

PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1: A Threat to the Promise of Equality

I. Introduction

In the June 2007 decision of *Parents Involved in Community Schools v. Seattle School District No. 1*,¹ the United States Supreme Court ultimately reinforced the notion that “race is the perpetual American dilemma.”² This decision is the latest in a string of cases dealing with the use of race as a criterion and forms of affirmative action in school admissions³ that began with the landmark decision of *Brown v. Board of Education*⁴ in 1954. In holding that the allegedly compelling interest of diversity in higher education could not justify school districts’ use of racial classifications in student assignment plans for elementary schools,⁵ Chief Justice Roberts proclaimed in the plurality opinion that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁶

This note argues that *Parents Involved in Community Schools* uses colorblind rhetoric in ways that are ultimately disconnected from precedent and from the reality of contemporary education, and are consequently harmful and useless. Part II discusses the precedent upon which the decision is founded, and argues that the plurality opinion in *Parents Involved in Community Schools* marks a divergence from prior case law⁷ by coming down “firmly on the side of

colorblindness,”⁸ in contrast to earlier decisions that have emphasized the need to address the importance and role of race in the education system in efforts to ameliorate the effects of past segregation.⁹ Parts III and IV argue that the Court improperly and counterproductively endorses colorblind legal rhetoric in *Parents Involved in Community Schools* to conclude that “as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.”¹⁰ Ultimately, the use of colorblind rhetoric, both in the plurality opinion by Chief Justice Roberts and in the concurring opinion of Justice Thomas, is a “blow to the philosophy laid out in *Brown v. Board of Education*.”¹¹

II. Perspective: The Evolution of *Brown v. Board of Education* and the Rise of *Parents Involved in Community Schools v. Seattle School District No. 1*

Brown v. Board of Education has been called “the Supreme Court’s greatest anti-discrimination decision”¹² because it “affected so deeply not only Americans but the world”¹³ in holding that “the government’s segregation of schoolchildren by race violates the Constitution’s promise of equal protection”¹⁴ under the Fourteenth Amendment. This case thereby “set the Nation on a path toward public school integration”¹⁵ by issuing desegregation court orders, mandating that public schools comply with the constitutional standards set forth therein. To aid

in this process, the Court “has authorized and required race-based remedial measures to address *de jure* segregation¹⁶.”¹⁷ Beyond the minimum requirements set forth in *Brown v. Board of Education*, “the Court left much of the determination of how to achieve integration to the judgment of local communities.”¹⁸ The Court went as far as to state that if a school district was to conclude that in order to prepare students to live in a pluralistic society that each school should have a prescribed racial ratio reflecting its district as a whole, that “to do this as an educational policy is within the broad discretionary powers of school authorities.”¹⁹

From the jurisprudence emerging after *Brown v. Board of Education*, it became well-established that “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”²⁰ The justification for this standard of review is that “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”²¹ To satisfy this standard of review, a school district must fulfill a two-pronged test, demonstrating that the use of individual racial classifications is “narrowly tailored” to achieve a “compelling” government interest.²²

One of the interests recognized by the Supreme Court as “compelling” is the interest in remedying the effects of past intentional discrimination.²³ The other is the interest in diversity in

higher education.²⁴ In attempting to ameliorate the effects of past segregation under the first interest, in addition to a number of schools being given court decrees of desegregation,²⁵ “a number of school districts in the South that the Government or private plaintiffs challenged as segregated by law voluntarily desegregated their schools without a court order.”²⁶

The litigation at the core of *Parents Involved in Community Schools v. Seattle School District No. 1* arose from the respective policies of two school districts: one in Seattle, Washington; the other in Louisville, Kentucky. In both Seattle and Louisville, each local school district began with schools that were highly segregated *de facto*.²⁷ The plurality claims that Seattle was never segregated *de jure*,²⁸ which the dissent dismisses as “simply not accurate.”²⁹ The Louisville school district was issued a court desegregation order in 1975.³⁰ It operated under this decree until 2000, when a District Court dissolved the order after concluding that the district had achieved “unitary status by eliminating ‘[t]o the greatest extent practicable’ the vestiges of its prior policy of segregation.”³¹ Both the plurality and dissent agree that the Louisville school district was segregated *de jure*.³² Both school districts voluntarily drafted and utilized school assignment plans that used race-conscious criteria.³³ Parents of students denied assignment under these plans brought suit claiming that the plans violated the Fourteenth Amendment guarantee of

equal protection.³⁴ In Seattle, the Ninth Circuit, in a rehearing en banc, ultimately affirmed a District Court’s determination that Seattle’s plan was “narrowly tailored to serve a compelling government interest,”³⁵ after which the Supreme Court granted certiorari.³⁶ In Louisville, the Sixth Circuit affirmed in a *per curiam* opinion, relying upon the rationale of a District Court, that Louisville had a “compelling interest in maintaining racially diverse schools, and that the assignment plan was . . . narrowly tailored to serve that compelling interest.”³⁷ The Supreme Court then granted certiorari.³⁸

III A. Analysis: The Ideological Divergence of the Plurality and Dissent Opinions, and Kennedy’s Concurrence

The plurality opinion of *Parents Involved v. Seattle School Dist. No. 1* holds that the school districts’ use of racial classifications in student assignment plans were not narrowly tailored and were thus unconstitutional.³⁹ The plurality distinguished primary and secondary education from the legitimate interest in a diverse student body in higher education recognized in *Regents of California v. Bakke* and *Grutter v. Bollinger*, which the Court asserts was due to “considerations unique to institutions of higher learning,” and states that these cases are not governed by *Grutter v. Bollinger*.⁴⁰

Even more significant, however, is the use of colorblind rhetoric by the plurality and Justice Thomas's concurrence. The Chief Justice argues that the use of racial classifications in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* merely amounts to racial balancing,⁴¹ which is "not to be achieved for its own sake,"⁴² and is "patently unconstitutional."⁴³ In doing so, the plurality advocates a colorblind approach to Equal Protection jurisprudence by arguing that recognition of racial classifications would "effectively assur[e] 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."⁴⁴ Later in the opinion, the Chief Justice lists alleged costs of using racial classifications,⁴⁵ ultimately concluding that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁴⁶ In his concurrence, Justice Thomas also advocates a colorblind approach to equal protection jurisprudence. He argues that "disfavoring a color-blind interpretation of the Constitution, the 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 v. Board of Education*,"⁴⁷ and repeatedly refers to a colorblind Constitution.⁴⁸

In contrast, Justice Breyer’s dissent states that a “longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it.”⁴⁹ Justice Breyer argues that *de facto* resegregation is on the rise,⁵⁰ that “the wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve,”⁵¹ and that school boards may therefore need “all of the means presently at their disposal to combat those problems.”⁵² The dissent posits that in light of the Court’s conclusions in *Grutter v. Bollinger* that there was a compelling interest in diversity in higher education because it promoted cross-racial understanding, helped to break down racial stereotypes, and enabled students to better understand persons of different races,⁵³ that the “compelling” nature of these interests in the context of primary and secondary education follows in these cases *a fortiori*.⁵⁴

The concurring opinion of Justice Kennedy, in diverging from the strict colorblind advocacy of the plurality opinion and Justice Thomas’s concurrence, states that “diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”⁵⁵ In perhaps the most candid departure from the colorblind advocacy of the plurality

and Justice Thomas in his dissent, the concurrence of Justice Kennedy argues that Justice Harlan's axiom that "[o]ur Constitution is color-blind"⁵⁶ must command our assent as an aspiration,⁵⁷ but that it regrettably "cannot be a universal constitutional principle" in the real world.⁵⁸ Nonetheless, Justice Kennedy concludes that because "the district fails to account for the classification system it has chosen . . . Seattle has not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny."⁵⁹

Clearly, there are discrepancies in the approaches of the plurality and the dissent opinions in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* with regards to race and its role in education. These discrepancies appear to be, at a minimum, demonstrative of ongoing disagreements and unsettled case law regarding the constitutionality of race-conscious criteria in education. At worst, it has been argued that Kennedy's concurrence "announces no coherent rule that any school system could apply with confidence."⁶⁰ It has also been argued that these discrepancies also illustrate that even fifty years after *Brown v. Board of Education*, "school segregation remains one of the most contentious issues facing American public schools."⁶¹

III B. Analysis: The Roberts Plurality and Thomas Concurrence as Divorced from Racial Reality

It is fairly well-established that there are still many segregated schools in this country,⁶² the number of which has been increasing since 1988.⁶³ The reality is that “[the United States has] a history, a deep history in this country, of racial segregation and discrimination . . . and we still have . . . massive racial inequality.”⁶⁴ In this context, the insistence on colorblindness by the plurality opinion and the concurrence of Justice Thomas is troubling and problematic.

Advocating a colorblind approach to equal protection jurisprudence in the arena of public education is ultimately counterproductive and useless: it is divorced from the reality that segregation is still very much a problem in public schools;⁶⁵ by forcing race-neutral solutions to *de facto* segregation, public schools will look for proxies for race⁶⁶ to accomplish the same goals.⁶⁷ A colorblind approach also ignores the benefits of acknowledging and using race-conscious policies in the context of public education, namely the documented benefits flowing from a diverse student population⁶⁸ and increased transparency in judicial assessment of educational policies.⁶⁹ Thus, it can be argued that the plurality and Justice Thomas’s insistence in adhering to a colorblind approach in *Parents Involved in Community Schools v. Seattle School District No. 1* hinders the ongoing and necessary efforts to promote the racial integration in the public school system that was first mandated by *Brown v. Board of Education*.⁷⁰

The reality of the public school system in the United States today is that “black and white children largely attend racially separate schools.”⁷¹ It has been argued that “race is always at the bottom of every academic achievement gap,”⁷² and that this achievement gap is both “profound” and “consistent across all kinds of data.”⁷³ Additionally, with respect to majority black schools, it has been found that “students who attend them are poorer than many, if not most, of the students attending majority white schools,”⁷⁴ making them “very likely to be schools experiencing the effects of concentrated poverty.”⁷⁵ There are a myriad of negative consequences of this reality, among which are that “children in these schools tend to be less healthy, to have weaker preschool experiences . . . to attend classes taught by less experienced or unqualified teachers, [and] to have friends and classmates with lower levels of achievement.”⁷⁶ Indeed, it has been posited that both of the school districts involved in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* “struggled with race,”⁷⁷ a fact that is obscured by the insistence on colorblindness by the plurality opinion and the concurrence of Justice Thomas. Thus, “school desegregation remains one of the most contentious issues facing American public schools,”⁷⁸ and thus, would most likely be better be served by legal action that approaches the role of race openly instead of the colorblind rhetoric advocated by the Court.

In addition to ignoring the realities of racial disparities in public school education and achievement, an insistence on race-neutral solutions to problems of *de facto* segregation will compel public schools to look for proxies to race.⁷⁹ In his controlling concurrence, Justice Kennedy states that “a compelling interest exists in avoiding racial isolation, and interest that a school district, in its discretion and expertise, may choose to pursue.”⁸⁰ It is conceivable, and it has been argued, that in doing so Kennedy has invited public school districts to pursue racial diversity by indirect means.⁸¹ Because school administrators in the public school systems are heavily invested in the idea of diversity,⁸² school districts will continue to feel pressured to reduce racial isolation, and will thus look for proxies for race because they will be forced to pursue racial diversity indirectly.⁸³ Thus, by advocating a race-neutral public education system while acknowledging that a compelling interest exists in avoiding racial isolation,⁸⁴ the Supreme Court does not actually succeed in promoting colorblindness,⁸⁵ but instead gives school administrators an incentive to pursue indirect methods of creating racial diversity and creates another layer of bureaucracy⁸⁶ in the public education system.

Additionally, the promotion of colorblindness in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* by the plurality opinion and the concurrence of Justice Thomas

ignores the potential benefits to be derived from acknowledging and using race-conscious policies in the context of public education. Some of these benefits flow directly from a diverse student population. Indeed, “[m]any public school districts, including Seattle and [the Louisville school district], have determined that their students are benefited by educational strategies designed to teach about race,”⁸⁷ including practices designed to help students learn “racial literacy.”⁸⁸ In fact, that the Court in *Grutter v. Bollinger* identified no less than thirteen “‘substantial’ governmental benefits that flow from a diverse student population”⁸⁹ in the context of higher education.

In acknowledging that “ours is a society with a heritage of racial problems growing out of generations of slavery and post-slavery segregation,”⁹⁰ the First Circuit United States Court of Appeals appropriately observed in *Comfort v. Lynn School Committee*⁹¹ that it “may be unrealistic to suppose that everything will work out well if only race is ignored in every context.”⁹² The court concluded from ample record support that “there are significant educational benefits to be derived from a racially diverse student body in the K-12 context.”⁹³ This record support included positive developments that had been observed in Lynn’s schools as a result of a race-conscious school transfer provision used by the school, including “higher attendance rates,

declining suspension rates, a safer environment, and improved standardized test scores.”⁹⁴ The Lynn School Committee claimed that these positive developments could be explained by the intergroup contact theory,⁹⁵ the benefits of which ultimately continue to accrue as a school becomes increasingly diverse.⁹⁶

Despite the significant record support of improvements in elementary and secondary public education as a result of increased student racial diversity through the use of the race-conscious school transfer provision,⁹⁷ the Supreme Court ultimately abrogated this case in *Parents Involved in Community Schools v. Seattle School District No. 1* by restricting the recognition of diversity as a compelling interest in *Grutter v. Bollinger* to institutions of higher education.⁹⁸ In the plurality opinion of *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, Chief Justice Roberts states that “prior to *Grutter*, the court of appeals rejected as unconstitutional attempts to implement race-based assignment plans . . . in primary and secondary schools.”⁹⁹ The Chief Justice argues that it was largely in reliance upon *Grutter* that the interest in diversity in education was extended to primary and secondary schools in *Comfort v. Lynn School Committee*.¹⁰⁰ Chief Justice Roberts limits the holding of *Grutter* to institutions of higher learning by arguing that the Court “relied upon considerations unique to institutions of

higher education,” and that these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. Thus, the Court in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* ultimately disregards the large amount of record evidence detailing improvements observed as a result of racial diversity in public schools as a result of the race-based transfer provision,¹⁰¹ evidently in an effort to contain the use of race-conscious criteria in public education.

Finally, in advocating strictly race-neutral solutions to *de facto* segregation, the Supreme Court ignores the potential benefit of increased transparency in judicial assessment¹⁰² of educational policies that do employ race-conscious criteria. As previously discussed, an insistence on race-neutral solutions to problems of *de facto* segregation will compel public schools to look for proxies to race.¹⁰³ One of the greatest criticisms of the decision of *Grutter*, and indeed of *Bakke* before it, is that these two cases adopt “viewpoint diversity”¹⁰⁴ as a justification for affirmative action, “as opposed to a candid recognition of present racial inequality and the continuing effects of past discrimination.”¹⁰⁵ Because it does not openly acknowledge the effects or role of racial inequality, this concept of “viewpoint diversity,” “far from [being] a viable means of ensuring affirmative action in the admissions policies of colleges

and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice.”¹⁰⁶

Conversely, it has been argued that the court in *Comfort* should be praised for its open use of

race-conscious criteria because it “provides an opportunity for an honest discussion of what is

permitted under the Equal Protection Clause.”¹⁰⁷ Thus, it is argued that the use of “racial

diversity” actually plays a clarifying role.¹⁰⁸ In contrast, insistence on race-neutral policies

appears to run contrary *Brown v. Board of Education* and its “promise of true racial equality.”¹⁰⁹

IV. Conclusion

This note argues that the plurality opinion and the concurrence of Justice Thomas in *Parents Involved in Community Schools v. Seattle School District No. 1* use colorblind rhetoric in ways that are ultimately disconnected from precedent and from the reality of contemporary education, and are consequently both harmful and useless. While “the last half-century has witnessed great strides toward racial equality,”¹¹⁰ *Brown*’s promise of true racial equality¹¹¹ has yet to be fully realized.¹¹² In threatening this promise, the use of colorblind rhetoric in *Parents Involved in Community Schools* represents a significant blow “to the philosophy laid out in *Brown v. Board of Education*”¹¹³ and consequently, to future efforts to combat discrimination.

¹ Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

² Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, (1999) (citing J.H. Wilkinson, III, *From Brown to Bakke* 8 (1979)).

³ See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that a law school had a compelling interest in attaining a diverse student body, thus justifying their use of race as a criterion in their admission process); Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the use of race as a criterion in an undergraduate admissions process violated the Equal Protection Clause).

⁴ 349 U.S. 294 (1954). The case of *Brown v. Board of Education* was a landmark Supreme Court decision of the civil rights era, holding that racial discrimination in public education was unconstitutional. *Id.* at 298.

⁵ *Parents Involved*, 127 S. Ct. at 2753.

⁶ *Id.* at 2768.

⁷ *Id.*

⁸ Jeffrey Rosen, *Can A Law Change A Society?*, N.Y. TIMES, July 1, 2007.

⁹ *The Diane Rehm Show: Supreme Court Decision on Race-Conscious Public School Policies*

(American University Radio WAMU 88.5 FM broadcast July 2, 2007).

¹⁰ *Parents Involved*, 127 S. Ct at 2770 (Thomas, J., concurring).

¹¹ *The Diane Rehm Show: Supreme Court Decision on Race-Conscious Public School Policies*

(American University Radio WAMU 88.5 FM broadcast July 2, 2007).

¹² *Parents Involved*, 127 S. Ct at 2822 (Breyer, J., dissenting) (citing Strauss, *Discriminatory*

Intent and the Taming of Brown, 56 U. CHI. L.REV. 935, 937 (1989)).

¹³ *Id.* at 2822–23 (Breyer, J., dissenting) (Justice Breyer lists a number of academic and legal sources supporting this assertion).

¹⁴ *Id.* at 2801 (Breyer, J., dissenting).

¹⁵ *Id.*

¹⁶ “Segregation” is defined by Justice Thomas in his concurrence as “the deliberate operation of a school system to ‘carry out a government policy to separate pupils in schools solely on the basis of race.’” *Id.* at 2769 (Thomas, J., concurring) (citing *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 6, 91 S. Ct. 1267 (1971)).

¹⁷ *Id.* at 2769 (Thomas, J., concurring).

¹⁸ *Id.* at 2801 (Breyer, J., dissenting).

¹⁹ *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)).

²⁰ *Id.* at 2751.

²¹ *Id.* at 2751–52 (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

²² *Id.* at 2752 (citing *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 211 (1995)).

²³ *Id.*

²⁴ The interest in diversity in higher education was first recognized by the Supreme Court in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 311–12 (1978), in which Justice Powell wrote that “institutions of higher learning have a First Amendment right—academic freedom—to use race as one ‘plus’ factor when shaping their student bodies to achieve viewpoint diversity.” George F. Will, *The Court Returns to Brown*, WASH. POST, July 5, 1007. The interest in diversity in higher education was upheld in *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003), when the Supreme Court held that a law school had a compelling interest in attaining a diverse student body. The interest in diversity education was again affirmed as compelling in *Gratz v.*

Bollinger, 539 U.S. 244, 270 (2003), in which the Court held that a university’s admissions policy was not sufficiently narrowly tailored to achieve the interest in educational diversity.

²⁵ *Parents Involved*, 127 S. Ct. at 2801 (Breyer, J., dissenting). This, indeed, was the case for the Jefferson County school district in Louisville, Kentucky that led to the decision of *Parents Involved in Community Schools v. Seattle School District No. 1*.

²⁶ *Id.* (Breyer, J., dissenting). Voluntary desegregation efforts without a prior court order occurred in Seattle School District No. 1, which led to the decision of *Parents Involved in Community Schools v. Seattle School District No. 1*.

²⁷ *Id.* at 2802 (Breyer, J., dissenting).

²⁸ *Id.* at 2761.

²⁹ *Id.* at 2812 (Breyer, J., dissenting).

³⁰ *Id.* at 2749.

³¹ *Id.*

³² *Id.* at 2749; *id.* at 2806 (Breyer, J., dissenting).

³³ *Id.* at 2746.

³⁴ *Id.* at 2746.

³⁵ *Id.* at 2749.

³⁶ *Id.* at 2749 (citing 126 S. Ct. 2351 (2006)).

³⁷ *Id.* at 2750.

³⁸ *Id.* (citing 126 S. Ct. 2351 (2006)).

³⁹ *Id.* at 2755.

⁴⁰ *Id.* at 2753.

⁴¹ *Id.* at 2757.

⁴² *Id.* (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

⁴³ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

⁴⁴ *Parents Involved*, 127 S. Ct. at 2758 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495

(1989)).

⁴⁵ *Id.* at 2767. The reasons listed include: because “such classifications promote ‘notions of racial inferiority and lead to a politics of racial hostility,’” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); because they “reinforce the belief, held by too many for too much of our history, that

individuals should be judged by the color of their skin,” *Shaw v. Reno*, 509 U.S. 630, 657

(1993); and because they “endorse race-based reasoning and the conception of a Nation divided

into racial blocs, thus contributing to an escalation of racial hostility and conflict,” *Metro*

Broadcasting, Inc. v. FCC, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting).

⁴⁶ *Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).

⁴⁷ *Id.* (Thomas, J., concurring).

⁴⁸ *Id.* at 2787 (Thomas, J., concurring).

⁴⁹ *Id.* at 2811 (Breyer, J., dissenting).

⁵⁰ *Id.* at 2833 (Breyer, J., dissenting).

⁵¹ *Id.* (Breyer, J., dissenting).

⁵² *Id.* (Breyer, J., dissenting).

⁵³ *Id.* at 2822 (Breyer, J., dissenting) (citing and paraphrasing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

⁵⁴ *Id.* at 2822 (Breyer, J., dissenting).

⁵⁵ *Id.* at 2789 (Kennedy, J., concurring).

⁵⁶ *Id.* at 2791 (Kennedy, J., concurring) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)

(Harlan, J., dissenting)).

⁵⁷ *Id.* at 2792 (Kennedy, J., concurring).

⁵⁸ *Id.* (Kennedy, J., concurring).

⁵⁹ *Id.* at 2791 (Kennedy, J., concurring).

⁶⁰ Benjamin Wittes, *Anthony Kennedy Punts on the Question of School Diversity*, THE NEW REPUBLIC, July 2, 2007, <http://www.tnr.com/docprint.mhtml?i=w070702&s=wittes070207>.

⁶¹ Amaya Rivera, *Standing Up Against School Segregation: An Interview With David Engle*, MOTHER JONES, September 29, 2006, http://www.motherjones.com/interview/2006/10/k12_segregation.html.

⁶² *The Diane Rehm Show: Supreme Court Decision on Race-Conscious Public School Policies* (American University Radio WAMU 88.5 FM broadcast July 2, 2007).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 280 (March 2006).

⁶⁶ Jeffrey Rosen, *Can A Law Change A Society?*, N.Y. TIMES, July 1, 2007.

⁶⁷ *Id.*

⁶⁸ Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 718 (March 2007).

⁶⁹ Randall L. Jackson, *Comfort v. Lynn School Committee: Illustrating the Untapped Potential of an Explicit Link Between Voluntary Desegregation and Local Constitutionalism*, 41 HARV. C.R.-C.L. L. REV. 553, 567–68 (2006).

⁷⁰ It has been argued by multiple scholars that the plurality opinion of Chief Justice Roberts is not merely contrary to *Brown v. Board of Education*, but is actually an “attack” on *Brown v. Board of Education*. See, e.g., The Editors, *Roberts Rules*, THE NEW REPUBLIC, July 13, 2007; Dahlia Lithwick, *Justice Unmasked?*, SLATE, June 28, 2007.

⁷¹ Adam, *supra* note 65, at 280.

⁷² Amaya Rivera, *Standing Up Against School Segregation: An Interview With David Engle*, MOTHER JONES, September 29, 2006, http://www.motherjones.com/interview/2006/10/k12_segregation.html.

⁷³ *Id.*

⁷⁴ Adams, *supra* note 65, at 280.

⁷⁵ *Id.* at 280–81.

⁷⁶ *Id.* at 281.

⁷⁷ *The Diane Rehm Show: Supreme Court Decision on Race-Conscious Public School Policies*

(American University Radio WAMU 88.5 FM broadcast July 2, 2007).

⁷⁸ Amaya Rivera, *Standing Up Against School Segregation: An Interview With David Engle*,

MOTHER JONES, September 29, 2006, <http://www.motherjones.com/interview/2006/>

10/k12_segregation.html.

⁷⁹ Jeffrey Rosen, *Can A Law Change A Society?*, N.Y. TIMES, July 1, 2007.

⁸⁰ *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring).

⁸¹ Jeffrey Rosen, *Can A Law Change A Society?*, N.Y. TIMES, July 1, 2007.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring).

⁸⁵ Jeffrey Rosen, *Can A Law Change A Society?*, N.Y. TIMES, July 1, 2007.

⁸⁶ *Id.*

⁸⁷ Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 709 (March 2007).

⁸⁸ *Id.* As discussed by Kaufman, the concept of racial literacy includes several objectives: an understanding of the biological and social components of race itself; an understanding of the history of race throughout the world and in America; an understanding of the current and projected racial composition of the world, the country, the state, the county, the school district, and the school; an understanding of the relationship between race and politics, law, society, geography, language, culture, religion, family, and education; an understanding of the connection between race and perceptions of the world and one's self; an understanding of the racial prejudices and biases that may exist in each student; an understanding of the strategies that may be used to overcome such prejudices and biases; and an understanding of the value of racial differences and racial tolerance. *Id.*

⁸⁹ *Id.* at 717–18. These benefits include: an increase in the “robust” exchange of ideas; cross-racial understanding; breaking down racial stereotypes; better preparation of students to work and interact in an “increasingly diverse” society and workforce; facilitating the “diffusion of knowledge and opportunity through public institutions of higher education” to be accessible to all individuals and thereby sustaining our “political and cultural heritage”; fostering the effective participation by members of all racial and ethnic groups which is vital to becoming one nation; and better preparation as professionals in an “increasingly global marketplace.” *Id.*

⁹⁰ *Comfort v. Lynn School Committee*, 418 F.3d 1, 28 (2005).

⁹¹ 418 F.3d 1 (2005).

⁹² *Id.*

⁹³ *Id.* at 16.

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* (“This theory holds that ‘under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes[,] and the disarming of stereotypes.’”).

⁹⁶ *Id.* at 15.

⁹⁷ *Id.* at 16.

⁹⁸ *Parents Involved*, 127 S. Ct. at 2754.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Comfort v. Lynn School Committee*, 418 F.3d 1, 16 (2005).

¹⁰² *See Jackson*, *supra* note 69, at 567–68.

¹⁰³ Jeffrey Rosen, *Can A Law Change A Society?*, N.Y. TIMES, July 1, 2007.

¹⁰⁴ *See Jackson*, *supra* note 69, at 567–68.

¹⁰⁵ *Adams*, *supra* note 65, at 285.

¹⁰⁶ *Id.* at 286.

¹⁰⁷ *See Jackson*, *supra* note 69, at 567.

¹⁰⁸ *Id.* at 567–68.

¹⁰⁹ *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting).

¹¹⁰ *Id.* (Breyer, J., dissenting).

¹¹¹ *Id.* at 2837 (Breyer, J., dissenting).

¹¹² *Id.* (Breyer, J., dissenting).

¹¹³ *The Diane Rehm Show: Supreme Court Decision on Race-Conscious Public School Policies*

(American University Radio WAMU 88.5 FM broadcast July 2, 2007).