Getting *Parents Involved* in Racially Integrated Schools

Cara Sandberg

Follow this and additional works at: https://digitalcommons.law.byu.edu/elj

Part of the Civil Rights and Discrimination Commons, and the Education Law Commons

Recommended Citation


Available at: https://digitalcommons.law.byu.edu/elj/vol2012/iss2/8
GETTING PARENTS INVOLVED IN RACIALLY INTEGRATED SCHOOLS

INTRODUCTION

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”1

In 2007, the United States Supreme Court decided Parents Involved in Community Schools v. Seattle School District, a case that considered the constitutionality of school assignment policies that voluntarily considered the race of students. The Court held that voluntary race-conscious school assignments in school districts like Seattle, which were never subjected to a court-ordered desegregation mandate, violated the Equal Protection Clause of the Fourteenth Amendment.2

Part I of this comment proposes that the Supreme Court’s plurality decision in Parents Involved—the most recent in a series of school integration and civil rights decisions—promotes the theory of colorblindness, and rejects voluntary adoption of race-conscious remedies to promote racial integration in public schools. In its holding, the plurality reads the Equal Protection Clause as though it is part of a colorblind Constitution. This part of the comment suggests that colorblindness has emerged as the Court’s preferred legal doctrine for accessing equal protection claims in the education context by analyzing the purpose of the Fourteenth Amendment, landmark desegregation cases, and the evolution of the theory of colorblindness.

The Court’s decision in Parents Involved prevents Seattle Public Schools from using race-conscious school assignments policies, and was determined without ample consideration of the history of segregation and institutional racism in Seattle. Part II of this comment suggests that the circumstances and history from which Seattle’s school assignment plan evolved are especially useful in understanding the adoption of

2. Id. at 711.
colorblindness into public sentiment and as a type of political rhetoric.

In Part III, Chief Justice Roberts’s plurality and Justices Thomas and Kennedy’s concurring opinions in Parents Involved are analyzed through the framework of colorblindness, with particular attention to how their opinions have not only embraced, but promoted colorblindness in considering voluntary school integration efforts. Conversely, the anti-subordination principles asserted and lauded by Justice Breyer’s dissenting opinion are examined as examples of alternative frameworks through which to assess voluntary integration and race-conscious school assignment plans.

In Part IV, this comment proposes a three-part method through which Seattle, and similarly situated public school districts, may seek to institute race-conscious school assignment policies. This portion of the comment further analyzes and interprets Justice Kennedy’s concurring opinion in Parents Involved to suggest school districts must first exhaust all race-neutral and generally race-conscious assignment policies before implementing race-conscious policies that classify and assign students to schools on the basis of race. This comment further suggests that the implementation of race-conscious assignment policies could challenge the Court’s utilization of colorblindness in determining the constitutionality of secondary school assignments.

I. THE EVOLUTION OF THE SUPREME COURT’S ADOPTION OF COLORBLIND CONSTITUTIONALISM IN SCHOOL INTEGRATION CASES

Parents Involved is the most recent school integration case considered by the Supreme Court. In Brown and subsequent school integration cases, the Court utilized anti-subordination principles and a color conscious reading of the Fourteenth Amendment. A common thread in these cases was the Court’s recognition of the impact of historical circumstances and persistent social realities of discrimination and segregation on efforts to integrate public schools. However, the Court abandoned this framework in Parents Involved and instead applied a colorblind reading of the Constitution and Fourteenth Amendment. Colorblindness is an “anticlassification principle, premised on the belief that the Constitution protects
individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing.” Part I of this comment argues that the Court’s holding in Parents Involved is a departure from the intended application of the Fourteenth Amendment and can best be understood 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.

A. Colorblind Constitutionalism

Colorblind Constitutionalism is neither contextual nor historical; it dismisses 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. Advocates of colorblindness believe individuals should be treated without regard to their race, and insist the government should never make race-based decisions. Colorblind rhetoric is ahistorical. 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, prioritizing individualism over the “substantive claims of historically oppressed groups.”

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. Similarly, anti-classification principles assert that equality means a

---


10. See López, supra note 8, at 1038.
commitment to protect individuals rather than groups from all forms of racial classification, even benign classifications. Contrary to the pronouncements of colorblind proponents, the Constitution and the Fourteenth Amendment are race conscious documents.

When the Constitution was ratified, the institution of slavery, meaning the enslavement of Africans by Europeans and Americans, was a cornerstone of American society and economics. Slavery was a racialized institution with Whites as free masters who owned African slaves as property. Thus the terms “master” and “slave” carried with them racial meaning. Consciousness of race is evident in the first three words of the Constitution, “We the people.” This phrase refers to “the whole Number of free persons,” where “free” denotes the exclusion of African slaves. As Professor Paul Finkelman asserts: “The Constitution of 1787 was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans.” The institution of slavery was protected in the Constitution through the Three-Fifths Clause, the prohibitory clause against ending the African slave trade before 1808, and the Fugitive Slave Clause. Additional clauses of the Constitution indirectly guarded slavery, making the Constitution a proslavery and race-conscious document.

11. Siegel, supra note 3, at 1288.
13. See Kathryn T. Gines, Race Thinking and Racism in Hannah Arendt’s The Origins of Totalitarianism, in HANNAH ARENDT AND THE USES OF HISTORY: IMPERIALISM, NATION, RACE, AND GENOCIDE 38, 46 (Richard H. King & Dan Stone eds., 2007) (“When we look at the specific case of slavery in the United States, we find a system in which black people were born slaves and white people were born free.”).
17. U.S. CONST. art. I, § 2, cl. 3.
19. U.S. CONST. art. IV, § 2, cl. 3.
20. U.S. CONST. art. I, § 8, cl. 4 (allowing Congress to prohibit the naturalization
The Fourteenth Amendment is not colorblind; it was enacted specifically to protect "against discrimination because of race or color." During the Reconstruction Era, many Southern states passed Black Codes, which limited the rights of Blacks to own property and permitted imprisonment for unemployment. The Thirty-ninth Congress responded by passing the Reconstruction Acts and the Civil Rights Acts, as well as establishing the Freedmen’s Bureau to support former slaves by providing food, hospitals, land, and education. President Johnson vetoed the bill to create the Freedmen’s Bureau, objecting to the special benefits to Blacks. However, the Thirty-ninth Congress overrode Johnson’s veto, rejecting his concerns about the race-conscious remedy of special benefits. The Thirty-ninth Congress, which established the Freedmen’s Bureau and embraced providing special relief for

of non-whites; U.S. CONST. art. 3, § 2, cl. 1 (diversity of jurisdiction limiting the right to sue in federal courts to “citizens,” thus excluding slaves and free Blacks); U.S. CONST. art. 4, § 1 (requiring each state to grant legal recognition to the laws of other states including laws protecting slavery); Juan F. Perea, The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought, 85 CALIF. L. REV. 1213, 1252 (1997) (“The fact that the text of the Constitution protects slavery in so many places demonstrates the importance of slavery in the foundation of the country.”); Earl M. Maltz, The Idea of the Proslavery Constitution, 17 J. EARLY REPUBLIC 37, 37 (1997) (“In recent years, the idea that the Constitution of 1787 should be viewed as proslavery has gained increased currency in academic literature.... While some significant dissenters remain, this thesis has clearly become an important theme in assessments of the role of slavery in American constitutional development.”).


22. Strauder v. West Virginia, 100 U.S. 303, 310 (1879); see also Christopher W. Schmidt, Listening to History: Parents Involved, Brown, and the Colorblind Constitution, THE LEGAL WORKSHOP (Apr. 30, 2009), http://legalworkshop.org/2009/04/30/listening-to-history-parents-involved-brown-and-the-colorblind-constitution/print/ (“The anticlassification principle that constitutes the heart of colorblind constitutionalism has little basis in the original meaning of the Fourteenth Amendment.”).


25. 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, 39th Cong., 1st Sess. 544 (1866) (remarks of Rep. Taylor)).

26. See id.
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. The Equal Protection Clause of the Fourteenth Amendment was enacted to protect newly freed former slaves. The Fourteenth Amendment extended the privileges of citizenship to Blacks, and in doing so, provided a race-conscious remedy to the institution of slavery.

Upon its ratification, the Fourteenth Amendment was 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. The Equal Protection Clause does not require that minorities and non-minorities be treated the same whenremedying distinct disadvantages. The Court recognized this fundamental element of the Fourteenth Amendment in the Civil Rights Era school desegregation cases.

28. See id. at 271 (noting that "[t]hose who read the Equal Protection Clause as rendering all race-based state action presumptively unconstitutional rely primarily on the specific historical events that precipitated its addition to the Constitution."). See also Schmidt, supra note 22 ("The legislators who in 1866 drafted the Amendment also passed distinctly color-conscious legislation designed to help the newly freed slaves.").
30. 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: "[T]he 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).
31. Maltz, supra note 20, at 166. "All of the civil rights enactments and court decisions deemed major in this area have sought to redress harms to Blacks."
32. Powell, supra note 7, at 379.
B. Early Civil-rights Era Desegregation Cases Recognized the Anti-Subordination Principles of the Fourteenth Amendment

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 school integration and civil rights cases have been based. The decision in Brown conveys anti-subordination principles, declaring that the states may not engage in practices that enforce the inferior social status of historically oppressed peoples. The court cited social realities of discrimination and segregation, stating: "To separate them [Black students]... solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The court's decision in Brown embraced an anti-subordination perspective that treats race as a socially and legally produced "hierarchical system structurally embedded in U.S. society."38

Professor Christopher Schmidt asserts: "The Brown decision actually reflected a conscious effort by the Justices to not accept the general principle of colorblind constitutionalism."39 In Brown and subsequent school integration cases, the Supreme Court utilized anti-subordination principles, taking into account social realities and the effects of segregation in determining school desegregation cases. Additionally, the Court recognized the power of school districts to implement color-conscious

35. See Brown I, 347 U.S. at 483, 494-95.
36. Siegel, supra note 1, at 1472-73. (The question presented in Brown v. Bd. of Educ. 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?" 347 U.S. 483, 493 (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 J. Am. Hist. 92 (2004).
39. Schmidt, supra note 22 (emphasis added).
40. See Siegel, supra note 4, at 1411.
integration plans.41

In 1968, *Green v. County School Board* defined the standards by which integration efforts were deemed sufficient.42 The court determined that the New Kent County School District remained a racially segregated “dual system” fourteen years after *Brown*.43 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.44 The district’s “freedom-of-choice” plan required Black families to petition for admittance to attend white schools.45 Blacks who dared to petition for admittance to white schools were threatened with the prospect of physical violence and economic sanctions from whites who opposed integration.46 The “freedom-of-choice” plan proved ineffective to promote integration: three years after the adoption of the plan, not a single white child chose to attend the historically Black Watkins school, and 86% of Black children continued to attend Watkins.47 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.”48

Dr. Green asserted that President Eisenhower’s famous remarks about all deliberate speed “meant take it slow and not upset the country . . . put brakes on all four wheels of *Brown*.”49 Justice Brennan’s opinion in *Green* seems to

43. Id. at 441.
44. Id. at 312. 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. Id.
46. Id.
47. Green, 391 U.S. at 441.
48. Id. at 439 (emphasis added).
recognize the impact "all deliberate speed" 50 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. 51 Perhaps most importantly, the court considered social realities of New Kent County and the South more broadly: the New Kent County district delayed its first step towards integration for eleven years after Brown. 52 Poverty deterred Black families from choosing formerly all-white schools, and Black families were threatened with violence and subject to harassment as a consequence of enrolling in white schools. 58 The Court’s decision in Green utilized an anti-subordination framework in recognizing continuing subordination and inequality for racial minorities in both American society and public schools.

Post-Brown school integration cases also enunciated the power of local school districts to enact integration plans. The Supreme 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." 54 In Swann, the Court considered the integration plan for Charlotte-Mecklenburg public schools and the duty of school boards to eliminate segregated public schools. 55 The integration plan at issue in Swann included rezoning school attendance lines, grouping white schools with Black schools, and busing students to create racially integrated schools. 56 Chief Justice Burger’s opinion stated the objective

50. Green 391 U.S. at 436.
51. See id. at 439. Brown prohibited state-mandated segregation, but the court refused to address the issues of appropriate remedy in Brown v. Board of Education II, and instead relegated this task to lower courts to proceed "with all deliberate speed." Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955).
52. Green, 391 U.S. at 438 ("In determining whether respondent School Board met that command by adopting its ‘freedom-of-choice’ plan, it is relevant that this first step did not come until some 11 years after Brown I was decided and 10 years after Brown II directed the making of a ‘prompt and reasonable start.’").
53. Id. at 441 n.c-d.
56. Id. at 10 ("The Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school, by
remains to eliminate from the public schools all vestiges of state-imposed segregation and reiterated the Court's holding in Green "that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" The Court upheld the integration plan, and reaffirmed the Court's previous pronouncement that school authorities are best equipped to determine and carry out integration policies:

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; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

It is noteworthy that the Court distinguished between the powers of local school districts and federal courts. Federal courts would only have the authority to "fashion a remedy that will assure a unitary school system" to remedy a proven Constitutional violation. In contrast, Chief Justice Burger's opinion stated that school authorities may choose to enact educational policies that result in schools reflective of the racial demographics of the school district as a whole. Such educational policies would, like the integration plan in Swann, be color conscious plans. This deference to local districts to implement race conscious school assignment plans was acknowledged in post-Brown elementary and secondary desegregation cases, but was challenged in the 1970s.

transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black schools.

57. Id. at 15.
58. Id. at 16.
59. Id.
C. The Court Abandoned Color-Conscious Measures and Adopted Colorblindness Amid Civil Rights Backlash

Throughout the 1960s federal and U.S. Supreme Court decisions upheld the right of state and local governments to implement race-conscious measures to remedy de facto segregation in public elementary and secondary schools. Professor Reva Siegel describes this framework: “Courts, in other words, understood equal protection as a race-asymmetric constraint on governmental action; they understood that the purpose of equal protection doctrine was to prevent the state from inflicting certain forms of status harm on minorities.” It was not until the 1970s that race-conscious assignment policies and voluntary desegregation initiatives were challenged as “invidious discrimination.”

By the late 1960s and early 1970s, America was amid an intense Civil Rights backlash. This anti-civil rights sentiment was pronounced through Presidential candidate Richard Nixon’s “Southern Strategy” and the increased incidents of violence and overt racism against Blacks and Civil Rights activists. In 1968, Nixon ran his presidential 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. Nixon’s campaign opposed welfare, busing, quotas and affirmative action. Upon taking office, Nixon appointed four Supreme Court Justices to uphold these ideals: Justices Burger,

61. Siegel, supra note 4, at 1514.
62. Id.
65. Nixon’s “Southern Strategy” focused on winning southern votes by inhibiting desegregation, creating educational alternatives to integrated schools, and appointing conservatives to the federal bench. See Frank Brown, Nixon’s “Southern Strategy” and Forces Against Brown, 73 J. OP NEGRO EDUC. 191 (2004).
66. Siegel, supra note 4, at 1522.
67. Id. at 1522-23.
Rehnquist, Powell, and Blackmun.68 By the 1970s, the Supreme Court had changed considerably and the pro-civil rights Warren court was dismantled.69 This transition is particularly notable in the Supreme Court’s 1978 decision in Regents of the University of California v. Bakke,70 which departed from considerations of anti-subordination, and instead adopted the concept of anti-classification and the reasoning of colorblindness.

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.71 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.”72 The Supreme Court considered the validity of the special admissions program under the Equal Protection Clause of the Fourteenth Amendment.73 The Court’s adoption of colorblindness begins with Bakke and is most recently manifested in Parents Involved.

There was no majority opinion in Bakke, but Justice Powell’s opinion announced the judgment of the Court.74 Justice Powell’s opinion promoted the anti-classification principles of colorblindness, which are intolerant of any use of racial classification; he concluded: “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”75 Powell argued race based classifications demand strict scrutiny, which would require the state to demonstrate a compelling interest for implementing affirmative action policies like the University of California’s admission policy.76 Citing the school desegregation cases following Brown, Powell stated the state has a legitimate

68. Id. at 1523.
69. For example, Justice Rehnquist’s firmly held anti-civil rights opinions dated at least as far back as his days clerking for Justice Robert Jackson during Brown. See Memorandum from William Rehnquist, Law Clerk, Justice Robert Jackson, entitled “A Random Thought on the Segregation Cases” (1952). Rehnquist stated: “I realize 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.”
71. Id.
72. Id. at 277-78.
73. Id. at 281.
74. Id. at 269.
75. Id. at 291; Siegel, supra note 3, at 1288.
76. Bakke, 438 U.S. at 291.
interest in eliminating the effects of discrimination but differentiated the admissions policy of the University of California from the school desegregation cases.\textsuperscript{77} He stated the University policy sought to remedy “the effects of ‘societal discrimination’” in contrast to the school desegregation cases in which “the States were required by court order to redress the wrongs worked by specific instances of racial discrimination.”\textsuperscript{78} Powell defined the University affirmative action program as “a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations,” and he concluded the University had not demonstrated a compelling interest “for inflicting such harm.”\textsuperscript{79} Powell did note a compelling interest for an institution of higher education to attain “a diverse student body” but specified “ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal.”\textsuperscript{80} Powell concluded the University of California’s special admissions program, which “focused solely on ethnic diversity” did not further the compelling state interest in achieving “genuine diversity.”\textsuperscript{81}

Conversely, the opinion of Justices Brennan, White, Marshall, and Blackmun, dissenting in part, argued that the school desegregation cases held “school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism” and that the elimination of discrimination “was recognized as a compelling social goal justifying the overt use of race.”\textsuperscript{82} The dissenting opinion argued that “race-conscious remedies have been approved” without a “judicial finding of discrimination” and that such a requirement would “severely undermine efforts to achieve

\textsuperscript{77} Id. at 307.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 307-09.
\textsuperscript{80} Id. at 312-14.
\textsuperscript{81} Id. at 314-15.
\textsuperscript{82} Id. at 363.
voluntary compliance with the requirements of law.”

However, Powell’s opinion as the Court’s de facto ruling concluded that the government’s use of racial classifications must meet strict scrutiny and may not be voluntarily adopted to remedy societal discrimination, thereby promoting the rhetoric of colorblindness.

Powell further promoted colorblindness through the concept of “ethnic fungibility”: The idea that each person “bears an ‘ethnicity’ with an equivalent legal significance and with an identical claim to protection.” He 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.” By asserting this narrative, Powell portrayed the experience of racial minorities in American as indistinguishable from that of other racial groups, including whites. Powell stated: “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” Powell diminished the significant role of race in the ratification of the Fourteenth Amendment, in prior Civil Rights cases, and in contemporary American society, thereby promoting the notion of a “color blind” Constitution. The introduction of ethnic fungibility allowed Powell to depict whites as a victimized group suffering as the result of the University’s affirmative action program.

In contrast, Justice Marshall’s dissent detailed the history in which Africans were brought to America, enslaved, and
denied human rights. He continued by describing the compromises and ratification of the Constitution, which protected the institution of slavery and denied equal rights to Blacks; the oppression of Black Americans through the antebellum, Reconstruction, and Jim Crow Eras; and concluded by noting the “still disfavored position” of Blacks in America. Justice Marshall stated: “Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.” Marshall's historical account—coupled with a recognition of persistent social conditions—exemplified an anti-subordination perspective, “a distinctly color-conscious interpretation of the equal protection requirement” that asserts “it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.” Powell's opinion adopted the opposite, anti-classification perspective, which is “premised on the belief that the Constitution protects individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing.” Thus, Powell'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. The Court furthered Bakke's promotion of colorblindness in Grutter v. Bollinger, and it is this legal precedent from which Parents Involved developed.

D. Grutter and the Compelling Government Interest of Diversity

In 2003, Justice O'Connor’s majority opinion in Grutter v.
Bollinger upheld the University of Michigan Law School admissions policy, which weighed race as one of many factors in deciding admissions.98 Barbara Grutter, a white applicant, brought the case against the law school alleging that her application was rejected because the law school used race as a “predominant” factor, giving preference to applicants from certain minority groups.99 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.100

Justice O'Connor expanded upon Justice Powell's opinion in Bakke, holding “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny,’” which requires racial classifications be “narrowly tailored to further compelling governmental interests.”101 O'Connor concluded that “student body diversity” in higher education is a compelling government interest.102 Her reasoning relied on amici briefs citing the importance of diversity in the military and corporate workplaces, and emphasized the importance of preparing students for “work and citizenship.”103 However, O'Connor did not address the promotion of racial diversity in higher education as a means to address persistent racial inequalities, especially for students who come from minority groups that have been historically excluded and underrepresented in higher education and professional programs like law schools.104 The majority determined that 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.”105 She stressed that the law school diversity

99. Id. at 316.
100. Id. at 317.
101. Id. at 326.
102. Id. at 328.
103. Id. at 331.
104. 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.”).
105. Grutter, 539 U.S. at 337.
admissions policy included "many possible bases" such as 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." 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.

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." As a result, historically white institutions may use diversity so some minority students are admitted, but not so many as to change the racial identity of the institution. Therefore, 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, or "what it might tell us about the need for affirmative action." 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."

The requirements for assessing higher education diversity admissions policies enunciated in Grutter were utilized by the Court to evaluate race-conscious secondary school integration policies in Parents Involved. The Court's holding in Parents
Involved, prohibiting Seattle Public Schools from using race-conscious school assignment policies, is an extension of colorblindness into the secondary school context, and was determined without consideration of the history of segregation and institutional racism in Seattle. Rather, the Court's promotion of colorblindness as legal doctrine parallels the adoption of colorblindness in political rhetoric and popular discourse.

II. COLORBLINDNESS AS POPULAR AND POLITICAL DISCOURSE: THE CIRCUMSTANCES IN SEATTLE AND SEATTLE PUBLIC SCHOOLS

The evolution of colorblindness as political rhetoric and popular opinion is exemplified through an examination of the history of segregation in Seattle and the Seattle School Board's struggle to integrate schools. The Supreme Court's plurality opinion in Parents Involved ignores the depth of the Seattle story, and treats Seattle abstractly without focusing on the significant circumstances from which this case evolved. The events and conditions from which Parents Involved developed provide a vivid setting to understand the development of colorblindness as popular and political discourse.

A. 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.113 Frances Owen, President of the Seattle School Board in 1954 noted "our feeling at that time was 'it was not our fault that the schools were segregated.'"114 In 1957, the first year Seattle collected these data, the School Board found 5% of its 91,782 students were Black, and 81% of these Black students "were concentrated in nine of the city's 112 schools."115 These discrepancies in racial concentration


were even more obvious in the city’s high schools; six of eleven high schools enrolled five or less Black students each.\textsuperscript{116} The racial make-up of Seattle’s public schools reflected segregated housing patterns in the city.\textsuperscript{117}

Seattle is divided east to west by the Lake Washington Ship Canal, which connects Seattle’s Lake Washington to Puget Sound. In addition to providing passage to vessels, the Ship Canal also acts as a geographic boundary which some refer to 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.\textsuperscript{118} Housing discrimination in Seattle made the Ship Canal a racial dividing line.\textsuperscript{119} These housing patterns continue in Seattle today, as a majority of white residents reside “in the northern, historically more affluent end of the city,” and a majority of Black, Asian, Hispanic and Native American residents live in the southern area of the city.\textsuperscript{120}

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.\textsuperscript{121} The enforcement of restrictive covenants in Seattle, and other discriminatory acts, like realtors refusing to show houses in certain neighborhoods to people of color and redlining by banks (denying credit to minorities), confined Black residents to the central area of Seattle.\textsuperscript{122} In 1961, the Seattle

\textsuperscript{116} Judge, supra note 113.

\textsuperscript{117} Id.


\textsuperscript{122} Id.
branch of the NAACP requested the passage of an ordinance prohibiting housing discrimination, which representatives of the Seattle Real Estate Board and Seattle Apartment Operators' Association opposed. In 1962, the Mayor and City Council refused to support an anti-discrimination housing ordinance, against the recommendation of the Mayor's Citizen's Advisory Committee on Minority Housing.

In response to the City Council's inaction to ending housing discrimination, Philip L. Burton, on behalf of the Seattle branch of the NAACP, filed suit against the Seattle School Board to desegregate the district's schools. The School Board and NAACP settled out of court in 1963 because 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. Even fewer white students chose to transfer to schools south of the Ship Canal. The same year, the Seattle Human Rights Commission drafted an open housing ordinance, which the City Council declined to pass. Instead, the City Council placed the open housing ordinance on the ballot for a March 1964 vote, where the ordinance was defeated by a vote of 115,627 to 54,448.

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. Housing discrimination in Seattle continued to

123. Id.
124. Id.
126. Judge, supra note 113. See also Kohn, supra note 118, at 24 ("The voluntary measures entailed allowing or encouraging transfers between schools within the district through program placement and magnet schools.").
127. Id.; Tate, supra note 119.
128. Id.; Tate, supra note 119.
129. The Seattle Open Housing Campaign, supra note 121 (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).
130. Id.
131. Id. (Opponents of the ordinance claimed it violated their property rights as "forced housing" legislation). See also Pieroth, supra note 114, at 54.
132. Henry, supra note 125. See also Pieroth, supra note 114, at 56.
be legal until April 19, 1968, just three weeks after Martin Luther King Jr. was assassinated. An open housing ordinance was passed unanimously by the City Council, and was signed by the Mayor. 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.

B. The Seattle Plan for Desegregation

In the 1960s, Seattle's school board began enacting measures 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. While the Seattle School District was never subject to court ordered desegregation plans, lawsuits were initiated against the district. At the point of each potential suit, the district implemented desegregation plans in order to avoid litigation. In 1977, another threat of litigation by the Seattle branch of the NAACP, the American Civil Liberties Union, and the Church Council of Greater Seattle prompted the school board to adopt the Seattle Plan for desegregation. The Seattle Plan was a busing program that paired schools in minority areas of the city with schools in white areas of the city and "designated one school for grades 1-2 and the other for grades 3-5." 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.

133. The Seattle Open Housing Campaign, supra note 121.
134. Id.
135. Parents Involved I, 137 F. Supp. 2d at 1225.
136. Kohn, supra note 118, at 22.
137. Id. ("These compromises testify to both the potential strength of the case and the desire on the part of the school board for the political cover of a threatened law suit on which they could blame their actions.").
138. Id. at 25.
139. Id.
140. Tate, supra note 119.
Backlash occurred immediately after the Seattle Plan was implemented, in the form of an anti-busing initiative sponsored by the Citizens for Voluntary Integration Committee. The initiative passed with 61% of the city’s voters in 1978. During the first year of the mandatory busing plan, the percentage of white students enrolled in the District’s schools dropped by 12%. The District created gifted student programs and other option programs aimed to appeal to middle-class parents in response to this “white flight.” This solution was not entirely successful, as white students were the primary participants in the option programs, creating segregated classrooms in technically integrated schools. The United States Supreme Court declared the anti-busing initiative unconstitutional in a 1982 opinion, but support for mandatory district wide busing was limited.

C. The Controlled Choice Plan

By the late 1980s, the Seattle busing plan continued to be a source of contention and debate. At first, critics of mandatory busing were primarily white parents who wanted their children to attend schools in their homogeneous neighborhoods. However, criticism of the busing program expanded to include Black parents and white liberals who initially supported the busing plan. Critics of the busing plan were concerned that it unfairly burdened children of color, created circumstances in which some schools under-enrolled and others over-enrolled, and was too costly. 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

111. Kohn, supra note 118, at 25.
112. Tate, supra note 119.
113. Id.
114. Id. (The number of schools offering “option” programs to appeal to middle-class parents increased from 27 in 1977 to 57 in 1982).
115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. Kohn, supra note 118, at 26.
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." 152

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. 153 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. 154 Under Stanford's leadership, the Seattle School Board ended mandatory busing and voted unanimously in November 1996 for a plan to increase student enrollment in neighborhood schools. 155

D. Seattle's Tie Breaker System for High School Assignments

After the end of mandatory busing in Seattle in 1997, the district sought to encourage voluntary integration by offering programs attractive to students and parents, as a means to

---

151. Tate, supra note 119.


See also Tate, supra note 119 (A former Army general, Stanford took the position of Superintendent without any prior experience in the field of education. He was one of few superintendents without a background in education.).


(Stanford's findings included reading scores on standardized tests for low-income elementary school students, which 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).

equalize the attractiveness of the district’s ten high schools. However, there were still large discrepancies in the desirability between the schools. In the 2000-2001 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. Eighty-two percent of the district’s students selected one of the five oversubscribed schools as their first choice, and only eighteen percent picked one of the other five schools as their first choice. To combat the issue of oversubscription, the district employed a series of four tiebreakers to determine student assignments.

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. The second tiebreaker depended on the school’s racial composition. Seattle classified students as either white (comprising 41% of the district’s students) or nonwhite (59% of the district’s students, which include all other racial groups). 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. For an “integration positive” school, the district’s second tiebreaker selected students whose race served “to bring the school into balance.” The third tiebreaker concerned geographic proximity of the school to the student’s residence, admitting the closest students first. The fourth tiebreaker was a lottery to assign any remaining seats, but the lottery was virtually never used because the geographic

---

156. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1 (Parents Involved III), 426 F.3d 1162, 1169 (9th Cir. 2005).
157. Id.
158. Id.
159. Id.
160. Id.
161. Parents Involved IV, 551 U.S. at 711-712; Parents Involved III, 426 F.3d at 1169 (The sibling tiebreaker determined between 15 and 20 percent of the student assignments for 9th grade students.).
162. Parents Involved IV, 551 U.S. at 712.
163. Id.
164. Id.
165. Id.
166. Id.; Parents Involved III, 426 F.3d at 1171 (The geographic tiebreaker assigned 70-75% of ninth grade admissions.).
tiebreaker assigned nearly all of the district’s students.\textsuperscript{167}

In the 2000-2001 school year only four oversubscribed high schools—Ballard, Franklin, Roosevelt, and Nathan Hale—were integration positive, meaning the enrollment of white students in the previous school year was greater than 51\%.\textsuperscript{168} Overall, more nonwhites than whites received placement in oversubscribed integration positive schools.\textsuperscript{169} Only 307 students were affected by the racial tiebreaker;\textsuperscript{170} 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.\textsuperscript{171}

Kathleen Brose, the President of Parents Involved in Community Schools, wanted her daughter Elizabeth to attend Ballard, but she was assigned to her fourth choice school, Franklin.\textsuperscript{172} Kathleen stated, “[Elizabeth] was told basically, ‘You have 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.’”\textsuperscript{173} Kathleen felt “absolutely betrayed”\textsuperscript{174} that her child was denied admission to her first three ranked schools, and this was the catalyst behind Parents Involved.

\textit{E. Washington State's Anti-Affirmative Action Law}

That Elizabeth Brose was simply denied her first choice in schools does not seem like a plausible discrimination claim. However, her mother stated, “It’s wrong. It’s illegal. To me, it’s immoral. This is the United States. We do not discriminate.”\textsuperscript{175}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} (Absent the tiebreaker: 107 more white students were assigned to Ballard; 89 more white students were assigned to Franklin; 82 more nonwhite students were assigned to Roosevelt; and 27 more nonwhite students were assigned to Nathan Hale.).
\item \textsuperscript{170} \textit{Parents Involved IV}, 551 U.S. at 711-712.
\item \textsuperscript{171} \textit{Id.} at 733-34.
\item \textsuperscript{172} Kathleen’s Story, \textit{PARENTS INVOLVED IN COMMUNITY SCHOOLS}, http://www.piics.org/page9.html (last visited May 18, 2012).
\item \textsuperscript{173} PBS Newshour: Supreme Court Revisits Race in Public Schools (PBS television broadcast Dec. 4, 2006), available at http://www.pbs.org/newshour/bb/law/july-dec06/scotus_12-04.html.
\item \textsuperscript{174} Kathleen’s Story, supra note, 172.
\item \textsuperscript{175} PBS Newshour, supra note 173.
\end{itemize}
\end{footnotesize}
It may appear that Kathleen Brose was conflating her desire to choose which school her daughter attended 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, Ward Connerly, a Black millionaire businessman and former University of California Regent, replicated his successful efforts passing California Proposition 209 with ballot Initiative 200 (I-200), in Washington state. The text of Section 1 of Washington’s I-200 prohibits “state and local agencies from discriminating against, or granting 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.” Connerly described the text of the initiative as a way “to restore the principle of equal treatment for all by enacting [state] constitutional amendments.” Connerly denounces race-conscious policies and affirmative action programs as discriminatory: “Essentially, the Court suspended the constitutional guarantee of equal protection for some citizens, particularly whites, in the interest of compensating blacks because their civil rights had been denied for many years.” However, the concept of equality Connerly espouses is based in a reading that disregards the racialized aspects of the Constitution and Fourteenth Amendment. Connerly stated: “We translate the Constitution and other documents literally and we are guided by the words. ‘Equal’ means ‘equal.’” In his interpretation of the Constitution and other documents, like the Declaration of Independence and the Pledge of Allegiance, Connerly dismisses the race-conscious purpose of the Equal Protection clause of the Fourteenth Amendment, and

---

179. Id. at 108 (Connerly used the same basic language of I-200 in ballot initiatives in Arizona, Colorado, Nebraska, California, and Michigan.).
181. See Connerly, supra note 176; see also Connerly, supra note 178.
instead employs a literal, ahistorical interpretation.

Connerly’s primary goal is for American society to “get beyond race”\(^{182}\) and he promotes colorblindness through policies and ballot initiatives like I-200 that prohibit the state from classifying individuals on the basis of race, arguing: “We must end the existing system of preferences that differentiates the American people on the basis of race, ethnicity, and gender.”\(^{183}\) Connerly’s non-profit organization, the American Civil Rights Institute (ACRI), contributed hundreds of thousands of dollars to the I-200 campaign.\(^{184}\) In 1996, 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.’”\(^{185}\) Connerly and ACRI’s efforts prevailed in Washington State when voters approved I-200 in November 1998 by a vote of 58%-42%.\(^{186}\) Connerly’s organization and funding of I-200 are notable examples of a political activist promoting anti-classification principles and portraying the use of race-conscious policies as morally and legally wrong,\(^{187}\) thereby expanding colorblindness from a legal doctrine and political view into a form of political discourse.

Kathleen Brose did not vote in favor of I-200.\(^{188}\) Brose

---

182. Connerly, supra note 180, at 71.
183. Connerly, supra note 176.
184. David Postman, *I-200 Foes Leading Battle of the Checkbook*, SEATTLE TIMES, Oct. 11, 1998, at A1, available at http://community.seattletimes.nwsource.com/archive/?date=19981011&slug=2777631 (Connerly’sACRI contributed over $80,000 for “educational” television commercials and $128,000 for radio commercials. ACRI was bound by IRS regulations for charitable groups, which forbid advocating a position on the ballot measure, but Connerly’s American Civil Rights Coalition was not bound by these regulations and his American Civil Rights Coalition also contributed $181,000.).
185. *About the American Civil Rights Institute*, AM. CIV. RTS. INST., http://www.acri.org/about.html (last visited May 18, 2012) (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 action measures following the passage of Prop 209 in California.).
187. Ward Connerly, *It’s Time to End Race-Based “Affirmative Action”,* 1 U. ST. THOMAS J.L. & PUB. POL’Y 56, 60 (2007) (“Treating Americans differently because of their ‘race’ or their skin color was determined to be morally and legally wrong in the first half of the twentieth century.”).
188. E-mail from Kathleen Brose (Mar. 7, 2011) (on file with author).
subscribed to the anti-I-200 "hype about how it would discriminate against people." Reflecting on her vote in 1998, Brose described herself as "an uninformed, politically naïve voter biased by political correctness. I was rationally ignorant." Today, Brose believes that the adoption of I-200 has "made it more fair for everyone, not just [her] children." Brose's statements incorporate the rationales of colorblindness and the objectives of I-200, specifically the idea that distinctions made on the basis of race are an unconstitutional form of discrimination.

F. The Initiation of Parents Involved in Community Schools

Parents Involved was initiated with the active participation of I-200 spokespeople and the support of politically conservative politicians and organizations. John Carlson, the I-200 campaign chairman, was centrally involved in organizing the lawsuit against the Seattle School District. The decision to sue the school district was based on the School Board's refusal in November 1999 to adopt recommendations from Superintendent Joseph Olchefske and General Counsel Mark Green to change assignment policies to "downplay racial considerations." Refusing the recommendations, 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 the district's "commitment to racial and cultural integration." 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."

189. Id.
190. Id.
191. Id. Keith Ervin, I-200 Backers Planning to Sue Seattle Schools, SEATTLE TIMES, Nov. 26, 1999, at B1, available at http://community.seattletimes.nwsource.com/archive/?date=19991126&slug=2997731 (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. 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-200.).
192. Id. (The recommendations 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.).
193. Id.
194. Id.
However, with support from colorblind advocates, the newly formed Parents Involved in Community Schools (PIICS) challenged the school district’s commitment to integrated schools in court.

The Sacramento-based Pacific Legal Foundation, a conservative public interest law firm, developed many of the arguments utilized by counsel for PIICS.195 The Pacific Legal Foundation is “devoted to a vision of individual freedom, responsible government, and color-blind justice.”196 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 sound bite, ‘We are not against diversity, we are against discrimination.’”197 John Carlson also provided a forum for PIICS to promote its message on his conservative radio show, a tactic similar to the approach he took when promoting the Washington Initiative he co-authored in the early 1990s.198 Carlson, a spokesperson for I-200, which embraces the anti-

197. E-mail from Kathleen Brose (Mar. 7, 2011) (on file with author) (Kathleen practiced with the Pacific Legal Foundation, fielding hardball practice questions, and filming her responses on videotape).  
198. Id. Carlson 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. Carlson 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. Carlson acted as a spokesperson for his initiative through his radio show as well as his free-lance column, which was featured weekly in The Seattle Times Newspaper editorial page. The initiative was approved by a three to one margin. Terry Tang, Media Ethics: The Curious Dual Role of John Carlson, Seattle Times, Nov. 9, 1993, available at http://community.seattletimes.nwsource.com/archive/?date=19931109&slug=1730764; Daniel W. Stiller, Initiative 593: Washington’s Voters Go Down Swinging, 30 GONZ. L. REV. 433 (1994-95).
classification principles of colorblindness and the Pacific Legal Foundation, whose mission statement proclaims their dedication to colorblindness, contributed to the formulation and development of PIICS’ case, thereby promoting colorblindness in the political and judicial domains.

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). Between 2001 and 2006, the Washington Supreme Court and four Federal Courts heard Parents Involved prior to the Supreme Court’s grant of certiorari.

III. THE SUPREME COURT PROMOTED COLORBLINDNESS IN PARENTS INVOLVED

Chief Justice Roberts’s plurality opinion in Parents Involved, which Justices Thomas, Scalia and Alito joined, further promotes colorblindness as the preferred approach in evaluating race-conscious policies, and severely restricts racial integration as a compelling government interest. The plurality opinion overlooked the depth of the Seattle story and determined the case relying on anti-classification principles, thereby promoting a colorblind framework in assessing the constitutionality of race-conscious remedies in the secondary school context.

A. Justice Roberts’ Plurality Opinion

Rachel Moran, Dean of UCLA Law School and Education Law scholar, 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. Justice Roberts, writing for the plurality, embraces

199. About Pl.F, supra note 196.
201. The Supreme Court granted certiorari and heard Parents Involved with a companion case, Meredith v. Jefferson County Board of Education in 2006. Notably, there was no circuit split on issues of voluntary integration plans prompting the Court to grant certiorari. Perhaps the Court objected to the reasoning of the Circuit courts and granted certiorari in order to rectify the Circuit court decisions.
the former by reading the Equal Protection Clause as though it is a part of a colorblind Constitution. The plurality concluded school districts may not voluntarily undertake integration efforts that are not in specific response to remedying legal segregation, ignoring the social reality of the continuing effects of historical segregation and racism.

The attorneys for PIICS framed their petition for certiorari specifically within the context of *Grutter v. Bollinger*. 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. The petitioner’s brief invoked the rhetoric of colorblindness, inviting judicial analysis along an anti-classification framework: “Any racial classification, by any government entity, is presumptively invalid and must be subjected to the strictest judicial scrutiny... the District’s program... violates the heart of the Equal Protection Clause—the principle that our Constitution is color-blind.”

Justice Roberts first agrees with petitioners that strict scrutiny is the proper standard of review for race-conscious school assignment policies, stating “the school districts must demonstrate that their use of such classifications is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”

The plurality looked 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

---

203. Initial Brief for the Appellant-Petitioner at i, Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908), 2006 WL 2452374 (“(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 balancing violate the Equal Protection Clause of the Fourteenth Amendment?”).

204. Moran, *supra* note 202, at 1322 (noting that the petitioner’s questioned whether the voluntary desegregation plans in Louisville and Seattle could be upheld under the requirements of *Grutter*).


intentional discrimination," the Seattle public schools were never segregated by law, so any use of race "must be justified on some other basis." 207 Absent from Roberts’ opinion is a recognition of the reality of segregation in Seattle, established through a system of legalized housing discrimination until 1968. Additionally, Roberts’ opinion, unlike Justice Breyer’s dissent, contains no discussion of NAACP lawsuits in the 1960s and 70s alleging the Seattle School Board acted to segregate schools, which were settled when the School Board vowed to undertake a mandatory desegregation plan. 208 Roberts adopted what Alan Freeman refers to as the “perpetrator” perspective in his insistence that voluntary race conscious integration plans may only be utilized to remedy past intentional discrimination. 209 From the “perpetrator” perspective, one only recognizes “the actions of identifiable perpetrators who have purposely and intentionally caused harm to identifiable victims who will be offered a compensatory remedy.” 210 The perpetrator perspective refuses to find “violations of antidiscrimination law in objective social conditions” like the patterns of housing segregation in Seattle. Roberts adopted this perspective in insisting that de facto segregation in Seattle was not a form of identifiable discrimination and therefore not a compelling interest that may be remedied by voluntary integration efforts, like those of the Seattle School District. 211

Roberts described a second compelling government interest under strict scrutiny as diversity in higher education, citing Grutter. 212 Roberts summarized interests of diversity from Grutter as extending only to “highly individualized, holistic review” of individuals, not as members of a racial group. 213

207. Id. at 720-21.

208. Id. at 808-10. (Breyer, J., dissenting) (“In 1966, the NAACP filed a federal lawsuit against the school board, claiming the board had ‘unlawfully and unconstitutionally’ ‘establish[ed]’ and ‘maintain[ed]’ a system of ‘racially segregated schools’... The board responded to the lawsuit by introducing a plan that required race-based transfers and mandatory busing... In 1977, the NAACP filed another legal complaint... [that] alleged that the Seattle School Board had created or perpetuated unlawful racial segregation... The school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the ‘Seattle Plan.’”).

209. Freeman, supra note 85, at 1412. See also Powell, supra note 7, at 383.

210. Freeman, supra note 85, at 1412.

211. Id. See also Powell, supra note 7, at 383.

212. Parents Involved IV, 551 U.S. at 722.

213. Id. at 723 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).
Roberts concluded the racial tiebreaker did not fit the individualized and holistic review required by Grutter.214 He stated that the purpose of 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.”215 Roberts defined the racial tiebreaker as the only factor considered, concluding: “[T]he racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.”216 In doing so, Roberts utilized the concept of diversity to exclude race or color consciousness policies.

Roberts rejected any other compelling interest and described the dangers of allowing racial balancing as a compelling interest, alleging that doing so would “effectively 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.”217 But Roberts’ assertion that race should not be relevant in American life is a rejection of a color-conscious Equal Protection Clause, and ignores the social realities of America, in which race certainly continues to be an important factor. Roberts ends his opinion stating: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”218

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

214. Id. (“In the present cases, by contrast, race is not considered as part of a broader effort. . . . It is not simply one factor weighed with others in reaching a decision, as in Grutter; it is the factor.”).
215. Id. (quoting Grutter, 539 U.S. at 330).
216. Id. at 726.
217. Id. at 730 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (O’Connor, plurality opinion)) (internal citations omitted).
218. Id. at 748.
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.

B. Justice Thomas’ Concurrence

In his concurrence, Justice Thomas similarly relied upon the fallacy “of a colorblind constitution” as the “essence of Brown’s legacy,”219 and rejected concerns about remedying social inequalities. He dismissed concerns of re-segregation in Seattle’s schools and stated: “Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.”220 Thomas also stated: “[R]acial imbalance can also result from any number of innocent private decisions, including voluntary housing choices” and reasoned that “racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional . . . .”221

Thomas disregards the historical fact that many of the housing “choices” made by residents of Seattle in the 20th 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 his view of the Constitution as that of Justice Harlan in Plessy v. Ferguson: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Thomas’ uses Harlan’s words in a fundamentally different way than originally employed by Justice Harlan.222 In

220. Parents Involved IV, 551 U.S. at 749.
221. Id. at 750.
222. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is
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.223 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.224 Thomas’ distortion of Harlan’s dissent is in furtherance of the colorblind perspective adopted by the Court.

C. Justice Kennedy’s Concurrence

While Justice Kennedy disagreed with the dissent’s determination that the school districts “identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation,"225 Kennedy refrained from joining parts of the plurality opinion because Roberts did not acknowledge that diversity “is a compelling educational goal a school district may pursue.”226 Kennedy recognized diversity as a compelling governmental interest, but determined the Seattle School District’s assignment policy was unconstitutional because it failed to pass strict scrutiny.227 Kennedy reasoned that the district’s policy was not narrowly tailored because it failed to explain why students from many ethnic backgrounds

in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

224. Plessy, 163 U.S. at 559-60 (Harlan, J., dissenting) (“Descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word ‘citizens’ in the constitution . . . . The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.”).
225. Parents Involved IV, 551 U.S. at 783.
226. Id.
227. Id. at 787 (to pass strict scrutiny the school district must demonstrate their use of racial classifications is “narrowly tailored” to achieve a “compelling” government interest).
were classified only as either "white" or "non-white."\textsuperscript{228} Kennedy concluded that school districts may utilize "individual racial classifications... only if they are a last resort"\textsuperscript{229} employed to foster racial diversity in schools.

Kennedy suggested that local school districts were most qualified to determine how best to reach the compelling interest of diversity,\textsuperscript{230} and should use race-neutral measures in order to achieve a cross section of racially diverse students—not because of a commitment to equal educational opportunity, but rather, because schools may "encourage a diverse student body, one aspect of which is its racial composition."\textsuperscript{231} 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."\textsuperscript{232}

Specifically, Kennedy encouraged school districts to use race-conscious measures that do not treat each student differently on the basis of race, such as "[s]trategic 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."\textsuperscript{233}

Because these methods do not classify and treat students differently on the basis of race, Kennedy asserted that it would be "unlikely any of them [the methods] would demand strict scrutiny to be found permissible."\textsuperscript{234}

Thus, Kennedy's concurrence offers school districts devoted to promoting diversity general suggestions of how to proceed, that is to implement generally race-conscious methods, and to exhaust all race-neutral school assignment policies before resorting to race-conscious measures.

\textsuperscript{228} Id. at 787.
\textsuperscript{229} Id. at 790.
\textsuperscript{230} Id. at 798 (Kennedy, J., concurring) ("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 on the basis of racial classifications.").
\textsuperscript{231} Id. at 788.
\textsuperscript{232} Id. at 798.
\textsuperscript{233} Id. at 789.
\textsuperscript{234} Id.
D. Justice Breyer’s Dissent

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 to enact policies specifically with race in mind.235 He stated: “[W]e have understood that the Constitution permits local communities to adopt desegregation plans even where it does not require them to do so.”236 Breyer insisted that the purpose of Brown and its progeny were to compel desegregation as a means to correct past racial injustice, and also to permit voluntary systems that promote diversity and encourage racial integration.237

Furthermore, Breyer criticized the plurality’s rejection of social conditions and prior school desegregation precedent, stating: “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.”238 Breyer declared the historical and factual context of these cases is critical, citing that the Supreme Court ordered many school districts 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 such integration in their schools.239

Breyer then argued both the Court and school districts should be concerned about resegregation of public schools, noting “progress has stalled” toward racial integration.240 Breyer utilizing extensive statistical data to demonstrate the social reality of resegregation in schools; for example, that one in six Black children attend a school with a student body that

235. Id. at 806 (“[T]he Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.”).
236. Id. at 803.
237. Id. at 864 (“Since this Court’s decision in Brown, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools.”).
238. Id. at 803.
239. Id. at 804.
240. Id. at 805.
is nearly 100% minority. Breyer looked to the history of Seattle, and specifically noted that segregation claims were filed against Seattle, and that a segregation complaint was filed with federal OCR, but the district settled, promising to enact a desegregation plan. The tiebreaker method grew from these remedial efforts. Breyer’s dissent correctly identified the importance of social realities in Seattle, where housing segregation led to de facto school segregation, and that the voluntary efforts of Seattle school district to remedy these social inequalities were constitutional.

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.

IV. TEN YEARS AFTER ABANDONING THE RACIAL-TIEBREAKER: HOW SEATTLE CAN CULTIVATE INTEGRATED SCHOOLS

In the wake of Parents Involved, school districts nationwide are faced with the difficult task of avoiding race-conscious measures in promoting school assignment programs and are limited to the compelling government interest of “diversity” rather than integration. Public sentiment is adopting what the Supreme Court has insisted—that colorblindness is the appropriate guide in equal protection jurisprudence. In the decade since the Parents Involved litigation began, Seattle has adopted race-neutral school assignment policies that have resulted in less racially-integrated schools compared to those under the challenged “assignment plan,” including several high schools that are predominantly white. I suggest that the

241. Id. at 806.
242. Id. at 810 (“The OCR and the school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the ‘Seattle Plan.’

243. Id. at 819.
244. RESEARCH, EVALUATION AND ASSESSMENT/STUDENT INFORMATION SERVICES OFFICE (REA/SISO), SEATTLE PUBLIC SCHOOLS INDIVIDUAL SCHOOL SUMMARIES (Dec. 2010), available at
race-neutral assignment method—although in line with the requirements and restrictions of the Parents Involved decision—perpetuates colorblindness by refusing to confront persistent de facto segregation and racism. Accordingly, I present a proposal for recovering integrated schools.

A. 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.245 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, students and families are not guaranteed a seat at any particular school.246 The current school assignment plan cites the Supreme Court’s ruling in Parents Involved, stating that the 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.”247

In the current assignment process, Seattle school district still uses a sibling tiebreaker, granting preference to students with a sibling already attending their sought after school. For
high school assignments, there is no neighborhood preference—the entire district is treated as a single region.\textsuperscript{248} High school assignments use lottery as a final tiebreaker to determine school assignment.\textsuperscript{249} Racial demographics within Seattle's high schools have changed drastically since 2000, the last full school year in which the district used the racial tiebreaker, and 2010.

\textbf{B. Seattle Can Improve Racial Integration in its High Schools by Utilizing Race-Conscious Assignment Policies Both Generally and Individually}

I suggest a three-part method by which Seattle may seek to employ race-conscious assignment measures, both to create racially-diverse school communities and to challenge the Supreme Court's mandated colorblind approach to school assignment policies. I propose that Seattle should: 1) exhaust race-neutral assignment methods; 2) exhaust race-conscious methods that only generally classify students on the basis of race; and 3) implement race-conscious assignment policies that classify individual students on the basis of race, as necessary to produce truly racially-diverse schools.

\textit{1. Exhaust race-neutral student assignment methods}

Seattle has used race-neutral high school assignments for the last ten years, resulting in four of its high schools being predominantly white or non-white.\textsuperscript{250} This race-neutral assignment policy has been in place long enough to determine that it has not achieved racially-diverse schools. The following is student demographic data collected by Seattle Public Schools:\textsuperscript{251}

<table>
<thead>
<tr>
<th>School</th>
<th>%White Students in 2000</th>
<th>%White Students in 2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ballard</td>
<td>58.2</td>
<td>67.3</td>
</tr>
<tr>
<td>Cleveland</td>
<td>10.5</td>
<td>4.6*</td>
</tr>
</tbody>
</table>

\textsuperscript{248} \textit{Id.} (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.).

\textsuperscript{249} \textit{Id.} (Each student is given a random lottery number, and if necessary, the student's lottery number is used to determine the school assignment.).

\textsuperscript{250} Seattle Pub. Sch., supra note 247.

\textsuperscript{251} \textit{Id.} (Data for the year 2000 on file with author).
Franklin 22.9 4.1**  
Ingraham 30.2 32.6  
Nathan Hale 60.3 57.0  
Roosevelt 52.7 63.0  
Garfield 46.6 37.5  
Center School Established in 2001 71.2  
Nova School N/A 74.1

Schools in *italics* were oversubscribed in 2000  
Schools underlined were integration positive in 2000  
*34 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 in 2000, schools like Ballard, Ingraham, and Nathan Hale show moderate changes in the percentage of white student enrollment in 2010. These three high schools are all located in the northern area of Seattle, and in neighborhoods that are predominantly white. Conversely, in 2010, schools like Cleveland and Franklin, both located in southern Seattle, had white enrollment of less than 5%, even though the district’s white student population comprised 41% of its total students.  

Center School and Nova were not included in the district’s demographic information for 2000. In 2010, both schools served a white student population comprised of over 70% white students, when the school district’s total composition included only 41% white students. Author Jonathan Kozol criticized Center School, founded in 2001, as an example of racial disparities in public schools, noting the school “attracted an 83
percent white enrollment when it opened in 2001, in a city where whites are only 40 percent of high school students district wide” whereas the Black student enrollment “was a meager 6 percent, although black children represent nearly a quarter of enrollment in the district.” Kozol explained the Center School “was started at the pressure of white families from the city’s affluent Queen Anne and Magnolia neighborhoods who were also in the leadership” of PIICS. He describes the creation of 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.”

The disparities in white student enrollment at Cleveland and Franklin high schools compared to Center School and Nova are illustrative of how the race-neutral high school assignment policies currently employed in Seattle have failed to create diverse high school populations, accurately resembling the racial make-up of the district’s total student population. Before adopting race-conscious policies classifying individual students on the basis of race and creating school assignments on the basis of race, Seattle will likely have to exhaust other race-neutral methods. Such policies might include a general lottery for high school assignments in which race is not considered, or a randomized student-to-school assignment system. However, instituting a lottery or random assignment policy would be a significant departure from the school choice plans utilized in Seattle since the introduction of the first “controlled choice” plan in 1988.

Seattle’s current race-neutral high school assignment plan has failed to produce racially diverse schools. The District would likely need to implement other race-neutral policies as well as generally race-conscious policies before enacting race-conscious policies that assign individual students to schools on the basis of race.

255. Id. at 277-78.
256. Id. at 278.
257. Parents Involved IV, 551 U.S. at 798 (Kennedy, J., concurring) (“Measures other than differential treatment based on racial typing of individuals first must be exhausted.”).
2. Exhaust all race-conscious efforts that address the problem generally

Prior to implementing race-conscious methods that classify individual students and treat them differently on the basis of race, Seattle School District must first seek to exhaust all race-conscious efforts to promote diverse school populations in a general manner. In his concurrence in *Parents Involved IV*, Justice Kennedy stated:

If school authorities are concerned that student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race.258

Kennedy’s concurrence specifically suggests school districts allocate “resources for special programs” to “bring[] together students of diverse backgrounds and races” through race-neutral means.259 Generally, race-conscious efforts undertaken by the Seattle School District used to include creating gifted student programs and other option programs in the late 1970s.260 The District, again in 1997, sought to encourage voluntary integration by creating unique programs in each of the ten high schools, in an effort to attract students and parents to the school.261 These efforts were unsuccessful in creating racially-integrated schools, and should be considered an ineffective generally race-conscious method.

Seattle may also consider implementing a socio-economic assignment plan to demonstrate efforts to foster diverse high school populations through generally race-conscious assignment policies.262 Since the Supreme Court’s ruling in

258. *Id.* at 788-89.
259. *Id.* at 789.
260. *The Seattle Open Housing Campaign, supra* note 121.
261. *Parents Involved III*, 126 F.3d at 1169.
262. *SEATTLE PUB. SCH., supra* note 247, at 5 ("In 2007, the U.S. Supreme 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. The Court ruled that there are limits to what a district can do to voluntarily pursue racially integrated schools. After the second year of high school assignments under this plan,
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 as a favored approach to increasing achievement for low-income students. Socioeconomic status is a primary indicator of academic achievement, and has been used by school districts, like Chicago, to meet federal desegregation decrees. Illinois cities Chicago and Champaign, as well as Pittsburgh, Pennsylvania 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.

Public schools in Cambridge, Massachusetts, used a race-based integration plan until 2001, but they now use a controlled choice plan based on family socioeconomic status. The Cambridge plan is designed to ensure that all schools are within ten percent of the district’s overall socioeconomic composition, but allows for sibling preference. The current white population in Cambridge school district is 36.4%, and 45.5% of students are low-income. 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. However, not all socioeconomic assignment plans have been as successful or popularly accepted as the Cambridge plan.

For example, Wake County in North Carolina, adopted a...
socioeconomic status plan in 2000. 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, moving for students to instead attend neighborhood schools. North Carolina NAACP President, Reverend William Barber, one of four demonstrators arrested at the school board vote, described the school board's decision as part of a re-segregation scheme. Dr. Del Burns, Superintendent of the Wake County Public Schools, offered his resignation effective in June 2010, expressing that he could not, in good conscience, be the administrator to end socioeconomic diversity in the school system. If Seattle were to initiate a socioeconomic assignment plan as a generally race-conscious effort, public acceptance of colorblindness, which asserts that race should never be considered, might result in a parent-led challenge of the policy, or a school board decision to abandon race-conscious socioeconomic assignment policies.

Seattle could also institute race-conscious assignments that generally consider race and ethnicity, as well as parent educational level and parent income level, similar to the Berkeley United School District's student integration plan in California. Berkeley voluntarily integrated its schools in 1968, with the primary goal to racially integrate. Its current

270. Brief of Amicus Curiae Walt Sherlin in Support of Respondents at 3, Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 126 F.3d 1162 (9th Cir. 2000) (No. 05-908, 05-918), 2006 WL 3063501 (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 cannot be considered necessarily replicable nor generalized as a "success.").


274. Information on Berkeley Unified's Student Assignment Plan, BERKELEY PUB.
student assignment plans takes into account parent education level, parent income level, and race and ethnicity. The district utilizes a composite diversity map that takes the three “diversity factors” into consideration, and student assignments are then based, not on the personal attributes of students, but rather, on the diversity characteristics of the “zone” or area in which the student lives. The Berkeley plan is an example of a successful integration plan that has withstood legal scrutiny. The Pacific Legal Foundation has challenged the Berkeley’s integration plan three times in four years. The most recent challenge, in 2009, alleged the plan was a violation of Prop 209, an ostensible reproduction of the case the foundation helped bring against the Seattle school district in Washington District Court. While the Berkeley plan may present a useful model for adopting a race-conscious assignment plan in Seattle, the Pacific Legal Foundation has a history of litigation against the Seattle School Board, and may bring litigation similar to that which was brought against the Berkeley School District.

Kennedy’s concurrence suggests that a school district needs to attempt every single school assignment policy that he included in his opinion before considering race-conscious policies at the individual student level. If all of the generally race-conscious policies fail to produce diverse schools, the Seattle School Board may then consider using race-conscious policies, including individual racial classifications.

3. Individualized race-conscious assignment policies are not impermissible

Race conscious school assignment policies that assign individual students on the basis of race are not necessarily impermissible after Parents Involved. A school district could employ such assignment policies and in doing so, challenge the Court’s adoption of colorblindness in determining the constitutionality of secondary school assignments. Justice Kennedy’s concurring opinion presents the possibility for school
districts like Seattle to utilize race-conscious assignment policies that classify individual students on the basis of race once race-neutral and generally race-conscious measures are exhausted. Kennedy stated: "What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification." Specifically, Kennedy noted that the assignment policies at issue were "unconstitutional as the cases now come to us," requiring the districts first implement generally race-conscious assignment policies. This presents the option for districts to utilize race-conscious assignment policies that individually classify students on the basis of race if previously used generally race-conscious policies proved ineffective.

Kennedy's concurrence specifically stated that race-conscious individual student assignment policies "would be informed by Grutter." Therefore, the Seattle School District could seek to impose race-conscious assignment policies that classify and assign students at the individual level and on the basis of race. The District could do so by structuring these policies in careful consideration of several issues emphasized by Justice Kennedy and within the standard enunciated in Grutter.

First, the district should seek a diverse student body, of which racial composition is one element. Kennedy's concurrence in Parents Involved specifically stated: "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." Thus, a student assignment plan that classifies students individually and assigns them on the basis of race must be in furtherance of a district goal to seek a diverse student body.

Second, the district must show that the assignment plan is narrowly tailored. Within the standard of Grutter, a school district may demonstrate narrow tailoring through 1) a serious and good faith consideration of race-neutral alternatives; 2) using race in a flexible, non-mechanical way; 3) avoiding an

278. Parents Involved IV, 551 U.S. at 798.
279. Id. at 782.
280. Id. at 790.
281. Id. at 783.
undue burden on non-minority applicants; and 4) limiting the assignment policy in time with periodic reviews of the policy's continued necessity.282

Seattle could demonstrate the serious and good faith consideration of race-neutral alternatives through its use of race-neutral and ineffective assignment policies over the last ten years. Justice Kennedy's concurrence suggests that race-conscious individual classifications may be utilized when race-conscious general policies have been exhausted, so Seattle may also cite to any race-conscious remedies that have been applied at a general level.

The District would then need to demonstrate that their use of race is flexible and non-mechanical.283 This could be shown through a race-conscious policy that avoids distinctions of "white" and "non-white." Both the plurality and Justice Kennedy in Parents Involved took issue with the binary classification of students in the Seattle racial-tiebreaker, specifically citing the other racial groups within the District and the possibility of non-integrated schools due to the use of "crude racial categories."284 The race-conscious plan must also avoid using quotas, "a fixed number or percentage which must be attained" and must be "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."285 The District could assign students based on consideration of their individual race by utilizing race as a "plus" factor in making individual student assignments, using a student's race or ethnicity not as a determining feature but merely as part of an "individualized, holistic review" of each student.286 However, there is a crucial difference between student assignments at the secondary school level and at the admissions process in higher education: High school students do not always submit extensive applications to gain admission to a secondary school.287 While it may be possible to implement

283. See id. at 334.
284. Parents Involved IV, 551 U.S. at 786.
286. Id. at 336-37.
a race-conscious policy that uses the race of an individual student only as a plus factor for high schools with full application procedures, it is unlikely that this process could exist in every Seattle high school.

Seattle would then have to establish that the race-conscious assignment policy does not "unduly burden individuals who are not members of the favored racial and ethnic groups." The method of avoiding undue burden enunciated in *Grutter* endorses an "individualized inquiry into the possible diversity contributions of all applicants." Similar to the problems presented in demonstrating a flexible and non-mechanical use of race, the District would seemingly have to implement a robust application procedure for admission to every district high school.

Finally, the District would need to exhibit that its race-conscious policy is "limited in time" by using "periodic reviews" to determine if the assignment policy is necessary "to achieve student body diversity." The District could satisfy this criterion by building in periodic assessments of the efficacy of the assignment policy.

The second and third criteria under the *Grutter* standard demonstrate a significant difference between the secondary school and higher education contexts: secondary students do not uniformly engage in a comprehensive application process in order to attend school. Thus, a school district employing this three-part proposal may have opportunity to utilize its race-conscious individualized student assignments on the basis of race as a means to challenge the appropriateness of the *Grutter* standard as applied to the secondary school context. In doing so, a school district would also have opportunity to confront the Court's colorblind approach.

Justice Kennedy joined the plurality because he agreed that the Seattle plan was not narrowly tailored. However, the

---

289. *Id*.
290. *Id* at 342.
Grutter narrow tailoring analysis is not applicable to the secondary school setting where students simply do not engage in detailed application processes. Even in a system that would require each student and family to submit a comprehensive application, there will always be students who, for a variety of reasons, do not submit an application. Unlike in higher education, secondary students require school assignments in order to satisfy compulsory schooling laws. A district that implements a race-conscious individualized assignment policy after exhausting race-neutral and generally race-conscious policies may challenge the applicability of the Grutter standard for narrow tailoring as incompatible with secondary school circumstances.

Finally, a school district that implements this three-party procedure may challenge the Court's colorblind approach to voluntary integration efforts. By first exhausting race-neutral and generally race-conscious policies, a district can show policies that avoid classifying individual students by race in making student assignment decisions that are ineffective to achieve student bodies that are racially diverse. This demonstration could persuade the Court to recognize that race-conscious individualized school assignment policies are necessary to promote racial integration, and to ameliorate racial isolation and persistent impacts of historical and societal racism.

V. CONCLUSION

The plurality opinion in Parents Involved, not only adopts, but also promotes the principle of colorblindness as the preferred approach in assessing the constitutionality of race-conscious policies, and severely restricts the means through which school districts may seek to achieve racial integration. Colorblindness has emerged as the principal form of resistance to race-conscious policies and practices, both as a legal doctrine and in public sentiment. This political discourse is exemplified through an examination of the history of housing segregation in Seattle and the Seattle School Board's struggle integrating schools.

Student assignment policies that voluntarily attempt to generate racially integrated schools are currently restricted by the Supreme Court's plurality decision in Parents Involved. School districts seeking to promote racially diverse schools are
confined by this decision, and are left without clear guidance on exactly which student assignment policies are permissible. Since abandoning a race-conscious individualized student assignment plan, Seattle School District’s high schools are significantly less integrated than they were ten years ago before the Parents Involved litigation first began.

The three-part approach proposed in this comment would provide Seattle, and other school districts, with a method through which they may institute race-conscious school assignment policies. By first exhausting all race-neutral and generally race-conscious assignment policies, school districts may then, if necessary to achieve racially diverse schools, enact race-conscious procedures that assign students individually on the basis of race. This comment suggests that the implementation of race-conscious assignment policies as the third part of this proposal may demonstrate the incompatible application of the Grutter standard for narrow tailoring in the secondary school context and challenge the Court’s utilization of colorblindness in determining the constitutionality of secondary school assignments.

*Cara Sandberg*

* J.D., University of California, Berkeley, School of Law, 2012. I would like to thank Professors Ian Haney López, Stephen Sugarman, Mary Louise Frampton, and Kristin Holmquist for their incredible support. I would also like to thank Jessica Tyler, Graham Robinson, and the editors of the BYU Education and Law Journal. Lastly, I dedicate this piece to my family. In particular, this piece is for my grandparents, Charlie and Yasuko Chatman.