

MAKING SCHOOLS MORE SEPARATE AND
UNEQUAL: *PARENTS INVOLVED IN
COMMUNITY SCHOOLS V. SEATTLE SCHOOL
DISTRICT NO. 1*

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INTRODUCTION

American public schools are increasingly separate and unequal. By every measure, public schools are becoming more racially segregated.¹ Historically, much less has been spent on education for African-American and Latino students than for white students.

The Supreme Court deserves a great deal of the blame for this. In *San Antonio Independent School District v. Rodriguez*, the Court held that inequalities in school funding do not deny equal protection, and the Court concluded that education is not a fundamental right under the Constitution.² While *Rodriguez* meant that there would be unequal schools, another decision a year later, *Milliken v. Bradley*,³ ensured that they would be racially separate.

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1. GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 8-14 (2006), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/racial-transformation-and-the-changing-nature-of-segregation/orfield-racial-transformation-2006.pdf> (analyzing data from the United States Department of Education’s Common Core of Data, 2003-2004); Regina Rosenello, *School Integration in the Wake of Parents Involved and Meredith*, 40 RUTGERS L.J. 535, 536 n.3 (2009).

2. 411 U.S. 1, 18, 54-55 (1973).
3. 418 U.S. 717 (1974).

In *Milliken*, the Supreme Court ruled that it is generally unconstitutional for courts to order inter-district remedies for school segregation,⁴ such as transferring white students from suburban schools to city schools and minority students from city schools to suburban schools. Without the ability to assign students from city schools to suburban ones, and from suburban schools to city ones, there is no practical way to achieve desegregation in almost every metropolitan area. If 90% of a city's school system is comprised of minority students, no amount of busing or shifting students can achieve desegregation. *Milliken* has thus had a devastating effect on the ability to achieve desegregation in many areas. Duke professor Charles Clotfelter, in a careful study of American schools, concluded that 60% of segregation is a result of *Milliken v. Bradley*; or put another way, American schools would be 60% less segregated if inter-district remedies were possible.⁵

The combined effect of *Milliken* and *Rodriguez* has been enormous. *Milliken* helped to ensure racially separate schools, and *Rodriguez* meant that they would be unequal. American public education is characterized by wealthy, white suburban schools spending a great deal on education surrounding much poorer black and Latino city schools that spend much less on education. The promise of *Brown* of equal educational opportunity has been unfulfilled because of the Supreme Court's failures.

After these decisions, the Court continued to limit the ability of courts to remedy racial segregation in schools. For example, in *Board of Education v. Dowell* the issue was whether a desegregation order should continue when its end would mean a resegregation of the public schools.⁶ There the Supreme Court held that federal-court desegregation orders should be ended once a school system has "achieved unitary status" even when it will mean the resegregation of the public schools.⁷ The result has been the end of many successful desegregation orders.

These cases—*Rodriguez*, *Milliken*, *Dowell*, and others like them—have limited the ability of courts to create equal educational opportunity. But many school boards on their own implemented plans to enhance racial diversity and desegregate their schools. In

4. *Id.* at 755-57.

5. CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (2004).

6. 498 U.S. 237, 240 (1991).

7. *See id.* at 244, 260.

2007, *Parents Involved in Community Schools v. Seattle School District No. 1*⁸ imposed significant, new limits on the ability of school systems to adopt such voluntary desegregation programs.

Part I of this Article describes the Court's decision in *Parents Involved*. Part II describes the effects of the decision on American public education. Part III explains why the decision is fundamentally flawed in its premises and its conclusions.

Parents Involved must be understood in the context of now forty years of Supreme Court decisions that have contributed to there being increasingly separate and unequal schools. Indeed, there has not been a single Supreme Court decision since *Rodriguez* in 1973 that has furthered desegregation or enhanced the equality of American public education.

I. THE COURT'S DECISION

Parents Involved in Community Schools v. Seattle School District No. 1 involved public school systems in Louisville, Kentucky and Seattle, Washington that had adopted plans using race as one factor in assigning students to schools to achieve greater racial diversity.⁹ Louisville, which had a program that included all students from kindergarten through twelfth grade, had previously been a system segregated by law and had been subject to a judicial desegregation order that had been lifted not long before it adopted its own desegregation plan.¹⁰ Seattle never had been segregated by law and had a plan that used race as a factor in assigning students to high schools to achieve greater racial diversity.¹¹

The Court, in a five-to-four decision, found both plans to be unconstitutional.¹² Chief Justice Roberts's opinion was joined in its entirety only by Justices Scalia, Thomas, and Alito.¹³ Justice Kennedy concurred in part, but also concurred only in the judgment in part,¹⁴ and his separate opinion is thus crucial to determining the scope and impact of the decision.

8. 551 U.S. 701 (2007).

9. *Id.* at 709-10.

10. *Id.* at 715-16.

11. *Id.* at 712-13.

12. *Id.* at 747-48 (plurality opinion); *id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

13. *Id.* at 708 (majority opinion).

14. *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

All five Justices in the majority agreed that the government must meet strict scrutiny—its actions must be necessary to achieve a compelling purpose¹⁵—even if it is using race to achieve school desegregation. Chief Justice Roberts, writing for the majority, declared, “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”¹⁶

Chief Justice Roberts, writing for a plurality of four, found that Seattle and Louisville lacked a compelling interest for their desegregation efforts.¹⁷ Chief Justice Roberts stressed that the school systems were not seeking to remedy constitutional violations, and he rejected the argument that diversity in classrooms was an interest sufficient to meet strict scrutiny. Chief Justice Roberts, writing for the plurality, stated the following:

However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled “racial diversity” or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.¹⁸

By contrast, Justice Kennedy and the four dissenters said that desegregating schools is a compelling government interest. Justice Kennedy stated, “In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”¹⁹

But all five Justices in the majority agreed that the school districts failed to show that race-neutral means cannot achieve desegregation.²⁰ Justice Kennedy, like the four Justices in the plurality, said that race can be used in assigning students only if there is no other way of achieving desegregation. Justice Kennedy identified several alternatives, which school systems can use to achieve greater racial diversity in their schools:

15. *Id.* at 720 (majority opinion).

16. *Id.*

17. *See id.* at 730-31 (plurality opinion).

18. *Id.* at 733.

19. *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment).

20. *Id.* at 733-35 (majority opinion).

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but 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.²¹

Justice Breyer wrote a lengthy dissent joined by Justices Stevens, Souter, and Ginsburg.²² He described how American public schools are increasingly racially segregated and lamented that the Court's decision will have the effect of placing many effective desegregation plans in jeopardy.²³ Justice Breyer attached an appendix to his dissent, which listed the many voluntary desegregation plans that will be in jeopardy in light of the invalidation of the Louisville and Seattle programs.²⁴ The dissent questioned whether these efforts can be effective in achieving meaningful desegregation.

The plurality and the dissent have dramatically different views about the importance of diversity in public schools and the meaning of *Brown v. Board of Education*. Chief Justice Roberts sees in the Constitution a command for color blindness and concluded his opinion by declaring:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way to achieve a system of determining admission to the public schools on a nonracial basis, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.²⁵

By contrast, Justice Breyer and the dissent express the need for deference to school boards in desegregating schools and see the

21. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment).

22. *Id.* at 803 (Breyer, J., dissenting).

23. *See id.* at 861-62.

24. *See id.* at 869-72.

25. *Id.* at 747-48 (plurality opinion) (citation omitted) (internal quotation marks omitted).

majority as abandoning the promise of *Brown v. Board of Education*. Justice Breyer concludes his dissent by stating:

The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.²⁶

II. THE IMPACT OF *PARENTS INVOLVED*

Parents Involved thus limits the ability of school systems to adopt voluntary desegregation plans. In assessing this decision, it is important to put this in the context of a general unwillingness in so many places across the country to adopt voluntary plans at all. *Parents Involved* thus reinforces and provides an excuse for what school boards don't want to do anyway. Professors Erica Frankenberg and Chinh Q. Le point out that "the law alone cannot account for the scores of school districts and communities that have essentially offered no strategy for or even intention of addressing racial, ethnic, and socioeconomic isolation in their schools, despite the growing segregation they are and have been witnessing."²⁷

There is very little federal incentive encouraging school districts to pursue integration. The Obama Administration's recent efforts with regard to the nation's education system have focused mainly on encouraging the proliferation of charter schools.²⁸ Many

26. *Id.* at 868 (Breyer, J., dissenting).

27. Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1021 (2008); see also James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007) ("The truth is that racial integration is not on the agenda of most school districts and has not been for over twenty years. Modern education reform efforts might still share the goal of equalizing educational opportunities for minority students, which the Court in *Brown* embraced. But integration is not generally the means of choice to achieve that goal, nor is the Supreme Court the key arena."); Danielle Holley-Walker, *Educating at the Crossroads: Parents Involved, No Child Left Behind and School Choice*, 69 OHIO ST. L.J. 911, 935 (2008) (expressing the opinion that, given the pressures and emphasis placed on student performance by No Child Left Behind, school integration may not be a top priority for the majority of schools).

28. See, e.g., Greg Toppo, *Ready, Set, Race for Education Money: States Rush to Make Changes to Get Part of Stimulus Grant*, USA TODAY, Nov. 4, 2009, at 7D, available at http://www.usatoday.com/printedition/life/20091104/topblline04_st.art.htm (illustrating how the Obama Administration has prioritized further expansion of the charter movement by tying eligibility for stimulus funds

proponents of desegregation worry that charter schools may actually hamper and undermine integration efforts, given the increasingly segregated nature of charter schools.²⁹ Indeed, several school districts in Georgia sued their state over the establishment of charter programs for this very reason.³⁰ Also, the remaining federal efforts do not do very much to encourage integration efforts. Professor Stephen Smith thus concluded that

[t]o be sure, court opinions such as those in *Parents Involved* will have important consequences for school districts around the country But insofar as (i) there is looser coupling between local venues and Congress and the executive branch on desegregation issues than there was in the civil rights era, and (ii) the federal government has largely abandoned its efforts to promote desegregation, the new politics of desegregation is likely to be more piecemeal than it was in the civil rights era and more likely to occur on a district-by-district basis, since it is more dependent on local conditions and developments.³¹

It is in this context that the effects of *Parents Involved* need to be assessed. The decision has most obviously affected the desegregation efforts of the school districts pursuing existing integration plans fatally similar to those of Louisville and Jefferson County that were struck down by *Parents Involved*. While estimates on the actual number of such districts vary considerably (from “more than 1,000” to “possibly [less than] ten”),³² these districts still undoubtedly exist, and “the efforts of the . . . school districts that

from Race to the Top grants to the “loosening [of] legal caps on the number of charter[s]”).

29. See Alyssa M. Simon, Comment, “Race” to the Bottom? Addressing Student Body in Diversity in Charter Schools After *Parents Involved*, 10 CONN. PUB. INT. L.J. 399, 403 (2011) (“While charter schools theoretically have the potential to reduce segregation by drawing from larger attendance zones and crafting missions that might appeal to a diverse cross section of students, they are in fact more racially isolated than their public counterparts. Seventy percent of black charter school students attend ‘intensely segregated’ schools. The average white charter school student attends a charter school that is over 70 percent white, despite the fact that white students comprise only 43 percent of charter school enrollees.” (footnotes omitted) (quoting Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, 11 EDUC. POL’Y ANALYSIS ARCHIVES 1, 12 (2003))).

30. Erica Frankenberg, Genevieve Siegel-Hawley & Adai Tefera, *School Integration Efforts After Parents Involved*, HUM. RTS., Fall 2010, at 10, 11.

31. Stephen Samuel Smith, *Still Swimming Against the Resegregation Tide? A Suburban Southern School District in the Aftermath of Parents Involved*, 88 N.C. L. REV. 1145, 1175 (2010).

32. See Frankenberg & Le, *supra* note 27, at 1021 n.29 (internal quotation marks omitted).

presently pursue racial integration will undoubtedly impact the lives of a significant number of schoolchildren, even if only some of those districts continue their efforts after *Parents Involved*.³³ These districts are left with two choices: risk future litigation by relying on the Kennedy concurrence to craft desegregation plans that are centered around factors other than race or that consider race as only one of many factors, or simply abandon previous desegregation efforts.³⁴

To be sure, some districts are taking the former route. According to Professor Kimberly Robinson, “Despite the *Parents Involved* decision, many school districts remain committed to pursuing diversity and avoiding racial isolation.”³⁵ Professor Robinson cites as one of her examples the new student assignment plan adopted in May 2008 by the district of Jefferson County, Kentucky, one of the former litigants in the *Parents Involved* case, which seeks to increase economic and racial diversity by employing socioeconomic factors.³⁶

33. Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 279 (2009).

34. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (suggesting various strategies to avoid racially isolated schools and to create diverse ones, including: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race”).

35. Robinson, *supra* note 33, at 279; see also Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAG., July 20, 2008, at 38, 42; Mark Walsh, *Use of Race Uncertain for Schools*, EDUC. WK. (July 18, 2007), http://www.edweek.org/ew/articles/2007/07/18/43scotus_race.h26.html (quoting an attorney for numerous school boards who stated that “she was hearing a commitment [from school districts] to do whatever could pass legal muster to keep schools racially diverse”); Susan Eaton, *Diversity’s Quiet Rebirth*, EDUC. WK. (Aug. 18, 2008), <http://www.edweek.org/ew/articles/2008/08/18/01eaton-com.html>.

36. See, e.g., Robinson, *supra* note 33, at 280-81; see also Genevieve Siegel-Hawley, *The Integration Report, Issue 4*, INTEGRATION REP. (Feb. 25, 2008), <http://theintegrationreport.wordpress.com/2008/02/25/issue-04/> (describing five Iowa school districts ordered by the State Department of Education of Iowa to revise decades-old desegregation plans to comply with *Parents Involved*, and all five chose to develop “new diversity plans that consider socio-economic status, academic skill levels, race and ethnicity, and language background” as opposed to simply abandoning desegregation efforts).

But the reality also is that many school districts are simply abandoning their desegregation efforts.³⁷ This is exactly the effect that Justice Breyer predicted in his dissent in *Parents Involved*,³⁸ and it has occurred across the country. In this way, the school experiences of thousands of children have been adversely affected by the *Parents Involved* decision.

Parents Involved has also likely affected the decisions of school districts that are considering adopting measures to ameliorate the issue of segregation in a similar way as it affected the districts with an existing plan discussed in the previous section. The *Parents Involved* decision operates to scare away schools from adopting desegregation measures and provides ammo to litigious parents. As *Parents Involved* supporter and President of the Center for Equal Opportunity, Roger Clegg, puts it, the effect of *Parents Involved*

will be significant, and is already visible. School-board members across the country will pick up the paper and read what the Court did, and they will conclude that using skin color to determine school assignments is a bad idea. . . . On top of all this, school-board members now know that, when their counterparts in Seattle and Louisville used race-based student assignments, they enmeshed their respective school districts in years of litigation, ultimately losing and ultimately requiring them to pay, not just

37. See, e.g., ABBIE COFFEE & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, TWO YEARS AFTER THE *PICS* DECISION: DISTRICTS' INTEGRATION EFFORTS IN A CHANGING CLIMATE 5, 8 (2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/districts-integration-efforts-in-a-changing-climate-two-years-after-the-pics-decision/coffee-2-years-after-pics-2009.pdf> ("In Arkansas, Fort Smith Public School District voted to abolish their previous practice of multicultural transfers, specifically in response to the 2007 Supreme Court ruling regarding 'racially based' transfer policies."); Matthew C. Greene, Note, *Unsuspected Shoals in Equal Protection: Adapting Wisconsin's Special Transfer Program to Survive Parents Involved*, 2008 WIS. L. REV. 1201, 1201 (charting the history of Wisconsin's decades-old voluntary desegregation plan (Chapter 220), explaining how it was rendered unconstitutional by the *Parents Involved* decision, and advocating for policymakers to revise the program in compliance with Justice Kennedy's concurrence). Sadly for Mr. Greene and the children involved in Wisconsin's public schools, it appears the program is being phased out. See Erin Richards, *As School Options Expand, Landmark Chapter 220 Integration Program Fades*, MILWAUKEE WIS. J. SENTINEL (Dec. 24, 2013), <http://www.jsonline.com/news/education/as-school-options-expand-landmark-chapter-220-integration-program-fades-b99156975z1-237207691.html>; see also Genevieve Siegel-Hawley, *The Integration Report, Issue 2*, INTEGRATION REP. (Jan. 31, 2008), <http://theintegrationreport.wordpress.com/2008/01/31/issue-02/> ("In the months following the June 2007 *Seattle/Louisville* decision, we have seen a disturbing pattern develop among school districts deciding that the easiest and safest response to the ruling is to eliminate existing desegregation plans altogether.").

38. *Parents Involved*, 550 U.S. at 861 (Breyer, J., dissenting).

their own lawyers, but the opposing side's lawyers as well. "No thanks," other school boards will say. The Seattle and Louisville plans were not atypical and were not particularly sloppy or badly thought out, and they were skillfully defended. But they lost.³⁹

"Thus, in Clegg's view, the potential harm of litigation costs, along with an unclear standard established by Justice Kennedy, will serve to deter school districts from implementing any race-conscious policies to support desegregation."⁴⁰

Furthermore, the efforts of the Office of Civil Rights in the Department of Education under the Bush Administration only served to make matters worse in discouraging school systems from adopting voluntary desegregation plans:

[I]n the wake of the 2007 Parents Involved decision, OCR issued a "Dear Colleague" letter misinterpreting the court decision as antithetical to the very goal of integrated education, and warned districts against the pursuit of any type of voluntary, race-conscious student assignment strategies. The goal of racially integrated education, according to the Bush-era Education Department, was to be realized without direct consideration of race.⁴¹

Misinformation and uncertainty about the decision, then, coupled with the difficulty associated with altering community views enough to elect a school board majority committed to an integration plan, and the very real possibility that an upset parent may initiate expensive and potentially successful litigation if a plan is adopted, ensure that only the communities that are overwhelmingly steadfast in their commitment to diversity will continue to pursue integration.

The effects are especially apparent when one considers the impact of *Parents Involved* on the many school districts that have had their desegregation orders lifted and been declared "unitary"

39. Roger Clegg, *A Good—If Mixed Bag*, NAT'L REV. ONLINE (July 5, 2007, 5:00 AM), <http://www.nationalreview.com/articles/221502/good-if-mixed-bag/roger-clegg>.

40. Smith, *supra* note 31, at 1150.

41. Genevieve Siegel-Hawley, *The Integration Report, Issue 23*, INTEGRATION REP. (Jan. 13, 2010), <http://theintegrationreport.wordpress.com/2010/01/13/issue-23/> (footnotes omitted); *see also* Frankenberg, Siegel-Hawley & Tefera, *supra* note 30, at 13 ("In 2008, the Bush administration sent a letter to school districts inaccurately interpreting the *Parents Involved* decision in a way that suggested only race-neutral means of pursuing integration would be legal. As President Obama took office, civil rights groups and other stakeholders anticipated that his administration would be more supportive of integration efforts, including issuing new guidance to replace the previous 2008 letter. In the third year of the Obama administration, however, no such guidance about voluntary integration has been issued.").

since the decision. For the most part, *Parents Involved* operates to prohibit these districts from carrying over their existing desegregation plans.⁴²

One of the first federal courts to react to *Parents Involved* was in Tucson, Arizona.⁴³

On August 21, 2007, United States District Judge C. Bury, a George W. Bush nominee, relied heavily upon *Parents Involved* in stating that the court intended to let the Tucson Unified School District (TUSD) out of a desegregation order issued in 1978 following a class action suit from Latino and black parents. Attorneys at the Mexican American Legal Defense and Educational Fund (MALDEF) responded the same day and submitted a Motion to Reconsider arguing that Bury's ruling was based upon a misunderstanding of *Parents Involved*, which allowed for race-conscious measures in remedying de jure segregation, which was exactly the case in Tucson. The Tucson school board, however, responded to Bury's order by ending their school desegregation program by a three to two vote.⁴⁴

The events in the Charlotte–Mecklenburg, North Carolina School District (CMS) are probably most illustrative of what happens to integration plans in the post-*Parents Involved* landscape. Superintendent Eric Smith was elected in 1996 while CMS was still under a desegregation order and during his job interview promised to the school board “that the one thing I would not do as superintendent was intentionally re-segregate the Charlotte–Mecklenburg Schools.”⁴⁵ Smith initially acted in complete accordance with this promise by vigorously defending his school system's desegregation goals from a legal challenge by white parents in 1999.⁴⁶ However, when that trial resulted in a court order declaring CMS unitary,

42. See *Parents Involved*, 551 U.S. at 721 (majority opinion) (noting that Jefferson County's recently dissolved desegregation order could not operate as a requisite compelling interest to satisfy strict scrutiny); see also COFFEE & FRANKENBERG, *supra* note 37, at 11-12 (listing forty-five districts that have been declared unitary two years since the *Parents Involved* decision).

43. Charles J. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is “All Deliberate Speed” Stuck in Reverse?*, 30 U. ARK. LITTLE ROCK L. REV. 279, 290 (2008).

44. *Id.* at 290-91 (footnotes omitted).

45. Eric Smith, *Achieving Equity: Why Diversity, High Expectations Matter*, CHARLOTTE OBSERVER, Mar. 9, 1999, at 12A.

46. STEPHEN SAMUEL SMITH, BOOM FOR WHOM? EDUCATION, DESEGREGATION, AND DEVELOPMENT IN CHARLOTTE 161-71 (2004); see also *Capacchione v. Charlotte–Mecklenburg Sch.*, 57 F. Supp. 2d 228, 242 (W.D.N.C. 1999).

Smith largely abandoned his commitment to desegregation.⁴⁷ Stephen Samuel Smith writes:

[T]he 1999 trial altered his perspective. Although a majority of the board still wanted to preserve as much as possible of CMS's historic commitment to desegregation, Smith was much more focused on adopting a plan that would be sure to avoid any additional legal challenges, would appeal to advocates of neighborhood schools, could be implemented quickly, and would satisfy a Charlotte business elite worried that uncertainty in pupil assignment was jeopardizing corporate relocations to Charlotte. Thus, Smith rejected proposals that CMS consider FRL or other socioeconomic criteria in developing its new plan even though such criteria were legal, and without such criteria, the new plan was sure to increase the number of high-poverty schools. Smith was aware of the many problems posed by high-poverty schools, but he felt that CMS and the broader community had the resources and will to deal with these problems. Indeed, when asked by a local journalist "whether concentrating low-income kids in inner city schools made the job harder, he replied, 'I don't think it matters.'"⁴⁸

Mr. Smith, a superintendent with a demonstrated commitment to desegregation goals, abandoned integration efforts due to a combination of economic, political, and legal pressures.

One of the most important things lost because of *Parents Involved* is hope, specifically the hope that the federal judiciary would assist the nation's schools fight the rising trends of segregation and fulfill its promise in *Brown*. The effect of *Parents Involved* is that the federal government, through the federal courts, is standing in the way, instead of facilitating, desegregation efforts. As Professor James Ryan writes:

To be sure, the Court's decision does not take away much that is tangible, as it will not affect many current student assignment plans. But it takes away some hope. Hope that the Court would stand firmly on the side of school integration. Hope that, despite past disappointments, new ways could be found to integrate schools, ways that were acceptable to local citizens of every color and ethnicity. Hope that schools would be places where students go not just to improve their test scores but also to become better citizens and better people. Hope that integrated schools would lead, slowly but finally, to an integrated society. So, yes, the decision is in one sense not terribly significant. But it is no small thing to dash hope.⁴⁹

47. Smith, *supra* note 31, at 1177.

48. *Id.* (footnotes omitted) (quoting SMITH, *supra* note 46, at 189).

49. Ryan, *supra* note 27, at 133.

III. A MISGUIDED DECISION

Chief Justice Roberts's plurality opinion is based on the premise that the Constitution requires that the government be color-blind in its actions. He concludes his opinion by declaring:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.⁵⁰

But nowhere does the Fourteenth Amendment say or imply that the government must be color-blind. I certainly do not believe that the meaning of a constitutional provision is determined by the intent of its framers, but it is clear that the drafters of the Fourteenth Amendment meant to allow the government to use race in its programs to benefit minorities. As Professor Stephen A. Siegel powerfully demonstrated, the Congress that ratified the Fourteenth Amendment adopted a plethora of race-based programs to benefit especially former slaves.⁵¹

The premise for both Chief Justice Roberts and Justice Kennedy is that government actions that use race for beneficial ends, such as desegregating schools, are the same under the Constitution as the use of race to disadvantage minorities. But this is wrong. There is a fundamental difference between using race to harm students of color and using race to benefit all by enhancing racial diversity and desegregation. Justice Sotomayor recently powerfully replied to Chief Justice Roberts's conclusion in *Parents Involved* by declaring:

This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather

50. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (plurality opinion) (citation omitted) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955)).

51. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 569-77 (1998).

than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.⁵²

The Supreme Court's decision in *Parents Involved* is based on the majority's view that race does not matter in terms of the composition of classrooms or for children's education. The decision's effect is to end many voluntary desegregation plans and to discourage others. In this way, it is contributing to the separate and unequal schools that exist throughout the United States.

52. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

