these three high schools are all located north of the Ship Canal, and in neighborhoods that are predominantly white. Conversely, in 2010 schools like Cleveland and Franklin (both located south of the Ship Canal) have white enrollments of less than 5%-- when the district’s white student population comprised 41% of total students. On a scale of 1-10, greatschools.org rates Garfield a 10, Ballard, Nova, Roosevelt, and The Center

<sup>291</sup> *Supra* note 289. This differs from the elementary and middle school assignments, which use region as a secondary tiebreaker, granting preference to students living in the region of the school.

<sup>292</sup> *Id.* Each student is given a random lottery number, and if necessary, the student’s lottery number is used to determine the school assignment.

<sup>293</sup> Seattle Public Schools Individual School Summaries, available: <http://www.seattleschools.org/area/asiso/disprof/2010/DP10indsch.pdf> and <http://www.seattleschools.org/area/asiso/disprof/2000/DP00indsch.pdf>

School a 9, Nathan Hale an 8, Franklin a 5, Ingraham a 4 and Cleveland a 3.<sup>294</sup> It is likely that the locations and rankings of these schools impact which schools parents and students apply to.

Additionally, it should be noted that The Center School and Nova were not included in the district's demographic information for 2000, and serve an overwhelmingly white student population in 2010. The Center School was founded in 2001 at the demand of parents in Queen Anne and Magnolia who wanted a neighborhood school for their children to attend. Kathleen Brose spoke specifically of this need for her neighborhood, and she sent her daughter Elizabeth to The Center School after her first year at Ingraham.<sup>295</sup> Author Jonathan Kozol criticizes The Center School in his book *Shame of the Nation*, specifically as an example of racial disparities in public schools. Kozol explains that "white families who were active in pressing for creation of center school" were also leaders in PIICS. He describes the creation of The Center School as "a way of giving something that they wanted to white parents, primarily in the Queen Anne and Magnolia neighborhoods, whose children could not always get into Ballard High School under the tie-breaker" and specifically quotes Kathleen Brose's proclamation that Elizabeth's school assignment was discrimination. When asked what she thinks about the changing demographics of Seattle high schools Brose says this just means that more kids are going to schools in their own neighborhoods. "The way I look at it is that there's a lot of parents that want to send their kids to that school, because it's close to home, so the white kids aren't taking those spots."<sup>296</sup>

It is unclear how the current school assignment plan will impact Seattle schools long term, as last September marked the beginning of the first school year under this plan, and current enrollment data does not appear to be available yet. However, issues arose last fall, like 1,784 students registering for classes at Garfield high school, although the school has capacity for only 1,600 students.<sup>297</sup> Current Seattle Superintendent, Maria Goodloe-Johnson, under whom the new student assignment plan was developed and released, has received public scrutiny, and a no-confidence vote from teachers, aides, and other school employees.<sup>298</sup> In March 2011, the Seattle school board dismissed Goodloe-Johnson.<sup>299</sup>

Specifically recognizing the limits of what the district may do to voluntarily pursue racially integrated schools, the district decided to track high school assignments under the current plan for two years. In 2012, the Superintendent will report to the School Board and the public regarding the demographics of Seattle's high schools, and based on that report, the district will determine whether to utilize an "economic diversity" tiebreaker in a subsequent year.<sup>300</sup> While the Seattle school district clearly still prioritizes the goal of creating racially integrated schools,

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<sup>294</sup> greatschools.org available <http://www.greatschools.org/washington/seattle/high-schools/>

<sup>295</sup> Email Interview with Kathleen Brose.

<sup>296</sup> David Bowermaster and Emily Heffter, *U.S. Supreme Court to Hear Seattle's School Racial-tiebreaker Case*, The Seattle Times, December 3, 2006.

<sup>297</sup> Riya Bhattacharjee, *Garfield High Overcrowded Under New Assignment Plan*, thestranger.com, September 20, 2010.

<sup>298</sup> Vanessa Ho, *Maria Goodloe-Johnson Timeline*, Seattle Post Intelligencer, March 1, 2011.

<sup>299</sup> *Seattle's Ousted Schools Superintendent Apologizes for Financial Scandal*, The Seattle Times, March 8, 2011.

<sup>300</sup> *Supra* note 290.

while still remaining subject to the Court’s ruling in *Parents Involved*, the use of economic status in school assignments may prove as problematic as the racial tiebreaker.

### *Economic Status in School Assignments and the Dismantling of School Integration Plans*

Since the Supreme Court’s ruling in *Parents Involved*, advocates of school integration and school districts have experimented with utilizing socioeconomic status in school assignment procedures. Richard D. Kahlenberg of the Century Foundation advocates for socioeconomic integration, argues that socioeconomic integration is a favored approach to increasing achievement for low-income students.<sup>301</sup> Socioeconomic status is a primary indicator of academic achievement, and has been used by school districts, like Chicago, to meet federal desegregation decrees.<sup>302</sup> Chicago, as well as Pittsburgh and Champaign, Illinois all once used race as a factor in student assignment policies, but switched to socioeconomic status after the end of their federal desegregation decrees and the Court’s ruling in *Parents Involved*.<sup>303</sup>

However, the use of economic status in school assignments will likely be tested in courts as a race based factor. A case against the Eden Prairie, Minnesota school district is currently developing, alleging that proposed reconfigurations of school boundaries, made with socioeconomic data in mind, is a race based decision for school assignments.<sup>304</sup> The Eden Prairie school district used maps and socioeconomic data (with some documents also listing racial demographics, in an effort by the district to ensure they were not increasing racial segregation) to balance school placements according to economic income levels.<sup>305</sup> “Yes for Neighborhood Schools”, a group of unidentified parents opposing the boundary changes, have retained John Munich, the attorney who successfully argued *Missouri v. Jenkins*, the 1995 Supreme Court case that dismantled Kansas City’s school desegregation plan.<sup>306</sup> The Eden Prairie school district stated the boundary changes are *not* a proxy for race,<sup>307</sup> but Munich claims the district is illegally using race as a factor in boundary changes.<sup>308</sup>

This pending lawsuit in Minnesota comes after other school districts adopted and subsequently withdrew similar assignment plans in which socioeconomic status was a factor. Wake County and Charlotte-Mecklenburg in North Carolina both utilized socioeconomic status as a consideration in student school assignments, but recently abandoned the practice.<sup>309</sup> Both school districts were subject to court ordered desegregation plans, but were granted unitary status in 1982 and 1999, respectively. The Supreme Court’s decision in *Parents Involved* forbids these

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<sup>301</sup> Mary Ann Zehr, *Socioeconomics Replacing Race in School Assignments*, Education Week, May 7, 2010.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Kelly Smith, *Eden Prairie Parents: School Lawsuit is ‘Warranted’*, StarTribune, March 11, 2011.

<sup>305</sup> *Id.* Consultants to the school district include the Center for Efficient School Operations, World Architects, and the University of Minnesota’s Institute on Race and Poverty, which is run by Myron Orfield. Myron’s brother Gary Orfield is a noted researcher of desegregation issues and used to work at Harvard with Dean Edley.

<sup>306</sup> Kelly Smith, *Eden Prairie Parents Turn Up Heat in School Battle*, StarTribune, January 25, 2011.

<sup>307</sup> Paul Groessel, *Group Says Lawsuit Against Eden Prairie Schools Would be Justified*, Eden Prairie Community News & Voices, March 16, 2011.

<sup>308</sup> *Supra* note 304.

<sup>309</sup> *Supra* note 301.

school districts from using race as a factor in school assignment plans, even with the goal of preventing resegregation, because they were granted unitary status.

Wake County adopted a socioeconomic status plan in 2000, which was cited in amicus briefs for the respondent school districts in *Parents Involved*. The briefs specifically referenced Wake County's socioeconomic status plan as a poor example of a "race neutral" assignment plan, citing that racial diversity is a coincidental byproduct of Wake County's plan, and the results in Wake County can not be considered necessarily replicable nor generalized as a "success".<sup>310</sup> In March 2010, the all-white Wake County school board, backed by Tea Party conservatives, voted to end race and socioeconomic status as significant factors in school assignments,<sup>311</sup> moving for students to instead attend neighborhood schools. North Carolina NAACP President Reverend William Barber was one of four demonstrators arrested at the school board vote, and considers the school board's decision part of a resegregation scheme.<sup>312</sup> Dr. Del Burns, Superintendent of the Wake County Public Schools, offered his resignation effective in June 2010 stating that he could not in good conscience be the administrator to end socioeconomic diversity in the school system.<sup>313</sup> Wake County's attempts to maintain school assignment policies that promote integration have been thwarted by public sentiment and the Supreme Court's ruling in *Parents Involved*.

As previously discussed, Charlotte-Mecklenburg school district was ordered to desegregate in 1969, and the Supreme Court upheld this decision in 1971. Charlotte-Mecklenburg schools implemented desegregation policies until an angry white parent sued the district in 1997, alleging that his daughter was denied enrollment at a magnet school that put aside enrollment spaces for minority students.<sup>314</sup> The landmark desegregation case, *Swann v. Charlotte-Mecklenburg*, was overturned and the district was ordered to operate without regard to desegregation by the 2002-03 school year. The district created a new student assignment plan that was race neutral, implemented in 2002.<sup>315</sup> The assignment plan was based on income and choice, but Professor Roslyn Mickelson of the University of North Carolina at Charlotte contends, "the schools became markedly more segregated" under the race neutral plan.<sup>316</sup> The district stopped using socioeconomic status in school assignments in the 2006-07 school year, and now only uses magnet programs to attract a "diverse group of students" to its schools.<sup>317</sup> Of the district's seven "learning communities" (organized into geographic regions), three have white

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<sup>310</sup> Brief of Amicus Curiae Walt Sherlin in Support of Respondents. October 10, 2006.

<sup>311</sup> David Zucchino, *North Carolina County Schools Reverse Busing Law*, Los Angeles Times, March 25, 2010.

<sup>312</sup> Kosta Harlan, *Struggle to Stop Resegregation of Wake County Schools Hears Up as Four Civil Rights Activists are Arrested in NC*, FightBack News, June 16, 2010.

<sup>313</sup> *Sad News for Desegregation and Wake Co. Public Schools*, The Daily Kos, February 19, 2010.

<sup>314</sup> Leigh Pressley, *Insiders' Guide to Charlotte*, 251, January 1, 2005.

<sup>315</sup> *Magnet Schools In Charlotte-Mecklenburg Schools*, available <http://www.cms.k12.nc.us/boe/ComprehensiveReview/Magnet%20Programs/Magnet%20Schools%20in%20CMS%20-%20Brief%20History.pdf>

<sup>316</sup> Johnathan Glater and Alan Finder, *Diversity Plans Based on Income Leave Some Schools Segregated*, The New York Times, July 15, 2007.

<sup>317</sup> Zehr, *supra* note 301.

student enrollment under 25%,<sup>318</sup> and two learning communities have white enrollment above 50%<sup>319</sup> The Supreme Court's decision in *Parents Involved* prohibiting race conscious school assignments has exasperated efforts to desegregate in Charlotte-Mecklenburg. However, other school districts have creatively sought to develop integration plans that operate within the restrictions of *Parents Involved*.

#### *Models for School Integration Plans after Parents Involved*

Justice Kennedy's concurring opinion in *Parents Involved* states that school boards may consider the racial makeup of schools and adopt policies that encourage diversity, although he is clear in asserting that race is just one factor of diversity.<sup>320</sup> Kennedy's suggestions include "strategic sit selection of new schools; drawing attendance ones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollment, performance, and other statistics by race. Kennedy claims these methods are race conscious without telling students they are "defined by race."<sup>321</sup> Some school districts have instituted school assignment plans that are in accordance with Justice Kennedy's suggestions, including Berkeley, Cambridge, and Lower Merion.

Berkeley United School District's student integration plan may be an example of a successful integration plan that has withstood legal scrutiny. The Pacific Legal Foundation challenged the district's integration plan three times in four years, alleging the plan was a violation of Prop 209, an ostensible reproduction of the case the foundation helped PIICS bring against the Seattle school district in Washington District Court.<sup>322</sup> Berkeley voluntarily integrated its schools in 1968, with the primary goal to racially integrate.<sup>323</sup> The current student assignment plans takes into account parent education level, parent income level, and race and ethnicity.<sup>324</sup> The district utilizes a composite diversity map that utilizes these three "diversity factors", and student assignments are then based not on the personal attributes of students but rather on the diversity characteristics of the area in which the student lives.<sup>325</sup> Berkeley's integration plan will likely serve as an important model for voluntary integration plans after the Supreme Court's decision in *Parents Involved*, Ward Connerly's campaign to dismantle state sponsored affirmative action programs, and public sentiment shifting toward colorblindness and preference for neighborhood schools.<sup>326</sup>

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<sup>318</sup> Achievement Zone Learning Community: 6.6% white, West Learning Community 21.7% white, Northeast Learning Community 13.2% white. Available:

<http://apps.cms.k12.nc.us/departments/instrAccountability/schlProfile05/profiles.asp>

<sup>319</sup> North Learning Community 53.3% white, South Learning Community 56.6% white. Available:

<http://apps.cms.k12.nc.us/departments/instrAccountability/schlProfile05/profiles.asp>

<sup>320</sup> *Parents Involved in Community Schools VI*, 551 U.S. 788.

<sup>321</sup> *Id.* at 789.

<sup>322</sup> Tess Townsend, *Court Approves Berkeley Unified School District's Integration Plan*, The Daily California, May 12, 2011.

<sup>323</sup> Berkeley Unified School District School Assignment Plan/Policy, available

<http://www.berkeley.net/index.php?page=student-assignment-plan>.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> Lisa Chavez, Erica Frankenberg, *Integration Defended: Berkeley Unified's Strategy to Maintain School Diversity*, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity at the University of California, Berkeley Law School, September 2009.



Cambridge public schools used a race-based integration plan until 2001, but now uses a controlled choice plan focused on family socioeconomic status.<sup>327</sup> The Cambridge plan is designed to ensure that all schools are within 10 percent of the district's overall socioeconomic composition, but allows for sibling preference.<sup>328</sup> The current white population in Cambridge school district is 36.4%, and 45.5% of students are low-income.<sup>329</sup> Of the thirteen schools included in the 2009-10 student data report, one school enrolled over 50.2% white students, and three schools enrolled over 50% low-income students.<sup>330</sup> Cambridge's use of family socioeconomic status may be a useful example for other school districts, and could perhaps act as a legal integration model in suits challenging the use of socioeconomic status, like the pending suit in Eden Prairie, Minnesota.

The Lower Merion School District is an example of successful implementation of one of Justice Kennedy's suggested race neutral options. The Eastern District of Pennsylvania upheld a redistricting plan in June 2010 against a challenge that the school district improperly considered racial demographics.<sup>331</sup> The Lower Merion School District adopted a plan that redistricted neighborhoods, specifically targeting a particular neighborhood with a high concentration of African American students.<sup>332</sup> The District court upheld the plan finding that the redistricting plan aimed to address valid educational interests, "(a) equalizing the populations at the two high schools, (b) minimizing travel time and transportation costs, (c) fostering education continuity, and (d) fostering walkability."<sup>333</sup> Utilizing the reasoning from both *Parents Involved* and *Grutter*, the District court determined that the school district's use of race as one of several factors to meet their race-neutral goals.<sup>334</sup> While the District court's reasoning upheld the redistricting plan, like *Parents Involved* and *Grutter*, promotes the idea that race may only be used as one of many factors in creating school assignment plans, thus ignoring the important and necessary discourse around persistent social conditions, and the need for race conscious remedies. Kennedy's suggested plans from *Parents Involved* may have given school districts a way to enact school assignment plans in a race neutral manner, but this contributes to the rhetoric of colorblindness, by dismissing explicit discussions about and considerations of race in the context of public education.

### ***After Parents Involved***

It has been a decade since the initiation of *Parents Involved*, and June will mark four years since the Supreme Court's decision. During these years, Kathleen Brose's daughter Elizabeth has graduated from both high school and college. Her younger daughter attended Ingraham school

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<sup>327</sup> Erica Frankenberg, *Voluntary Integration After Parents Involved: What does research tell us about available options?*, Charles Hamilton Houston Institute for Race & Justice at Harvard Law School, December 2007, 11.

<sup>328</sup> *Id.*

<sup>329</sup> Cambridge Public Schools Student Data Report 2009-2010, available [http://www2.cpsd.us/media/network/7752/media/SDR\\_%202009-10.pdf?rev=0](http://www2.cpsd.us/media/network/7752/media/SDR_%202009-10.pdf?rev=0)

<sup>330</sup> *Id.*

<sup>331</sup> *Doe v. Lower Merion School District*, 2010 U.S. Dist. LEXIS 62797 (E.D. Pa. June 24, 2010).

<sup>332</sup> *Id.* at \*6.

<sup>333</sup> *Id.* at \*36.

<sup>334</sup> *Id.* at \*49-50.

for two years, but then transferred to Ballard.<sup>335</sup> Kathleen asserts that Seattle schools are better off without the racial tiebreaker. She states, “Without the use of the racial tie-breaker, Seattle's schools are becoming more diverse all of the time. We are a port city and new immigrants are changing our racial make-up.”<sup>336</sup> Kathleen’s assertion seems inaccurate based on the school data report previously cited and discussed, but her statement may be an accurate depiction of public perception of school diversity in Seattle. The adoption of I-200 in Washington, coupled with the Supreme Court’s decision in *Parents Involved*, will likely serve as a means to instill and inculcate the rhetoric of colorblindness in both public attitudes and beliefs. The Supreme Court is a powerful body for directing and restricting school districts and educating citizens about what constitutes a “compelling government interest” regarding public education and the use of race. Regrettably, the Court’s decision in *Parents Involved* detracts from prior school desegregation precedent, in which a color conscious Constitution and Fourteenth Amendment were recognized and respected.

Perhaps the real issue for the members of PIICS was really about the illusion of “choice.” The school choice plan may have given parents the sense that their child was entitled to attend one of the schools they ranked, regardless of whether their student’s assignment to a particular school would result in a replication of city-wide housing segregation, or high concentrations of certain racial groups within schools. If the school district had not allowed parents to rank schools of their choosing, and instead had instituted a simple lottery, the racial tiebreaker may not have been as controversial as it was when Kathleen and Elizabeth Brose were applying for high schools in 1999.

Kathleen Brose continues to keep PIICS alive, funding their website with her own dollars and acting as a resource for parents across the country who want to follow her example in filing suit against their school districts.<sup>337</sup> Harry Korrel of Davis Wright Tremaine lead a highly publicized dispute for attorney’s fees after the Supreme Court’s decision, requesting \$2 million dollars for fees in the case which his firm took on pro bono.<sup>338</sup> Federal law does give prevailing attorneys the right to collect fees from the losing party, but District Court Judge Rothstein wanted to consider whether Korrell’s \$2 million request was appropriate in this case.<sup>339</sup> There is debate in the legal community regarding whether it is ethical to collect fees from pro bono cases,<sup>340</sup> but Korrell stated, “This stuff is expensive.”<sup>341</sup> Kathleen Brose agreed with Korrell, that collecting attorney’s fees is appropriate; “We settled with the SSD [Seattle school district] and the law firm recovered its costs and some of the fees. I was very comfortable with this and took a great deal of heat for it. There are repercussions to your actions. What the District did was wrong. If we don't hold people accountable for their actions, this includes the Seattle School District, what exactly are we teaching our children in school?” Perhaps Korrell and Brose are correct, and the law firm of Davis Wright Tremaine does deserve to collect \$2 million dollars

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<sup>335</sup> Email Interview with Kathleen Brose.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> Linda Shaw, *Firm’s Right to Collect Attorneys Fees in Limbo*, The Seattle Times, January 14, 2009.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> Marcia Oddi, *Lawyer in Kentucky Schools Case Seeks Fees*, Indiana Law Blog, July 29, 2007.

from a public school district. Regardless, the clear losers in the case of *Parents Involved* are the Seattle Public School district, and its students.

The story of *Parents Involved* demonstrates how the Court and American public have adopted of the mentality of colorblindness, accepted anti-affirmative action laws, and utilized these ideals in recent antidiscrimination law. And so the story of *Parents Involved* ends with the dismantling of Seattle's voluntary integration plan, and restrictions nationwide on what school districts may legally do in order to promote racially integrated school environments for students. Perhaps the most important lesson from the story of *Parents Involved* is that race conscious discussions must be veiled in terms of diversity, thus adhering to the values of colorblindness, and the Court's notion of diversity, thereby dismissing explicit discourse about persistent racial inequalities, specifically within our public schools.