One Year Later: A Reflection on *Parents Involved in Community Schools v. Seattle School District* and the Pursuit of Racial Representation in Public Elementary and Secondary Public Schools

*By Sharon L. Browne**

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.

Parents Involved in Community Schools v. Seattle School District

A little more than a year has passed since the U.S. Supreme Court issued its splintered decision in *Parents Involved in Community Schools v. Seattle School District,*[1] striking down two voluntary racial integration plans used by the public school systems in Seattle and Louisville. The court's rejection of the voluntary use of race in assigning students to the nation's public elementary and secondary schools prompted a heated debate among legal scholars and educators, leaving school districts struggling to make sense of the emotionally charged, 5-4 ruling.

Both Seattle and Louisville expressly used race as the tipping factor in assigning school children to public schools.[2] The common motive for these plans was "voluntary integration" to increase racial and ethnic diversity within the public schools.[3] These plans sought to achieve the government's preferred racial and ethnic mix of students, regardless of the choices of the students themselves, or of their parents.

Although the Court's decision struck down both programs, the *Parents Involved* decision did not provide a clear set of rules and principles for school districts to follow, and created some confusion about what school districts and communities can do to promote racial balance in their schools. Much of the confusion arises because the justices in *Parents Involved* were sharply torn on the question of whether public schools should pursue both academic and civic missions. Justice Thomas's concurrence, in particular, sided with the academic-mission advocates, while the dissenting justices sided with the civic-mission advocates.[4] Writing for the plurality, Chief Justice Roberts avoided the debate, contending that the sociological or academic effect of racial diversity was not a question that the Court needed to resolve because neither the Seattle nor Louisville plans were sufficiently narrowly tailored to survive strict scrutiny.[5] Consequently, measures voluntarily undertaken by public school districts to effect racial integration are presumptively unconstitutional, whether used to advance either a civic or academic mission.[6]

The opinion by the Court by Chief Justice Roberts, joined by Justices Scalia, Thomas, Alito and in part by Kennedy, severely limits the tools school districts can use to achieve racial diversity in the classroom. The plurality decision expressed skepticism of all governmental racial and ethnic classifications and preferences, and made clear that such measures must be justified by much more than a mere desire for integration or diversity. As the Chief Justice declared, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[7] The plurality rejected as compelling state interests eliminating racial imbalance, reducing racial isolation, racial integration, addressing racially concentrated housing patterns or remedying past societal discrimination.[8]

Justice Kennedy's concurrence provided the fifth vote to find Seattle's and Louisville's voluntary racial balancing plans unconstitutional, but took a different view, thereby creating both a legal and a policy conundrum.[9] Justice Kennedy said that school districts may have a compelling interest to avoid "racial isolation" and to achieve a "diverse student population," but made it clear that school children are not pawns to be moved about at the whim of school administrators. "What the government is not permitted to do, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits, valued and traded according to one school's supply and another's demand."[10] Justice Kennedy would endorse bringing students together through strategic site selection of new schools, drawing attendance zones with general recognition of demographics of neighborhoods, allocating resources for special programs, recruiting students and faculty in a targeted fashion, tracing enrollment, performance, and other statistics by race.[11]

Armed with Justice Kennedy's concurrence, the National School Boards Association, the NAACP, and others promptly claimed that the *Parents Involved* decision is murky enough to justify the continued use of race-conscious assignment plans when Justice Kennedy's concurring opinion is joined with the four dissenting justices.[12] School administrators and policymakers across the country are scrambling to craft and implement race-conscious measures designed to achieve racially diverse student bodies. This article questions the wisdom of such pursuits.[13]

Justice Kennedy's Concurrence Stressed the Need to Search for Race-Neutral Alternatives

The plurality opinion made (or reaffirmed) several important holdings. First, strict scrutiny applies to any voluntary integration plans that rely on individual racial classifications.[14] Second, the Court has recognized only two compelling interests for the use of race in the context of public education: remediation of past de jure segregation and, in higher education, the achievement of a broad concept of diversity where race is only one of many factors.[15] And finally, racial balancing per se is patently unconstitutional.[16] The plurality then struck down the Seattle and Louisville school assignment programs because they were not narrowly tailored, without addressing the key question of whether the plans served a compelling state interest.[17]

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While joining Justice Roberts' opinion on these points, Justice Kennedy parted company with the plurality in asserting that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[18] In some limited circumstances, Kennedy opined, race "may be taken into account" to ensure that "all people have equal opportunity regardless of their race."[19] In particular, the Kennedy concurrence stressed that "[t]o the extent the plurality opinion suggests the constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is in my view, profoundly mistaken."[20] Nevertheless, Justice Kennedy equally forcefully distanced himself from Justice Breyer's dissent: "The dissent's reliance on this Court's precedents to justify the explicit, sweeping classwide racial classifications at issue here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom. And in his critique of that analysis, I am in many respects in agreement with the Chief Justice."[21]

The Kennedy concurrence provides guidelines of race-neutral measures that, in his view, school districts may legally employ to "encourage a diverse student body, one aspect of which is its racial composition."[22] These include strategic site selection of new schools, drawing attendance zones with general recognition of the demographics of neighborhoods, allocating resources for special programs, recruiting students and faculty in a targeted fashion, and tracking enrollments, performance, and other statistics by race.[23] But in implementing such measures, Kennedy warned, the districts must not assign to "each student a personal designation according to a crude system of individual racial classification."[24] These admittedly race-conscious mechanisms, in Kennedy's view, "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."[25]

Still, the Kennedy concurrence would not give school officials a free pass to engage in voluntary integration through facially race-neutral policies.[26] As the concurrence points out, facially neutral measures require "a more searching inquiry" before strict scrutiny applies, but they are nonetheless ultimately bound by the most exacting level of judicial review.[27] If facially race-neutral measures are being used simply as a "pretext for racial discrimination" by the state, then strict scrutiny applies with equal force.[28] Notably, in *Columbus Bd. of Education v. Penick*,[29] the Court struck down a school district's race-neutral policy of using "optional attendance zones, discontiguous attendance areas, and boundary changes; and the selection of sites for new school construction" because they were "intentionally segregative" and had the "foreseeable and anticipated effect of maintaining the racial separation of the school."[30]

Predictably, courts will need to engage in their own line-drawing in determining what race-neutral alternatives are predominately racially motivated, and which are not. Justice Kennedy's concurrence opinion plainly invites further litigation regarding the manner and extent to which school districts may implement race-conscious policies to achieve non-remedial integration in their schools.

An Abundance of Race-Neutral Mechanisms Exist to Address the Problem Associated with Racial Imbalance in Public Schools

The *Parents Involved* decision left educators across the country struggling to identify fresh approaches to student assignment plans. The Court's opinion made it clear that all racial classifications are subject to strict scrutiny review, and even under Justice Kennedy's concurrence, such classifications may be employed in pursuit of a racially diverse student body only as a last resort.[31] In casting his vote to strike down the race-conscious school assignment plans adopted in Seattle and Louisville, Kennedy noted that "the schools could have achieved their stated ends through different means."[32]

What means could they have used?

The Department of Education's Office for Civil Rights has identified many innovative, race-neutral alternatives to promote student body diversity while avoiding the sort of blatantly discriminatory policies that were rejected by *Parents Involved.*[33] Perhaps the foremost example of such a race-neutral alternative would be providing preferential assignments on the basis of socioeconomic status. Such programs seek to reduce concentrations of poverty and "set the tone that academic achievement is to be valued and that aspirations should be set high."[34] To the extent racially imbalanced schools are merely a side effect of poor student achievement, other race-neutral strategies can be brought to bear on the problem. These might include the creation of "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools. Low performing schools can also enter into partnership with universities to strengthen their students' ability to succeed in college.

On a more fundamental level, school districts can reform their procedures to give parents greater choice as to where to send their children to school. Such reforms could introduce the use of charter schools or vouchers. "Increased choice creates a competitive environment that forces schools to compete for students. Thus, increased school choice should produce new and innovative schools, including those that are particularly effective at responding to the educational needs of low-income, urban, minority students."[35] Similarly, districts can create magnet schools offering specialized programs that attract diverse groups of students. As a California appeals court has explained: "Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis."[36] In case of excess demand to place students in high-performing schools, districts can make school assignments on the basis of a lottery system, perhaps weighted in favor of applicants from disadvantaged socioeconomic backgrounds.[37]

California's Proposition 209 Demonstrates the Potential of Race-Neutral Programs to Improve the Academic Performance of Minority Students

Are the foregoing proposals merely ideological window dressing, or do they have serious potential to overcome the problems associated with racially isolated public schools? If the goal of race-based assignment policies is to improve the

academic performance of minority children, then California has proven that the goal can be achieved through race-neutral means. For over ten years, most of California's public school districts have been providing equal educational opportunities to all students without using race-based assignment plans.[38] This is because the California Constitution prohibits the very kind of voluntary integration policies at issue in *Parents Involved*.

In 1996, California's voters overwhelmingly approved Proposition 209, adding Article I, Section 31, to the California Constitution. This measure provides that "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[39] By banning the use of race in public education for nearly any reason whatsoever, Proposition 209 imposes more stringent restrictions on government than those of the federal Equal Protection Clause.[40]

One of the goals of Proposition 209 was to "address inequality of opportunity... by making sure that *all* California children are provided with the tools to compete in our society."[41] At the same time, the voters understood that Proposition 209 would "eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts.[42]

In the wake of Proposition 209's passage, the League of California Cities made recommendations to school districts, including the development of academic support programs and financial aid services for students from low-income backgrounds.[43] Today, for example, the UC Links program at the University of California Berkeley helps prepare K-12 students from low-income families for college.[44] UC Links is inclusive, supporting children who are struggling in school, as well as those who do well. While many educational programs serve students who are already succeeding in school, UC Links programs are open to all children and youth in the host school or community. By giving youth from low-income or language-minority communities extra support early in their school careers, UC Links enables them to overcome obstacles they face to their academic development.[45] According to… the program has resulted in "improved basic literacy, greater information literacy, improved collaborative behavior and attitudes, and increased aspirations for higher learning."[46]

The academic achievement of students in California K-12 schools has not suffered from the unavailability of race-based policies since 1996. In fact, according to data reported by Eryn Hadley, "[t]he graduation rates of California's high school students steadily increased after the passage of Proposition 209" *in every ethnic group*.[47] Hadley goes on to explain:

> [T]he California High School completion rate reached a low point of 64% during the 1994-95 year (the year before Proposition 209 was adopted), after dropping from 68.6% in 1991-92. In the following years, the high school graduation rate crept back up to 69.6% in 2001-02. A report based on data from the California Department of Education shows that the graduation rate of all minority students increased in each ethnic group between the years 1995-96 and 2001-02. The low percentage of students that graduate with a high school diploma is discouraging, but it requires providing all students with the tools they need, regardless of race or sex.[48]

Moreover, minority high school students in California have outperformed minority high schools students nationally, notwithstanding the state's constitutional ban on race-based programs to achieve student diversity. As Hadley reports:

> The graduation rates of California's minority students were above the national average in 2001. In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally. Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally. California's black students beat the national graduation rate by 5.1% in 2001, with 55.3% of California's black students graduating from high school.[49]

Race-neutral programs have worked in California and have a proven track record. It is the responsibility of elected local school boards to ensure that every child has a genuine opportunity to receive an excellent education no matter what school he or she attends, regardless of race.

Parents and Community Leaders Can Band Together to Eliminate Race-Based Assignment Programs

It is generally acknowledged that many school districts must redo their assignment plans to comply with *Parents Involved*, and some school districts have abandoned their race-based school assignment plans in the wake of the decision.[50] Much can be accomplished through the political process when parents, guardians, and community leaders apply pressure on their school boards to eliminate race-based assignment plans. For example, in Beaumont, Texas, the locally elected school board recently discontinued its race-conscious student transfer policy in favor of one based on socio-economic factors after parents and community leaders threatened legal action unless the board discontinued its program.

After operating under a desegregation order for years, the Beaumont schools were finally declared unitary in 1984.[51] Nevertheless, the school board never ceased its race-based transfer policies. When approving or disapproving a student's transfer request, race became the deciding factor. The transfer policy stated:

> Students may request a school out of their assigned zone based upon ethnic percentages at their zoned school and their school of choice. If their ethnic classification is of a lesser number on the desired campus rather than their zoned campus, and space is available, then the transfer will be approved. Transportation is provided.[52]

In November of 2007, on behalf of parents, guardian, and community leaders, the Pacific Legal Foundation sent a demand letter to the Beaumont Board of Trustees demanding that they repeal the policy.[53] Local newspapers and radio stations joined in the effort. In February 2008, the Trustees eliminated the race-based transfer policy and replaced it with one based on economic status.[54]

Other school districts have refused to comply with the Supreme Court's decision, yet parents are reluctant to come forward because of the cost of litigation and fear of retaliation. Until parents and community leaders bring pressure to bear, school districts in Jefferson County, Kentucky, Los Angeles, California, Boston, Massachusetts, Hartford, Connecticut, Milwaukee, Wisconsin and elsewhere may continue to classify

their students by race in pursuit of the chimera of "diversity."

CONCLUSION

The *Parents Involved* decision is severely fragmented, yet the plurality opinion read in conjunction with Justice Kennedy's concurrence makes three points clear: voluntary integration plans that incorporate race-based criteria are subject to strict scrutiny, school districts may not classify individual students on the basis of racially defined groups, and race-neutral alternatives must be exhausted before any race-conscious program may be employed. Public school boards and administrators should rise to the challenge of fashioning creative race-neutral programs to ensure academic achievement by all students, regardless of race. If necessary, parents and community leaders must be willing to step forward and demand that their locally elected school boards comply with the Supreme Court's mandate in *Parents Involved*.

Endnotes

1 Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738 (2007).

2 *Id.* at 2747, 2750.

3 *Id.* at 2749.

4 *Id.* at 2820-2824. Justice Kennedy characterized the dissent's finding of compelling state interest: "The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation." *Id.* at 2789 (Kennedy, J., concur.).

5 *Id.* at 2755 ("The parties and their amici dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the 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."). Justice Kennedy characterized the plurality's opinion: "The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. For this reason, among others, I do not join Parts III-B and IV. Diversity depending on its meaning and definition, is a compelling educational goal a school district may pursue." 127 S. Ct. at 2789 (Kennedy, J. concur.).

6 While pursuit of achieving the social, democratic and academic benefits may be laudable, they do not guarantee educational equality for all students. *See* Eboni Nelson, *Examining the Costs of Diversity*, Miami L. Rev.(forthcoming).

7 127 S. Ct. at 2768 (plurality opinion).

8 127 S. Ct. at 2758 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote–racial diversity, avoidance of racial isolation, racial integration–they offer no definition of the interest that suggests it differs from racial balance.").

9 Marks v. United States, 430 U.S. 188, 193 (1977), holds that when there is a split in the Court's decision, "the position taken by those members who concurred in the judgment on the narrowest grounds" controls. Although beyond the scope of this article, it appears that Justice Kennedy's concurring opinion on what is a compelling state interest is too broad and undefined; whereas the plurality opinion directly addresses the issues before the court and should be followed.

10 *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concur). As demonstrated by a variety of amicus briefs filed on behalf of both sides in *Parents Involved*, the psychological, emotional, and mental harms that result when government engages in racial line-drawing are numerous. *See, e.g.*, Brief Amicus Curiae of Asian American Legal Foundation in Support of Petitioners in Parents Involved at 15 ("While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused obvious harm.… Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends."); Brief Amicus Curiae of Various School Children from Lynn, Massachusetts, Who are Parties in *Comfort v. Lynn School Committee*, Filed in Support of the Petitioners in *Parents Involved* at 9 ("Using race-based student assignments to achieve diversity based purely on race assumes that a child will contribute in a certain way to the classroom, without any examination of the individual child.").

11 *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concur.).

12 National School Boards Association, *Not Black and White*, *available at* http://www.nsba.org/SecondaryMenu/CUBE/Publications?CUBERResearchReports?NotBlackandWhite.aspx (last visited October 14, 2008); NAACP Legal Defense and Educational Fund, Inc. and the Civil Rights Project/Proyecto Derechos Civiles, *Still Looking to the Future: Voluntary K-12 School Integration*; A Manual for Parents, Educators, & Advocates, available at http://www.naacpldf.org/content/pdf/voluntary/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A Manual for Parents,_ Educators_and_Advocates.pdf (last visited Oct. 14, 2008).

13 There were 97,000 K-12 public schools in the 2005-06 school year, which educate approximately 49.1 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than $487.8 billion. Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http:// nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 14, 2008).

14 127 S. Ct. at 2751-52.

15 *Id.* at 2752-53.

16 *Id.* at 2753-54.

17 *Id.* at 2755.

18 *Id*. at 2789 (Kennedy, J. concur.).

19 *Id.* at 2791.

20 *Id.*

21 *Id.* at 2793.

22 *Id.* at 2791.

23 *Id.* at 2792.

24 *Id.*

25 *Id.* at 2791.

26 *See, e.g.*, Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. Ann. Surv. Am. L. 385, 419 (Justice Kennedy's "clear formulation of the appropriate instances in which courts may find that a state agency has met its burden of showing a compelling governmental interest provides future courts with the ability to uphold race-preference challenges beyond the context of higher education."); *see also* Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. Rich. L. Rev. 707, 734-40 (identifying the race-neutral alternatives in achieving racial diversity under *Grutter*).

27 *See* 127 S.Ct. at 2792.

28 *Id.*

29 443 U.S. 449 (1979).

30 *Id.* at 461-63.

31 127 S. Ct at 2792 (Kennedy, J., concur.).

32 *Id*. at 2792-93 (Kennedy, J., concur.).

33 *See* U.S. Dep't of Educ., Office for Civil Rights, *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004) *Available at* http://www.ed.gov/about/offices/list/ocr/edlite-race neutralreport2.html (last visited July 9, 2006).

34 *Id.* at 34.

35 Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 Ohio St. L.J. 37, 41 (2006).

36 Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96, 104 (Cal. Ct. App. 2002) (internal citation and quotation marks omitted); *see also* Hernandez v. Bd. of Educ. of Stockton Unified Sch. Dist., 25 Cal. Rptr. 3d 1, 4-5 (Cal. Ct. App. 2004) (describing a school district's "race neutral" magnet program for achieving racial diversity).

37 *See Crawford*, 121 Cal. Rptr. 2d at 104 ("Another version of an 'integration plan' described is a program which would assign only a very small geographic area for a student's home school, and fill remaining places in that school's class by an unweighted random lottery."). *See also* U.S. Dep't of Educ., Office of Innovation & Improvement, *Innovations in Education: Creating Successful Magnet Schools Programs* 4 (2004).

38 Proposition 209 provides a narrow exception from the prohibition on the use of race when there is a court order or a consent decree that was "in effect" when Proposition 209 was adopted in 1996. Cal. Const. art. 1, section 31(d). When a narrow exception is not triggered, California appellate courts have struck down plans to achieve racial balancing. *See, e.g., Crawford*, 121 Cal. Rptr. 2d at 104 (striking down race-based voluntary transfer policy used to achieve racial balance).

39 Cal. Const. art. I, § 31(a). "State" includes school districts. Cal. Const. art. I, § 31(f).

40 *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1087 (Cal. 2000) ("Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception"). The measure does provide for narrow statutory exceptions, including race-conscious programs required to comply with existing court orders and to maintain federal funding.

41 *Id.* at 12 P.3d at 1083, 24 Cal. 4th at 561.

42 *Id.* at 584 (concurring and dissenting opinion of George, C.J.).

43 *See* Eryn Hadley, Note, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 B.Y.U. J. Pub. L. 103, 131 (2005) (citing League of California Cities report).

44 "UC Links serves students starting at the early stages of the academic pipeline. UC Links largely serves students at the elementary and middle school levels, and sets them early on a college-going path through engaging learning activities." *UC Links: A Summary*, http://www.uclinks. org/what/what_home. html (follow "summary" hyperlink).

45 *See id.*

46 UC Links, *University-Community Links: Building a Pathway to Higher Education Through Informal Learning Activities*, http://www. uclinks.org/what/what_home.html (follow "overview" hyperlink).

47 *Supra* note 43, at 132 (citing California Department of Education statistics).

48 *Supra* note 43, at 132.

49 *Supra* note 43, at 133.

50 Charles Ogeltree, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?"* 30 U. Ark. Little Rock L.Rev. 279, 290 (2008)(citing Gary Orfield & Erica Frankenberg, *The Integration Decision*, Education Week (July 18, 2007).

51 United States v. Texas Educ. Agency, No. B-6819-CA, slip. op., at 17 (E.D. Tex. July 19, 1984).

52 On file at Pacific Legal Foundation.

53 On file at Pacific Legal Foundation.

54 BISD changed its policy in response to a December 2007 cease and desist letter by the Pacific Legal Foundation. Emily Guevara, *BISD Replaces Race-Based Transfers With Policy Based On Students' Economic Status*, Beaumont Enterprise. Com (February 23, 2008), available at http://www.beaumontenterprise. com/site/news.cfm?newsid=19258589&BRD=2287&PAG=461&dept_ id=512588&rfi=6 (last visited April 15, 2008).