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# REJOINDER

## *PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DISTRICT No. 1: RACIAL IMBALANCE IS NOT SEGREGATION*

by Sonya D. Jones and Erin N. Ramsey\*

*“Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself.”*

### INTRODUCTION

On June 28, 2007, the U.S. Supreme Court decided a crucial case involving race-based, public school assignment plans in compulsory education.<sup>[1]</sup> The quote above from Justice Thomas’s concurrence captures the spirit of the Court’s decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, striking down public school assignment policies based on racial classifications.<sup>[2]</sup> Quite simply, the Court determined that the policies used in both the Seattle and Louisville school districts violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>[3]</sup> Fifty years after *Brown v. Board of Education*, it baffled the Court that race could still be used as a determinative factor in participation in a compulsory school system: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>[4]</sup>

The Seattle School District operates an open choice policy for incoming ninth graders to high school, meaning that students may choose which of the ten high schools they would prefer to attend.<sup>[5]</sup> Once a high school has been oversubscribed, a set of tiebreakers is triggered to determine who will be admitted to that high school.<sup>[6]</sup> The first tiebreaker selects students for admission if they already have a sibling attending that school.<sup>[7]</sup> The second tiebreaker selects students who will not disrupt the racial balance of the school, in relation to the racial balance of the district overall, by more than ten percent.<sup>[8]</sup>

Jefferson County Schools were once subject to a court ordered decree to desegregate due to past segregation policies.<sup>[9]</sup> In 2000, a court dissolved that decree, finding that Jefferson County Schools “had achieved unitary status by eliminating ‘[t]o the greatest extent practicable,’ the vestiges of its prior policy of segregation.”<sup>[10]</sup> After the decree was dissolved, Jefferson County adopted a “voluntary” student assignment plan in order to encourage racial balancing in public schools in that county.<sup>[11]</sup> Parents of kindergartners, first graders, and students transferring into the district may submit an application indicating their first two choices of schools within a specified geographic range of their residence.<sup>[12]</sup> Decisions to assign those students within the designated geographic ranges are based on available space and racial guidelines promulgated by the district.<sup>[13]</sup> If a school is too close to the “extremes of the racial guidelines,” a student whose race would disrupt the racial balance is denied admission.<sup>[14]</sup> As for middle and high school students, there are no considerations based on location; they are merely denied admissions if the applicant would disrupt the racial balance objectives set out by the district.<sup>[15]</sup>

### THE MAJORITY AND CONCURRING OPINIONS

Any government action that “distributes burdens or benefits on the basis of individual racial

classifications” is subject to strict scrutiny.<sup>[16]</sup> Strict scrutiny requires that the action be narrowly tailored to achieve a compelling governmental interest.<sup>[17]</sup> At issue here was whether the two school assignment plans were narrowly tailored and whether those plans were in pursuit of satisfying a compelling government interest. Chief Justice Roberts, along with Justices Scalia, Thomas, Kennedy, and Alito, formed the majority, holding that the subject school plans were not narrowly tailored to achieve a compelling governmental interest.<sup>[18]</sup>

### ***Compelling Government Interest***

According to the Court, the only permitted uses of race in public school assignments are (1) to remedy past, intentional segregation, or (2) in the interest of creating educational diversity in higher education.

<sup>[19]</sup> The Court found that the Seattle Plan did not fall into the first category of permissible interests because there was no previous forced segregation in the Seattle School District.<sup>[20]</sup> Further, the Court found that Jefferson County had no current interest in remedying past segregation due to the dissolution of the decree to desegregate.<sup>[21]</sup> As for the second category of permissible government interests, the Court highlighted the difference between the compelling interest of creating a diversified educational experience in higher education contrasted to that in primary and secondary education.<sup>[22]</sup> In *Grutter*, the Michigan Law School used criteria for admission that included race among many other factors, in identifying students who would contribute to a more diversified learning experience deemed beneficial in law schools.<sup>[23]</sup> The *Grutter* Court found there was a compelling interest in considering multiple factors that create a diverse learning environment, not just race.<sup>[24]</sup> The Court distinguished *Grutter* because the student applicants were considered as individuals, and not simply as members of a racial or ethnic group, and that was permissible in the context of law school admissions.<sup>[25]</sup>

Chief Justice Roberts, along with Justices Scalia, Thomas and Alito, formed a plurality holding that racial diversity in all primary and secondary education is not a compelling interest that could justify race-based admissions.<sup>[26]</sup> The plurality opinion rejected the school district’s argument that its plan served a compelling interest because of its efforts to undo damage done by *de facto* segregation caused by Seattle’s housing pattern.<sup>[27]</sup> Further, they argued that because a racially diverse learning environment is superior, and the best means to achieve that is to base admissions on race, then the plans at issue do not fall under the *Grutter* analysis.<sup>[28]</sup> The Court rejected those contentions stating “[t]he plans are tied to each district’s specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.”<sup>[29]</sup>

Because the school districts failed to articulate a constitutionally acceptable purpose for their racially selective schemes, the plurality agreed that there was no compelling interest at all for racial balancing. The subject plans sought only to manipulate the schools’ enrollments, based on race alone, in order to more accurately reflect the racial makeup of the districts, constituting racial balancing which is unconstitutional. At the very heart of the Fourteenth Amendment is the noble idea that “Government must treat its citizens as individuals, not as simply components of a racial, religious, sexual, or national class.”<sup>[30]</sup> Even though the districts’ attempts to classify their goals as promoting racial diversity, there is no distinction.<sup>[31]</sup>

In *Brown v. Board of Education (Brown)*, the Court declared that school districts must “achieve a system of determining admission to the public schools on a non-racial basis.”<sup>[32]</sup> In *Brown*, both the plaintiffs’ amici asserted that differential treatment of school children on the basis of race alone was detrimental to the educational experience and unconstitutional under the Fourteenth Amendment.<sup>[33]</sup> That position ultimately prevailed in *Brown* and in *PICS*.

### ***Narrowly Tailored***

A majority, including Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Alito, agreed that the subject plans were not narrowly tailored.<sup>[34]</sup> The districts “failed to show that they considered methods other than explicit racial classifications to achieve their stated goals.”<sup>[35]</sup> In order to satisfy the “narrowly tailored” prong of strict scrutiny, it was imperative that the school districts employ “serious, good faith consideration of race-neutral alternatives.”<sup>[36]</sup> Again, the school districts failed to satisfy this requirement.<sup>[37]</sup>

More importantly, unlike in *Grutter* where race was only one factor considered in the admissions process, in the Seattle Plan, “it was *the* factor.”<sup>[38]</sup> The Seattle Plan “speaks of the ‘inherent educational value’ in ‘providing students the opportunity to attend schools with diverse student enrollment.’”<sup>[39]</sup> Because the Seattle Plan allows for only white and non-white racial classifications, potentially providing absurd results, the Court rejected the plan as not being narrowly tailored to achieve the stated purpose of the plan.<sup>[40]</sup>

In his concurrence, Justice Kennedy suggested that achieving diversity may be a compelling interest that school districts may pursue.<sup>[41]</sup> Justice Kennedy opined that

[i]f school authorities are concerned that the 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.<sup>[42]</sup>

To that end, Justice Kennedy suggested several race-neutral alternatives that would pass constitutional muster, such as “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; [and,] allocating resources for special programs . . . .”<sup>[43]</sup> Any of the methods for achieving diversity mentioned by Justice Kennedy would be race-conscious without being racially discriminating, thereby passing strict scrutiny and achieving the same stated goals as in these subject plans.

## **RESPONSE TO DISSENTS**

The plurality attacked Justice Breyer’s dissent by highlighting the faulty reliance on distinguishable cases that were all decided prior to the implementation of strict scrutiny as the test for all government-sanctioned classifications based on race.<sup>[44]</sup> As discussed below, Justice Breyer incorrectly assumes that the plans in these cases were remedial in nature as a result of past segregation of some variety, but that was not the case.<sup>[45]</sup> The Seattle School District was never segregated by law and the Jefferson

County School District had satisfied a stringent court order to desegregate.<sup>[46]</sup> As the plurality stated, “[s]imply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject” to anything less than strict scrutiny.<sup>[47]</sup>

“[T]he Constitution emphatically does not forbid the use of race-conscious measures by [school] districts... that voluntarily desegregate their schools.”<sup>[48]</sup> Throughout his dissent, Breyer makes no distinction between voluntary desegregation and voluntary integration. The former is a remedial measure taken to correct a previous injustice. The latter is a proactive attempt to meet a racial proportion which is more aesthetically pleasing to the local school district. This case is not about voluntary desegregation, but rather voluntary integration programs, which arbitrarily use race as the definitive factor for which school a child attends.

Unlike the present case, the legal precedents upon which Breyer relies are desegregation cases challenging the state proscription against assignments made on basis of race for the purpose of creating racial balance to disestablish dual systems of education.<sup>[49]</sup> In contrast, the Seattle Plan challenges a voluntary integration program adopted by the school district to better blend the races in Seattle’s public schools. As stated above, there is a distinction between desegregation and integration programs. The Seattle case was not about *de facto* segregation, but rather a case about *de jure* discrimination for the purpose of effectuating a race-based integration program. Justice Breyer’s reliance on desegregation cases as legal authority to his analysis is inappropriate and unpersuasive.

In his concurrence, Justice Thomas criticized Justice Breyer’s dissent as sounding alarmingly familiar: “Disfavoring a color-blind interpretation of the Constitution, [Justice Breyer’s] dissent would give school boards a free hand to make decisions on the basis of race “an approach reminiscent of that advocated by the segregationists in [*Brown*].”<sup>[50]</sup> Justice Thomas noted that Justice Breyer mischaracterized the nature of the subject plans as being implemented to remedy segregation or prevent resegregation even though neither district was currently being compelled to remedy segregation nor threatened with resegregation.<sup>[51]</sup> Justice Thomas stressed that “racial imbalance is not segregation,” and racial imbalance is not itself unconstitutional.<sup>[52]</sup> “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>[53]</sup> Such strong sentiments from Justice Thomas illuminate the fatally flawed thinking in the dissent that race should matter.

## CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment secures to “a race recently emancipated... all the civil rights that the superior race enjoy.”<sup>[54]</sup> The purpose of the Fourteenth Amendment is to prevent and remedy segregation. Moreover, it seeks to eliminate the inequitable separation of races. It seeks to give equal opportunity for every individual regardless of race and eliminate the exclusion of an individual from access to an opportunity because of race. That “balance of individual and collective interests” cannot in itself offend our Constitution by means amounting to retaliatory discrimination resulting in a benefit to those previously disadvantaged to the exclusion of the previous benefactors’ fundamental right to equality.

This decision itself sets up an interesting scenario by virtue of the fractured opinion – namely that similar plans will have to be viewed individually in the context of their overall purpose and race-

conscious means to achieve that purpose. However, one thing is perfectly clear: the two subject plans in these cases were unconstitutional, surely bringing to light hundreds of others across the country that will now have to be re-evaluated in order to pass constitutional muster. If the ultimate goal is a better education, then schools must stop teaching racial discrimination by using racial discrimination in their admittance policies.

*\*Sonya D. Jones is an attorney with Pacific Legal Foundation in Bellevue, Washington. PLF filed as amicus in support of Petitioners in both cases in the U.S. Supreme Court. Erin N. Ramsey is a law student at Seattle University School of Law.*

## References

- [1] *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, 551 U.S. \_\_\_\_, 127 S.Ct. 2738, 2746 (2007). This opinion also represents the opinion in *Meredith v. Jefferson County Bd. of Educ.*, a similar case involving race-based school admissions policies. For background information on these two cases, see Sonya D. Jones and Erin N. Ramsey, DISCRIMINATION VEILED AS DIVERSITY: THE USE OF SOCIAL SCIENCE TO UNDERMINE THE LAW, available at <http://www.wce.wvu.edu/Resources/CEP/eJournal/v002n001/a003.shtml> (last visited July 24, 2007).
- [2] *See PICS* at 2769 (J. Thomas, concurring). Even more egregious in this case was that Seattle considered two categories in trying to achieve racial balance: white and non-white. Louisville considered two, as well: black and other. *Id.* at 2746. Neither system of classification distinguishes students of other ethnic backgrounds, such as Hispanic, Asian, or Native American, and woefully discounts the diversity provided by those students.
- [3] *See id.* (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, ' 2).
- [4] *Id.* at 2768; *see also, id.* at 2743 (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Id.* at 493); *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955) (school districts must not base admissions to public schools on race).
- [5] *See PICS*, 127 S.Ct. at 2746-47.
- [6] *See id.* at 2747.
- [7] *Id.*
- [8] *Id.* The overall distribution in Seattle Public Schools is 41% white, and 59% non-white. *Id.*
- [9] *Id.* at 2749. Jefferson County Schools operate the public schools in Louisville, Kentucky. *Id.*
- [10] *Id.* (internal citations omitted).
- [11] *Id.*
- [12] *Id.*

[13]

*Id.*

[14]

*Id.* at 2749-50.

[15]

*Id.* at 2750, n.7.

[16]

*Id.* at 2751-52 (internal citations omitted).

[17]

*Id.* at 2752 (internal citations omitted).

[18]

*Id.*

[19]

*Id.* at 2752-53.

[20]

*Id.*

[21]

*Id.*

[22]

*Id.* at 2753.

[23]

*Grutter v. Bollinger (Grutter)* 539 U.S. 306, 331 (2003). “[The law school’s] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees 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.” *Id.* at 338.

[24]

See *PICS*, 137 S.Ct. at 2753; *Grutter*, 539 U.S. at 331.

[25]

*PICS*, 127 S.Ct. at 2753; see also, *Grutter*, 539 U.S. at 337.

[26]

See *PICS*, 127 S.Ct. at 2755. A plurality occurs when a majority of Justices agree in the judgment, but do so for different reasons. Usually, the narrowest test asserted by any of the opinions supporting the majority judgment will be the test used in future cases. Here, that opinion arguably belongs to Justice Kennedy, giving his asserted possibility of a compelling interest future play in the courts.

[27]

*Id.*

[28]

*Id.*

[29]

*Id.* Further, the school districts offered “no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts . . . .” *Id.* at 2756.

[30]

*Id.* at 2757 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

[31]

*Id.*

[32]

*Brown II*, 349 U.S. at 300-01.

[33]

*See PICS*, 127 S.Ct. at 2767-68.

[34]

*See id.* at 2760.

[35]

*Id.*

[36]

*Id.*

[37]

*See id.*

[38]

*Id.* at 2753 (emphasis in original).

[39]

*Id.* at 2754 (internal citations omitted).

[40]

*Id.*

[41]

*See id.* at 2788-89 (J. Kennedy, concurring).

[42]

*Id.* at 2792.

[43]

*Id.*

[44]

*Id.* at 2761-62; *id.* at 2762 n.16.

[45]

*Id.* at 2762.

[46]

*Id.*

[47]

*Id.* at 2765.

[48]

*Id.* at 2811 (J. Breyer, dissenting).

[49]

*Id.* at 2811-12 (citing *Swann*, 402 U.S. at 15-16; *Northern Carolina School Bd. of Ed. v. Swann*, 402 U.S. 43 (1971); *Bustop, Inc. v. Los Angeles Bd. of Ed.*, 439 U.S. 1380(1978)).

[50]

*See id.* at 2768 (J. Thomas, concurring).

[51]

See *id.* at 2768-69; see also, *id.* at 2788 (J. Kennedy, concurring) (“Justice Breyer’s dissenting opinion . . . rests on what in my respectful submission is a misuse and mistaken interpretation of our precedents.” *Id.*).

[52]

*Id.* at 2769.

[53]

*Id.* at 2770 (quoting *Grutter*, 539 U.S. at 353 (J. Thomas, dissenting)).

[54]

*Id.* at 2815 (J. Breyer, dissenting) (citing *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879)).