THE DREAM OF EQUAL EDUCATIONAL OPPORTUNITY DEFERRED

Giovanni Luciano Escobedo

"[F]or unless our children begin to learn to live together, there is little hope that our people will ever learn to live together."[1]

-- Supreme Court Justice Thurgood Marshall

Introduction

Will the promise of Brown v. Board Of Education, the promise of greater racial integration and equal educational opportunity in public schools, be lost and forgotten? The re-segregation of public schools is on the rise.[2] Furthermore, under the current temperament of the U.S. Supreme Court, the use of race as a remedy to counter the re-segregation of public schools is deemed unconstitutional. The binding U.S. Supreme Court decisions do not distinguish between benign racial classifications and invidiously discriminatory classifications; instead, recent U.S. Supreme Court decisions embody a view that disregards the motive for a racial classification and treats all racial classifications as if they are equally harmful.[3] Yet as asserted in various U.S. Supreme Court dissenting opinions, benign racial classifications, which are intended to bring people together, should be treated distinctly from invidiously discriminatory classifications, which are intended to exclude and separate people.[4] However, what should be is not; this article will discuss our Equal Protection Clause jurisprudence and will use case law as a means of attempting to solve the issue of resegregating schools.

The Fourteenth Amendment and the Equal Protection Clause

The Fourteenth Amendment was enacted by the 38th Congress in 1868; it was enacted due to resistance by the South to the post civil war reform efforts that aimed at bringing a formal end to slavery. Section One of the Fourteenth Amendment provides:

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

[1] *See* Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).
[2] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2801-03 (2007); *see* Genevieve Campbell, *Is Classism the New Racism? Avoiding Strict Scrutiny's Fatal in Fact Consequences by Diversifying Student Bodies on the Basis of Socioeconomic Status*, 34 N. KY. L. REV. 679, 686 (2007).
[3] *See Parents Involved*, 127 S. Ct. at 2764.
[4] *See id.* at 2798, 2818; *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (Stevens, J., and Ginsburg, J., dissenting); *see* Gratz v. Bollinger, 539 U.S. 244 (Ginsburg, J., dissenting).

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

At the time it was enacted, the common purpose behind each clause of Section One of the Fourteenth Amendment was to secure and protect the civil rights of the former slaves.[5] However, in recent times the Fourteenth Amendment is viewed as having a broader application.[6]

The Equal Protection Clause of the Fourteenth Amendment protects people from being placed in a class, based on some distinction or characteristic, for the purpose of denying people of that class the equal protection of the laws.[7] As a part of the Fourteenth Amendment, the Equal Protection Clause was intended to make the former slaves members of the United States, and to protect them from any attempts to continue practices of unequal treatment based on beliefs of racial inferiority and goals of racial exclusion.[8] However, the recent consensus is that the Equal Protection Clause was intended to protect all individuals.[9] Since the Fourteenth Amendment applies to the states and not the federal government, the U.S. Supreme Court has interpreted the Fifth Amendment, which does apply to the federal government, as including an equal protection component.[10] Although the Equal Protection Clause did not manifest an impact on our constitutional jurisprudence until the mid- 1900's, once its significance was acknowledged by the U.S. Supreme Court, it came to be viewed as a source of authority for the aim of ensuring equality in the United States.

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[5] *See* Slaughter-House Cases, 83 U.S. 36, 71 (1872) ("[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.").

[6] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978) ("Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority,' Slaughter-House Cases, supra, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.").

[7] *See* Sunday Lake Iron Co. v. Wakefield Tp., 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

[8] *See Parents Involved*, 127 S. Ct. at 2815.

[9] *See Bakke*, 438 U.S. at 289-90 ("[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

[10] *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

However, there are instances where laws draw distinctions among people while avoiding unconstitutionality; some examples of such laws are those involving drinking age, and age requirements for driver's licenses. The Equal Protection Clause does not provide for an absolute prohibition against the use of classifications. Instead, it requires that the use of a classification be supported by a sufficient justification. In Korematsu v. U.S,[11] the U.S. Supreme Court declared that, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[12] Thus, the Court stated that even with regard to race classifications, the Equal Protection Clause is not an absolute prohibition.

In Korematsu, the Equal Protection Clause was invoked on a claim of discrimination based on race and national origin. The case arose in the context of the Japanese internment camps that were established during World War II where Japanese people were forced from their homes and taken to camps due to fear that arose after the Pearl Harbor incident. Korematsu, who was an American citizen of Japanese descent, was convicted for failing to comply with an order by the U.S. army that required all people of Japanese ancestry be excluded from what had been declared a "Military Area." In Korematsu, the U.S. Supreme Court concluded that the classification and exclusion of all people of Japanese ancestry was not unconstitutional and declared:

> [o]ur task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice…. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures….[13]

Thus, according to the Korematsu opinion what makes a race classification unconstitutional is not the mere use of race in the allotment of benefits or in the imposition of burdens, but rather the fact that the distribution of such benefits or burdens is based upon hostility to the particular race.

In Brown v. Board of Education, the U.S. Supreme Court concluded that laws requiring or permitting segregation in public schools, according to race, are

[11] 323 U.S. 214 (1944).
[12] *Id.* at 216.
[13] *Id.* at 223.

in violation of the Equal Protection Clause of the Fourteenth Amendment.[14] In accordance with Korematsu, the Court concluded that the race classification presented in the Brown case was unconstitutional because it was based on hostility towards Black people. In Brown, unlike Korematsu, Black students were excluded "because of hostility" to their race. The Court recognized the challenged policy of segregation as a policy that was in place to impose a detrimental effect on Black people by denoting them as being members of an inferior group.[15] Chief Justice Warren, who was joined by all the Justices in a unanimous decision, wrote:

> The words of the [Fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,-the right to exemption from unfriendly legislation against them distinctively as colored,-exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[16]

Thus, the Court declared the Equal Protection Clause of the Fourteenth Amendment to be the source of a right to be released, free from, and immune to race classifications that distribute burdens based upon hostility to the particular race, or for the purpose of denoting inferiority of the particular race.

The Current Equal Protection Clause Analysis

As stated earlier, the Equal Protection Clause is not an absolute prohibition against the use of classifications. The general question to be asked with regard to the Equal Protection Clause is whether the use of the classification is justified by a sufficient purpose. The U.S. Supreme Court has fleshed out this general question into a more precise analysis. The first step in determining whether a violation of the Equal Protection Clause has occurred is to identify the discrimination being imposed on a class of people. The second step is to determine the appropriate level of judicial scrutiny that the discrimination will be subjected to. Lastly, the third step is to determine whether the law or government action satisfies the applicable level of judicial scrutiny.

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[14] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[15] *See id.* at 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.").
[16] *Id.* at 492.

There are two ways in which discrimination can manifest itself. One is where the discrimination is the result of a facially evident race classification, while the other is where the discrimination is the result of a facially neutral law or facially neutral government action. Discrimination is facially evident when it is imposed by a law or by government action that by its very terms expressly draws distinctions among people based on some particular characteristic. Discrimination results from a facially neutral law or facially neutral government action when the effects or administration of that law or government action have a discriminatory impact upon people within a particular class, and when that law or government action is purposefully discriminatory.

In Washington v. Davis, the U.S. Supreme Court held that discriminatory impact alone does not violate the Equal Protection Clause.[17] The case arose in the context of a qualifying test taking requirement for Washington, D.C. police force applicants. According to statistics, Black applicants failed the examination in greater numbers than White applicants. In reaching its conclusion, the Court held that there must be proof of a discriminatory purpose in order to show that a facially neutral law or facially neutral government action constitutes a classification.[18] Subsequent U.S. Supreme Court case law established that to be deemed purposefully discriminatory or considered purposeful discrimination, a government act must have been taken for the purpose of, not merely in spite of, its adverse effects on an identifiable group.[19] Moreover, it is the plaintiff claiming a violation of the Equal Protection Clause that has the burden of showing that there was purposeful discrimination. Once the plaintiff has met this burden, the defendant has a defense if it can show that the law or government act was founded on some other basis.[20] Once the defendant makes a showing that there is some

[17] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

[18] *See id*. at 229, 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact."); *see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

[19] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

[20] *See* Hunter v. Underwood, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.").

reason other than purposeful discrimination for the law or government act, then it will be determined there is no Equal Protection Clause violation.[21]

Once the existence of a classification has been proven, the Court then subjects that classification to judicial scrutiny. Depending on the basis for the classification, the court will apply different levels of scrutiny. The levels of scrutiny applied vary in the degree of deference the Court will grant the government actor with regard to its use of a classification. Where the court grants the lowest level of deference to the government actor, it is likely that a classification will be deemed unconstitutional. Furthermore, as the court grants greater deference to the government actor, there is a greater probability that the classification will be deemed constitutionally permissible.

Strict scrutiny is the least deferential of the levels of judicial scrutiny and consequently almost always results in a classification being deemed unconstitutional. Under strict scrutiny, the government actor has the burden of persuading the Court that the use of the classification is necessary and narrowly tailored to achieve a compelling government purpose. Rational basis review is the most deferential of the levels of judicial scrutiny and consequently almost always results in a classification being deemed constitutionally permissible. Under rational basis review, the plaintiff claiming a violation of the Equal Protection Clause has the burden of persuading the Court that the use of the classification is not rationally related to a legitimate government purpose. In other words, under a rational basis review there is a presumption in favor of the government actor. All levels of judicial scrutiny above rational basis review are referred to as heightened scrutiny.

Once it has been determined what level of judicial scrutiny will be applied to the law or government action at issue, the Court must then determine whether the government action meets the level of scrutiny. This determination depends on the extent to which the government's use of the classification is either underinclusive or overinclusive. The classification is deemed underinclusive when it fails to include individuals who should have been included in the classification because of the fact that they are similar to those within the classification. Conversely, the classification is deemed overinclusive when it includes individuals who should not have been included in the classification because of the fact that they are not amongst the individuals who were intended to be affected by the classification. The extent to which the underinclusiveness or

[21] *See* Batson v. Kentucky, 476 U.S. 79, 94 (1986) ("Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.").

overinclusiveness of a classification is permitted depends on the level of judicial scrutiny applied. Where the level of judicial scrutiny allows less deference, it is expected that the use of the classification will be more precise so that it is neither overly underinclusive nor overly overinclusive. The court will conclude that a classification is unconstitutional when the classification is either more underinclusive or more overinclusive than the level of judicial scrutiny allows

The Current Level of Judicial Scrutiny Applied to All Race Classifications

Under the current law, strict scrutiny applies to all classifications based on race and national origin.[22] Consequently, for a race classification to be constitutionally permissible it must be justified by a compelling government interest and the use of the race classification must be narrowly tailored to the achievement of that compelling government interest. The U.S. Supreme Court has only acknowledged the validity of two compelling government interests that allow for the use of race classifications. The first is an interest in remedying the effects of past intentional discrimination[23] and the second is an interest in student body diversity within higher education facilities. [24] With regard to the compelling interest of remedying the effect of past intentional discrimination, the Court held that it is a prerequisite to show a "strong basis in evidence" for a conclusion that remedial action is necessary.[25] With regard to the compelling interest of diversity, the Court held that race may be used as a factor to ensure diversity,[26] so long as race is not utilized as the decisive factor to the exclusion of other factors.[27] One reason that the Court applies strict scrutiny to race classifications is to "smoke out" the illegitimate use of race, so as to prevent government action which promotes ideas of racial inferiority and racial hostility.[28] Furthermore, it is

[22] *See Adarand Constructors*, 515 U.S. at 227 ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."). *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) ("There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest.' . . . Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'").
[23] *See* U.S. v. Paradise, 480 U.S. 149, 167 (1987) ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor.").
[24] *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.").
[25] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).
[26] *See Grutter,* 539 U.S. 306.
[27] *See Gratz*, 539 U.S. 244.
[28] *See City of Richmond*, 488 U.S. at 493 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are

reasoned that classifications based on race should be subjected to greater scrutiny because race is a characteristic which people are born with and which they cannot change; thus it is unfair to discriminate against people on the basis of such a characteristic.[29]

Race Classifications and the Desegregation of Public Schools

Prior to 1954, race classifications had been permitted as a means of separating the races. Race classifications were used to exclude Black people and were based on notions that the Black race is inferior to the superior White race. However, in a unanimous decision, Brown v. Board of Education overruled the doctrine of "separate but equal," and called for an end to legally imposed segregation.[30] In Brown, the U.S. Supreme Court framed the issue as follows: "[d]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[31] As stated by the Court, the issue is instructive as to the meaning behind the Brown decision. It was not the mere use of a race classification that led to the Brown decision. The decision was not based on the premise that the physical facilities and other tangible factors, when compared between White and Black schools, were unequal. The decision was instead based on the premise that the use of the race classification deprived children in the minority group of equal educational opportunities. Furthermore, the decision was based on the premise that separating children based on race has a detrimental effect on public education. It was based on the premise and the fact that the race classification at issue in Brown was intended to separate children of different races, thus leading the Court to find a

'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *see Adarand Constructors,* 515 U.S. at 275-76 (Ginsburg, J., and Breyer, J., dissenting) ("[T]he purpose of strict scrutiny 'is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making,' … 'to differentiate between permissible and impermissible governmental use of race….").

[29] *See Bakke*, 438 U.S. at 360 ("[R]ace… is an immutable characteristic which its possessors are powerless to escape or set aside.").

[30] 347 U.S. 483.

[31] *Id.* at 493.

violation of the Equal Protection Clause.[32] Moreover, the issue, as framed by the court, also shows that the interest which the Court sought to protect was that of equal educational opportunities for minority groups.[33] Thus, in Brown the race classification was deemed unconstitutional because it sought to separate and exclude children of "the minority group" in a manner which deprived them of equal educational opportunities.

However, despite the U.S. Supreme Court's decision in Brown, there was significant resistance to the call of desegregating public schools.[34] To combat this resistance, the U.S. Supreme Court held that school boards have an affirmative duty to pursue a unitary school system absent of racial discrimination.[35] In 1971, the U.S. Supreme Court decided Swann v. Charlotte-Mecklenburg Board of Education, and thus the authority for courts to impose school integration and to remedy past school segregation was born.[36] Swann provided the federal district courts with broad equitable powers regarding the use of school desegregation decrees,[37] for the purpose of fashioning remedies that would result in a unitary or integrated school board.[38] Furthermore, this judicial power to impose remedies in school desegregation cases would be triggered if the school district had failed to perform its affirmative duty to pursue a unitary school system absent of racial discrimination.[39] In Swann, the Court declared that racial balances or racial

[32] *See id.* at 492 ("We must look instead to the effect of segregation itself on public education."); *see id.* at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); *see id.* at 494 ("[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").
[33] *See Brown*, 347 U.S. at 493 ("In these days, it 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.").
[34] *See* Cooper v. Aaron, 358 U.S. 1, 9 (1958) (The Governor called on the Arkansas National Guard to keep blacks out.).
[35] *See* Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430, 437-38 (1968) ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").
[36] 402 U.S. 1 (1971).
[37] *See id.* at 15 ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.'").
[38] *See id.* at 16 ("In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.").
[39] *See id.* at 15 ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked.").

quotas could be used as a starting point in a remedial decree, alteration of attendance zones would be permitted as part of a remedial decree, and busing could also be used as a remedial measure to the extent that it would not compromise the health or educational process of children.[40] Thus, the post-Brown cases established that race could be used in fashioning remedial measures to bring an end to the segregated school boards that resulted from intentional discrimination.

A school board under a federal district court desegregation decree was to remain under federal court supervision until the federal district court declared that the school board had reached unitary status. In Board of Educ. of Oklahoma City Public Schools v. Dowell, the U.S. Supreme Court established a test for determining when a school board had reached unitary status, to wit: "[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[41] To determine whether the vestiges of past discrimination have been eliminated the district court looks to seven factors, which are not all inclusive and the district court may consider any other factors it deems appropriate.[42] The seven recognized factors are: (1) the composition of the student body, (2) the composition of the faculty, (3) the composition of the staff, (4) the extent of equality with regard to transportation, (5) the extent of equality with regard to extracurricular activities, (6) the extent of equality with regard to educational facilities, and (7) the quality of education being offered to the white and black student populations.[43] It is possible for the district court to acknowledge a partial unitary status. When such a status is found to exist within the school, the district court withdraws supervision from the aspects of the school system that have reached unitary status, while maintaining supervision of the aspects that have yet to reach unitary status.[44] Once a school system is deemed to have reached unitary status, then federal desegregation remedies come to an end and control of the school system is returned to the school board.

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[40] *See Swann,* 402 U.S. at 22-31.
[41] 498 U.S. 237, 249-50 (1991).
[42] *See* Freeman v. Pitts, 503 U.S. 467, 492-93 (1992) ("The District Court's approach illustrates that the *Green* factors need not be a rigid framework. It illustrates also the uses of equitable discretion.").
[43] *See Green,* 391 U.S. at 435 ("Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations-faculty, staff, transportation, extracurricular activities and facilities."); *see Freeman,* 503 U.S. at 473 ("The court considered an additional factor that is not named in *Green*: the quality of education being offered to the white and black student populations.").
[44] *See Freeman,* 503 U.S. 490-91.

Desegregation Efforts and the Furtherance of Equal Educational Opportunity Hindered

In 1974, the U.S. Supreme Court decided Milliken v. Bradley, and thereby significantly hindered the ability to achieve desegregation in school systems.[45] In Milliken, prior to the case having reached the U.S. Supreme Court, the District Court had concluded that the Detroit Board of Education had been involved in purposeful discrimination. In fashioning a remedy for such discrimination, the District Court opted for a cross district bussing plan, because it concluded that absent a cross district remedy, achieving integrated schools within Detroit would be impossible due to white flight.[46] This cross district plan was to be imposed upon the entire metropolitan area, which was then defined as Detroit and 53 outlying school districts.[47] In Milliken, the issue before the Court was as follows: under what circumstances may a federal court "order desegregation relief that embraces more than a single school district?"[48] Despite acknowledging the existence of a constitutional right to attend a unitary school system,[49] the Court held that before a desegregation remedy could be imposed on a school district, it would first have to be shown that a constitutional violation had been committed by that school district, or that the segregation had resulted from the administration of a purposefully discriminatory state law.[50] The Court's holding would allow for the irremediable existence of a "growing core of Negro schools surrounded by a receding ring of white schools."[51] Thus the consequence of Milliken was to give breadth to the continued existence of racial exclusion, racial separation, racial hostility, and notions that Blacks and minorities are inferior, while Whites are superior. After Milliken, Brown's promise of integrated schools would be devastated by the resegregation of public schools due to racially segregated housing patterns.

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[45] 418 U.S. 717 (1974).
[46] *See Milliken,* 418 U.S. at 739 ("[A]ny Detroit only segregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 percent white and 13 percent black.").
[47] *See id.* at 740.
[48] *See id.* at 741 ("Here the District Court's approach to what constituted 'actual desegregation' raises the fundamental question, not presented in Swann, as to the circumstances in which a federal court may order desegregation relief that embraces more than a single school district."); *see id.* at 744 ("We therefore turn to address, for the first time, the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district.").
[49] *See Milliken*, 418 U.S. at 746 ("The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district.").
[50] *See id.* at 744-45.
[51] *See id.* at 799.

San Antonio Independent School Dist. v. Rodriguez involved a class action challenging the reliance on local property taxation for school funding purposes.[52] The suit was initiated by Mexican-American parents on behalf of their children and on behalf of poor children throughout the state who reside in school districts having a low property tax base. The plaintiffs alleged that the disparities in school funding resulting from a system which relies on local property taxation for school funding purposes, violated the Equal Protection Clause. However, the plaintiff's allegations failed as the Court held that disparities in school funding do not violate the Equal Protection Clause.[53] Thus, the consequence of the decisions in Swann and San Antonio Independent School Dist. is the irremediable existence of separate and unequal schools: wealthy white schools and poor minority schools.

A Boundary is Drawn: De Jure Segregation and De Facto Segregation

The U.S. Supreme Court has only allowed for federal courts to exercise their post-Brown remedial authority against de jure segregation or the vestiges of de jure segregation. De jure segregation is segregation as a matter of law, which means it is the result of a purposefully discriminatory law or purposefully discriminatory government action. However, where segregation exists without a showing that it was brought about by discriminatory action of government authorities, then the courts deem this de facto segregation.[54] De facto segregation is usually the segregation that results from housing patterns or other socio-economic factors. The Court has stated that the differentiating factor between de jure and de facto segregation is the presence of "purpose or intent to segregate" by government authorities.[55]

However, the question that logically follows is, how do we determine whether present segregation is de facto segregation or whether it is a vestige of de jure segregation? The U.S. Supreme Court has indicated that due to the passage of time, the relationship between past de jure segregation and present segregation "may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention."[56] Under the aforementioned circumstances, the Court has indicated that "a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does

[52] 411 U.S. 1 (1973).
[53] *Id.* at 54 ("[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.").
[54] *See Swann,* 402 U.S. 18.
[55] *See* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 208 (1973).
[56] *Id.* at 211.

not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation."[57]

Another question raised by the de facto/de jure distinction is whether de facto segregation is a vestige of past de jure segregation? If answered in the affirmative, then the de facto/de jure distinction has no significance and the federal courts would have authority to remedy all instances of public school segregation that results in students being deprived of equal educational opportunities. The rationale behind the view that there should be no distinction between de jure and de facto segregation is that both are unconstitutional in that they deprive students of equal educational opportunities.[58] Furthermore, it is known that prior to Brown segregation existed in northern school systems despite the absence of laws or government action that imposed segregation.[59] Thus, strict adherence to the de jure/de facto distinction would mean that the pre-Brown segregated northern schools, not segregated by law or government action, would be irremediable.

Opposing Views of the Equal Protection Clause: Anti-subordination and Anti-classification

Our current Equal Protection Clause jurisprudence represents an anti-classification view.[60] The anti-classification view is based on the interpretation that the Equal Protection Clause requires all race based classifications to be subjected to strict scrutiny. The anti-classification view is not concerned with drawing distinctions between whether a classification is benign or invidiously discriminatory; this view embodies the ideas that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens"[61] and that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[62]

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[57] *Id.*
[58] *See id.* at 215 (Douglas, J., concurring) ("When school authorities, by their actions, contribute to segregation in education, whether by causing additional segregation or maintaining existing segregation, they deny to the students equal protection of the laws.").
[59] *See Keyes,* 413 U.S. at 219 (Powell, J., concurring in part and dissenting in part) ("First, it was that the problem was worse in the South. Then the facts began to show that that was no longer true. 'We then began to hear the de facto-de jure refrain.' 'Somehow residential segregation in the North was accidental or de facto and that made it better than the legally supported de jure segregation of the South.' It was a hard distinction for black children in totally segregated schools in the North to understand, but it allowed us to avoid the problem.").
[60] *See* Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After* Parents Involved in Community Schools, 43 HARV. C.R.-C.L.L. REV. 491, 508, 528 (2008).
[61] *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
[62] *See Parents Involved,* 127 S. Ct. at 2768.

The anti-subordination view is based on the interpretation that the Equal Protection Clause protects people from being treated as subordinate because of their race. This view does distinguish between whether a classification is benign or invidiously discriminatory.[63] The anti-classification view defines invidious discrimination as "an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority."[64] Conversely, the anticlassification view labels "remedial race based preferences" as benign, and views them as constitutionally permissible because they reflect "a desire to foster equality in society."[65] Under the antisubordination view, race based classifications are permissible for the purpose of complying with the affirmative duty to end segregation and provide equal educational opportunities for all children.[66] The antisubordination view embodies the idea that "[t]he Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races."[67]

Parents Involved in Community Schools: Government Action Seeking to Bring People Together is Declared Unconstitutional

In Parents Involved in Community Schools v. Seattle School Dist. No. 1, the issue was the constitutionality of the Seattle and Louisville school systems' race conscious student assignment plans that were being used to diversify student population.[68] The student assignment plans were voluntarily implemented for the purpose of distributing minority and white students more equally among the schools within the school systems. Chief Justice Roberts, who announced the judgment of the Court, presented the question as follows: "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments?"[69] In its decision the U.S. Supreme Court declared

[63] *See id*. at 2834 ("[T]he Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.") (Breyer, J., dissenting).
[64] *See Adarand Constructors,* 515 U.S. at 243 (Stevens, J., dissenting).
[65] *Id.* (Stevens, J., dissenting).
[66] *See* Fischbach, Rhee, & Cacace, *supra* note 60, at 508.
[67] *See Parents Involved,* 127 S. Ct. at 2834-35 (Breyer, J., dissenting); *see Adarand Constructors,* 515 U.S. at 243 (Stevens, J., and Ginsburg, J., dissenting) ("Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to 'govern impartially,' should ignore this distinction.").
[68] *See Parents Involved,* 127 S. Ct. 2738.
[69] *Id.* at 2746.

the Seattle and Louisville school systems' race conscious student assignment plans unconstitutional.

The Seattle school system never had a federal court decree mandating desegregation efforts imposed upon it. In 1969, the NAACP filed a federal lawsuit against the Seattle school system claiming that the school system established and maintained unconstitutionally segregated schools.[70] However, the parties settled out of court after the school system agreed to take affirmative steps to desegregate its schools. As time progressed, these desegregation efforts evolved so that less reliance would be placed on the use of race.[71] The integration plan which came before the Court involved a series of tie breakers that were used when too many students listed a particular school as their first choice. The first tie breaker considered whether the applicant had any siblings enrolled in the chosen school. The second tiebreaker considered the racial composition of the chosen school, and the racial composition of the applicant. The third tiebreaker considered the distance between the chosen school and the applicant's residence.

The Louisville school system was the subject of a federal court remedial decree. In 1972, the Louisville school system was sued in federal court under a claim of unconstitutional segregation and in 1975 the District Court entered a decree requiring desegregation. [72] In 2000, the 1975 decree was dissolved when the District Court concluded the Louisville school system had achieved unitary status.[73] After the decree was dissolved, the Louisville school system continued to implement integration efforts. In 2001, the Louisville school system voluntarily adopted a student assignment plan that required all nonmagnet schools to maintain a minimum black enrollment of fifteen (15%) percent, and a maximum black enrollment of fifty (50%) percent.

In his opinion, Chief Justice John Roberts presented the legal question in such a way as to limit the scope of his opinion to school systems under no legal obligation to combat de jure segregation. In doing so, Chief Justice Roberts eliminated the possibility that the Seattle or Louisville school systems could justify their voluntary race conscious plans as a compelling interest in remedying past intentional discrimination. This is due to the fact that the compelling interest of remedying past intentional discrimination has been limited too school systems that were de jure segregated and are still subject to a federal court remedial decree. Both the Seattle and Louisville school systems were not under a remedial decree when implementing the race conscious plans at issue.

Though Chief Justice Roberts framed his opinion so that it was unnecessary to address the compelling interest of remedying past intentional

[70] *Id.* at 2803 (Breyer, J., dissenting).
[71] *Id.* at 2805 (Breyer, J., dissenting).
[72] *Id.* at 2806 (Breyer, J., dissenting).
[73] *Parents Involved,* 127 S. Ct. at 2809 (Breyer, J., dissenting).

discrimination, he did address the compelling interest of diversity. Besides the compelling interest of remedying past intentional discrimination, diversity is the only other interest the court has deemed compelling so as to justify the use of race classifications. Chief Justice Roberts concluded that the means used to pursue the interest of diversity were not sufficiently narrowly tailored because the race conscious student assignment plans used race in such a way that whenever it came into play it would be the decisive factor instead of being one factor considered amongst others. Chief Justice Roberts wrote: "the plans here 'do not provide for a meaningful individualized review of applicants' but instead rely on racial classifications in a 'nonindividualized, mechanical' way."[74] Furthermore, Chief Justice Roberts concluded that law regarding the compelling interest of diversity did not govern the case because the interest of diversity is limited to the context of higher education and does not apply to elementary and secondary schools.

In contesting Justice Breyer's dissent, Chief Justice Roberts asserted that Justice Breyer relied heavily on dicta. In his dissent, Justice Breyer cited Swann v. Charlotte-Mecklenburg Bd. of Ed. as providing school systems with broad authority to implement voluntary race conscious plans seeking to bring the races together. In Swann, Chief Justice Burger wrote:

> [s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[75]

Chief Justice Roberts asserted that the portion of Swann relied on by Justice Breyer is dicta because it did not address the question presented in Swann regarding the authority of federal courts to remedy de jure segregation.[76] Furthermore, Chief Justice Roberts asserted that the Court is not bound by the Swann dicta because the issue of voluntarily implemented race conscious assignment plans, used by school systems seeking to diversify school population, was not fully debated when Swann was decided.[77]

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[74] *Id.* at 2753-54.
[75] *Swann,* 402 U.S. at 16.
[76] *Parents Involved,* 127 S. Ct. at 2762.
[77] *Id.*

In his concurrence, Justice Thomas asserted that the arguments made by the dissenting justices are similar to the arguments made by the segregationists during the segregation era.[78] Justice Thomas wrote:

> What do racial classifications do in these cases, if not determine admission to a public school on a racial basis?
> 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.[79]

Justice Thomas advocated the anticlassification view of the Equal Protection Clause; he does not distinguish between classifications which are meant to separate, stigmatize, and denote inferiority and classifications which are meant to bring the races together. Consequently, Justice Thomas concluded that the Seattle and Louisville school systems engaged in unconstitutional race-based decision making.

Though Justice Kennedy provided the decisive fifth vote that secured the outcome of the case, his concurrence contains important and notable differences from Chief Justice Roberts' opinion. In his concurrence, Justice Kennedy concluded that the compelling interest of diversity is not limited to the context of higher education, and that it is an interest which elementary and secondary schools may constitutionally pursue.[80] Furthermore, Justice Kennedy wrote:

> parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.[81]

Justice Kennedy dismissed the Chief Justice's view that any use of race conscious action is in contravention with the goal to stop discrimination on the basis of race.[82] Moreover, Justice Kennedy disagreed with Chief Justice Roberts' opinion

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[78] *See id.* at 2768 (Thomas, J., concurring) ("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*…."); *see id.* at 2785 (Thomas, J., concurring) ("The similarities between the dissents arguments and the segregationists arguments do not stop there.").
[79] *Id.* at 2768.
[80] *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring).
[81] *Id.* at 2791 (Kennedy, J., concurring).
[82] *Id.* (Kennedy, J., concurring).

to the extent that it suggests the Constitution mandates that state and local school authorities must accept and ignore the problem of de facto resegregation of public schools.[83]

The differences between Justice Kennedy's concurrence and Chief Justice Roberts' opinion are attributable to the following views asserted in Justice Kennedy's concurrence: one being that "[s]chool districts can seek to reach Brown's objective of equal educational opportunity[,]"[84] and the other being that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."[85] It should also be noted that Justice Kennedy's concurrence acknowledged the existence of other compelling interests that a school system may choose to pursue: (1) "[a] compelling interest exists in avoiding racial isolation" and (2) "a compelling interest to achieve a diverse student population."[86]

Justice Kennedy and Justice Breyer differed in that Justice Kennedy affirmed the distinction between de jure and de facto segregation.[87] According to Justice Kennedy, the Court must limit the classification of individual students based on their race to instances where such a classification is used to remedy prior de jure segregation.[88] Justice Kennedy wrote: "[t]he limitation of this power to instances where there has been de jure segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications."[89] Furthermore, Justice Kennedy asserted that the power to classify individual students based on their race is improper to combat de facto segregation.[90] According to Justice Kennedy, de facto segregation may be remedied by the use of individual race classifications only where there is some extraordinary showing that this is necessary. Absent such a showing, government officials must seek alternatives to classification and differential treatment of individuals by race.[91]

Justice Kennedy's vote resulted from his conclusion that the Seattle and Louisville school systems failed to pursue the compelling interest of diversity by

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[83] *Id.* (Kennedy, J., concurring).
[84] *Id.* (Kennedy, J., concurring).
[85] *Parents Involved,* 127 S. Ct. at 2797 (Kennedy, J., concurring).
[86] *Id.* (Kennedy, J., concurring).
[87] *Id.* at 2795 (Kennedy, J., concurring) ("Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not.").
[88] *See id.* at 2796 (Kennedy, J., concurring).
[89] *Id.* (Kennedy, J., concurring).
[90] *Parents Involved,* 127 S. Ct. at 2796 (Kennedy, J., concurring).
[91] *Id.* (Kennedy, J., concurring).

sufficiently narrowly tailored means.[92] Justice Kennedy's concurrence indicates his view that the two school systems could have pursued the goal of bringing together students of diverse backgrounds and races by other means that would not result in differential treatment based on a race classification.[93] Justice Kennedy wrote:

> 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.[94]

In fact, Justice Kennedy's concurrence indicates that he may have voted differently had the school systems used means that are race conscious while also being facially race neutral.[95]

Justice Breyer framed the issue as follows: "whether the constitution (sic) permits, rather than prohibits, voluntary State action aimed toward reducing and eventually eliminating de facto segregation?"[96] Justice Breyer answered in the affirmative, asserting that the Constitution permits local communities to adopt desegregation plans even where it does not require them to do so.[97] Up until now, the Constitution has only required local school systems to adopt desegregation plans as a remedy for de jure segregation. Thus, Justice Breyer's conclusion is that the Constitution permits local school systems to implement desegregation efforts to combat de facto segregation. The reasoning behind this conclusion is that Justice Breyer believes race conscious plans pursuing the objective of greater racial integration in public schools are not unconstitutional. It is evident from the

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[92] *See id.* at 2790 (Kennedy, J., concurring) (The Louisville school system "fails to make clear… whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question…."); *see id.* at 2791 (Kennedy, J., concurring) ("Seattle has not shown its plan to be narrowly tailored to achieve its own ends….").
[93] *See id.* at 2792 (Kennedy, J., concurring).
[94] *See Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).
[95] *See id.* at 2792-93 (Kennedy, J., concurring).
[96] *See id.* at 2813 (Breyer, J., dissenting).
[97] *See id.* at 2800, 2811 (Breyer, J., dissenting); *see id.* at 2823 (Breyer, J., dissenting) ("No case of this Court has ever relied upon the the de jure/ de facto distinction in order to limit what a school district is voluntarily allowed to do.").

aforementioned rationale that Justice Breyer believes the Constitution recognizes a difference between benign and invidiously discriminatory classifications. In other words, Justice Breyer's position is based on the idea that the Constitution treats classifications intended to bring the races together differently than it treats classifications intended to separate the races.[98] Thus, Justice Breyer's dissent is based on the antisubordination view of the Equal Protection Clause.

Justice Breyer used Swann v. Charlotte-Mecklenburg Bd. of Ed., and the wide acceptance and reliance by the legal community on principles within Swann, as authority for his position 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."[99] In Swann, the U.S. Supreme Court came to a unanimous decision in which Chief Justice Burger declared that school authorities have broad power to create and give effect to educational policy, such as: creating a policy that students be prepared to live in a pluralistic society and giving that policy effect by requiring schools to adhere to race conscious ratios in determining the student population.[100] Justice Breyer asserted that subsequent U.S. Supreme Court case law, reliance by state courts, the enactment of race conscious statutes by Congress, and the use of race conscious measures by presidential administrations, are all proof that the declaration by Chief Justice Burger in Swann reflects a constitutional principle that has been widely accepted and relied upon for many years.[101]

According to Justice Breyer, context matters when reviewing race based government action under strict scrutiny.[102] His view is that strict scrutiny does not treat dissimilar race based decisions as equally objectionable. Justice Breyer did not object to applying strict scrutiny to all race based classifications, but instead asserted that not all race based classifications are invalidated by strict scrutiny. To Justice Breyer, strict scrutiny only invalidates race based classifications that harmfully exclude, but does not invalidate race based classifications which seek to include.[103]

Justice Breyer, like Justice Kennedy, acknowledged that for strict scrutiny purposes, "avoiding racial isolation" and "achieving a diverse student population" are compelling interests.[104] Justice Breyer justifies these as compelling interests because they both combine "remedial, educational, and democratic objectives."[105] Justice Breyer identified the remedial objective as one of undoing the remnants of

[98] *See Parents Involved*, 127 S. Ct. at 2818 (Breyer, J., dissenting).
[99] *Id.* at 2811 (Breyer, J., dissenting).
[100] *See supra* note 74 and accompanying text; *see Swann,* 402 U.S. at 16.
[101] *Parents Involved,* 127 S. Ct. at 2812-16 (Breyer, J., dissenting).
[102] *Id.* at 2817-18 (Breyer, J., dissenting).
[103] *Id.* at 2817 (Breyer, J., dissenting).
[104] *Id.* at 2835 (Breyer, J., dissenting).
[105] *Id.* (Breyer, J., dissenting).

prior segregation and preventing de facto resegregation.[106] He identified the educational objective as one of overcoming the adverse effects segregation has on education.[107] Furthermore, Justice Breyer identified the democratic objective as one of "teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation."[108]

In applying strict scrutiny, Justice Breyer concluded that the Seattle and Louisville school systems had narrowly tailored the means by which they pursued the compelling interest of diversity.[109] Justice Breyer claimed that the plurality imposed the narrow tailoring requirement in a manner that would not allow for it to be satisfied in practice. He wrote: "[T]he race-conscious criteria at issue only help set the outer bounds of broad ranges…. They constitute but one part of plans that depend primarily upon other, non-racial elements."[110] Thus, Justice Breyer concluded that the race conscious assignment plans were narrowly tailored because race was not used as the decisive factor.[111]

In his dissent, Justice Breyer questioned the logic of Chief Justice Roberts' conclusion that unitary status is the boundary line between de jure and de facto segregation.[112] According to Chief Justice Roberts' view, once the federal court enters an order dissolving a remedial decree that had been imposed on a de jure segregated school, and dismisses the de jure case, then the school is deemed to have reached unitary status, and any segregation occurring thereafter is automatically deemed de facto. Pursuant to this view, a race based classification used by a school system under a federal court's remedial decree is constitutional one day, but if on the very next day the decree is dissolved and the school is deemed unitary, then the classification imposed by the court becomes unconstitutional. Consequently, the achievement of unitary status has a significant and irreversible effect because all race conscious action taken

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[106] *Parents Involved*, 127 S. Ct. at 2820 (Breyer, J., dissenting).
[107] *Id.* (Breyer, J., dissenting).
[108] *Id.* at 2821 (Breyer, J., dissenting).
[109] *Id.* at 2830 (Breyer, J., dissenting).
[110] *Id.* at 2824 (Breyer, J., dissenting).
[111] *See Grutter,* 539 U.S. at 339 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.).
[112] *Parents Involved*, 127 S. Ct. at 2830 (Breyer, J., dissenting) ("But if the plan was lawful when it was first adopted and if it was lawful the day before the District Court dissolved the order, how can the plurality now suggest that it became unlawful the following day? Is it conceivable that the Constitution, implemented through a court desegregation order, could permit (perhaps require) the district to make use of a race-conscious plan the day before the order was dissolved and then forbid the district to use the identical plan the day after?"); *id.* at 2811 (Breyer, J., dissenting) ("Are courts really to treat as merely de facto segregated those school districts that avoided a federal order by voluntarily complying with Brown's requirements?").

thereafter, regardless of the motivating intention, will most certainly be deemed unconstitutional under the plurality's Equal Protection Clause analysis.

A Race Neutral Alternative: Socioeconomic Plans as a Means of Pursuing the Goal of Equal Educational Opportunity

Under current Equal Protection Clause jurisprudence, wealth classifications are subject to rational basis review. In Dandridge v. Williams, the U.S. Supreme Court held:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'... 'The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific.'... 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'[113]

Justice Stewart reasoned that: "it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." [114] In San Antonio Independent School District v. Rodriguez, the Court held that disparities in school funding do not violate the Equal Protection Clause. [115] In Maher v. Roe, the U.S. Supreme Court declared: "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."[116] Thus, U.S. Supreme Court cases make it clear that a socioeconomic classification or socioeconomic plan, if challenged under the Equal Protection Clause, would be subjected to rational basis review. Therefore, socioeconomic classifications and/or plans are presumptively constitutional.

Because poverty is arguably the most influential factor in regard to student academic performance,[117] socioeconomic classifications would be extremely

[113] Dandridge v. Williams, 397 U.S. 471, 485 (1970).
[114] *Id.* at 485-86.
[115] *Rodriguez*, 411 U.S. at 54 ("[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.").
[116] *See* Maher v. Roe, 432 U.S. 464, 471 (1977).
[117] *See* Campbell, *supra* note 2, at 692 ("A 2001 study conducted in Montgomery County, Maryland, reported test scores and economic statuses of over 50,000 students; it demonstrated that

resourceful in fulfilling Brown's promise of equal educational opportunity.[118] Furthermore, for school systems pursuing diversity and combating de facto segregation, socioeconomic plans would also be extremely helpful due to the correlation between race and poverty that exists in America.[119] Accordingly, socioeconomic plans could be used to pursue important interests where race conscious efforts used to pursue those interests have been struck down as unconstitutional.

Socioeconomic plans are race neutral because, both facially and in application, they do not take race into account. Socioeconomic plans could be used as a race neutral alternative method for pursuing the interests of educational equality, diversity, and for combating de facto segregation. The Supreme Court has indicated that race neutral alternatives for pursuing diversity are constitutionally permissible.[120] In Parents Involved in Community Schools v. Seattle School Dist. No.1, Justice Kennedy's concurrence indicates that he would not apply strict scrutiny to "mechanisms [which] are race conscious but do not

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poverty is the most influential factor in predicting a student's academic performance and that individual student performance hinges on the overall level of poverty in the school attended by each student. Statistics from similar studies conducted by the Department of Education revealed that in 2000 the average twelfth grade, low-income student read at the same level as an average eighth-grade, middle-class student; 25 percent of the students in the lowest-income quintile drop out of high school compared with 2 percent of students in the highest quintile."); *see id.* at 687-88 ("[P]overty-stricken schools have weak academic offerings, less resources, and less experienced teachers with higher turnover rates."); *see id.* at 691 ("At a 2003, 'Back-to-School Address,' Rod Paige, former Secretary of Education stated: We are facing an unrecognized educational crisis in this country. Our wide and sometimes growing achievement gap confirms that there is a two-tiered educational system. For the lucky few, their education is the best in the world; virtually ensuring those students have wonderful opportunities for further education, economic security, professional rewards and personal freedom. For others, there is an underperforming system. Students come to school, but find little education. The vast majority of students left behind are disadvantaged or low-income. Effectively, the education circumstances for these students are not unlike that of a de facto system of apartheid.").

[118] *Brown,* 347 U.S. 483.

[119] *See* Campbell, *supra* note 2, at 687 ("African American and Hispanic students are more than three times as likely as whites to be in high poverty schools and twelve times more likely to be in schools where almost the entire population is poor, whereas over half of all white students attend schools in which 25 percent or fewer students are poor."); *see id.* at 691 ("[R]acial and ethnic groups are disproportionately disadvantaged per socioeconomic factors."); *see id.* at 691-92 ("Currently, 35 percent of African American female-headed households and 34 percent of Hispanic female-headed household live below the poverty line, compared to only 17 percent of non-Hispanic whites in female-headed households. Also, 6 percent of married African American couple households and 14 percent of married Hispanic couple households live below the poverty line, compared to only 3 percent of non-Hispanic white married households.").

[120] *See Grutter,* 539 U.S. at 339 ("Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.").

lead to different treatment based on a classification that tells each student he or she is to be defined by race."[121] Thus, Justice Kennedy, who cast the decisive vote in Parents Involved in Community Schools v. Seattle School Dist. No.1, would approve of means that are race conscious while also being facially race neutral.[122]

However, given the fact that socioeconomic classifications would have an incidental and obvious greater, positive effect on minorities, it is likely that reverse discrimination claims would result. The fact that socioeconomic classifications have a positive effect on minorities should not raise concerns that the Court may find such classifications unconstitutional in light of Washington v. Davis[123] and Personnel Adm'r of Massachusetts v. Feeney.[124] In Davis, the Court declared:

> [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.[125]

Thus, the Court held that a race neutral law or race neutral government action does not violate the Equal Protection Clause. The Court held that though "racially disproportionate impact" was a factor to be considered, it is not a decisive factor because a "discriminatory purpose" must be proven before it can be concluded that the Equal Protection Clause was violated.[126] The Court defined discriminatory purpose or purposeful discrimination as action taken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[127] Thus, it would be insufficient to only show that the use of a socioeconomic classification resulted in a racially disproportionate impact. A plaintiff would have to prove purposeful discrimination by showing that the socioeconomic classification was

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[121] *Parents Involved,* 127 S. Ct. at 2792 (Kennedy, J., concurring).
[122] *See id.* at 2792-93 (Kennedy, J., concurring).
[123] 426 U.S. 229.
[124] 442 U.S. 256.
[125] *See Washington v. Davis*, 426 U.S. at 242.
[126] *See id.* at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."); *see Vill. of Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").
[127] *See Feeney*, 442 U.S. at 279 ("Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences…. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

used primarily for, and not merely in spite of, visiting harm among those within its particular race. However, the socioeconomic plans would be used to pursue educational equality and diversity, and not to visit harm to an identifiable group. Furthermore, socioeconomic plans, both facially and as applied, do not take race into account, but instead consider an individual's socioeconomic status. Thus, socioeconomic plans would not be invalidated if challenged under the theory that they are facially race neutral unconstitutional classifications.

Claims of Reverse Discrimination and Heightened Scrutiny

The current Equal Protection Clause analysis has been shaped by the U.S. Supreme Court's response to reverse discrimination claims. Reverse discrimination claims are brought by Whites claiming they have been burdened by an effort to remedy discrimination and the effects of past discrimination against non-Whites.[128] Efforts to remedy discrimination and the effects of past discrimination are termed affirmative action. As applied to public schools, such efforts are either termed desegregation or integration. Reverse discrimination claims are based on the Equal Protection Clause because they involve a White person claiming he/she has been subjected to a race classification, and burdened as a member of a racial class, as a result of government action.[129] The current law requires that use of a race classification withstand strict scrutiny, which holds government action to be presumptively invalid.

However, notable U.S. Supreme Court case law suggests that Whites are not entitled to strict scrutiny review of a government's use of a White race classification. United States v. Carolene Products Co. is the case that provided for heightened scrutiny.[130] Before this case was decided the Court concluded that rational basis review applied to social and economic regulations by the government. However, Justice Stone suggested that certain cases were of such a nature that they called for a more exacting standard of judicial review. In footnote 4 of Carolene Products Co., which is also known as "the most famous

[128] Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 547 (2000-2001) ("[T]he Court has invoked the Fourteenth Amendment and the idea of 'colorblindness' in favor of Whites to overturn governmental efforts to remedy the effects of long-standing discrimination against non-Whites.").
[129] Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1759 (2001) ("Styled along classic 'reverse discrimination' lines, our challenger might argue that 'less qualified' Black and Hispanic students are being admitted to the state university system while she, a White student, is not. Under this argument, percentage plans provide Blacks and Hispanics with a preference for admission to or eligibility for state colleges and universities that is denied to Whites.").
[130] *See U.S. v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

footnote in constitutional law," Justice Stone identified what cases this new level of heightened scrutiny would apply to. Footnote 4 provides:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth…. On restrictions upon the right to vote… on restraints upon the dissemination of information… on interferences with political organizations… as to prohibition of peaceable assembly…. prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

With regard to the Equal Protection Clause, footnote 4 called for heightened scrutiny for judicial review of government action against national or racial minorities, or against discrete and insular minorities.[131] Discrete and insular minorities are those that have a history of being politically unsuccessful, have a history of being subjected to unequal treatment and lack political power to such an extent that it is necessary to afford protection against the politically powerful majority.[132] The Court indicated that a person who is a member of an insular or discrete minority is less likely to be able to seek protection through the political process, and thus this special condition calls for heightened scrutiny.

These conditions do not apply to White people.[133] In the context of challenges by White parents to school desegregation efforts,[134] Justice Stevens wrote: "indeed, the history books do not tell stories of white children struggling to

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[131] *See id.* at 153.
[132] *See Rodriguez*, 411 U.S. at 28.
[133] *See Bakke*, 438 U.S. at 357 (Brennan, J., concurring in the judgment in part and dissenting in part) ("Nor do whites as a class have any of the 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"); *see* Justin P. Walsh, *Swept Under the Rug: Integrating Critical Race Theory Into the Legal Debate on the use of Race*, 6 SEATTLE J. FOR SOC. JUST. 673, 680 (2008) ("If innocence centers on an 'absence of advantage at the expense of others,' there is nothing innocent about a white person's status entering into the application process-he or she carries the advantage of white privilege at the expense of all nonwhite applicants.").
[134] Campbell, *supra* note 2, at 684 ("Jefferson County Public Schools' race conscious student assignment plan, promulgated in an attempt to diversify its student body, has been challenged by a group of parents of white children who were denied assignment to their first school choice in the district.").

attend black schools."[135] In accordance with footnote 4 heightened scrutiny, and thus strict scrutiny, should be reserved for classifications that burden discrete and insular minorities. Since Whites are not a discrete and insular minority, a White classification, unless invidiously discriminatory to the White race, should be subjected to rational basis review. However, footnote 4 also provided for heightened scrutiny to be applied to an interference with the Bill of Rights or an interference with fundamental rights. Consequently, if a White person suffered an interference with those rights, then footnote 4 would require that interference to be subjected to heightened scrutiny.

An Antisubordination Reform of the Equal Protection Clause Analysis

The de jure/de facto distinction, as applied by the majority of the current U.S. Supreme Court Justices, is in contravention with the promise of equal educational opportunity that Brown v. Board of Education made so many years ago.[136] If we are to fulfill Brown's promise, the distinction that is of significance is that between invidiously discriminatory classifications and benign classifications. Invidiously discriminatory classifications seek to exclude and separate the races, denote the inferiority of a particular race, subordinate a particular race, and are motivated by racial hostility. Benign classifications are those that use race as a means to bring the races together. Pursuant to Korematsu v. U.S[137] and Brown, the Equal Protection Clause outlaws invidious discrimination. In both cases, the Court was concerned with whether the use of the classification was motivated by racial hostility, visited harm upon individuals within the class or denoted inferiority of individuals within the class. These considerations concerned the Court because the Court concluded that only a classification motivated by and used for such purposes is outlawed by the Equal Protection Clause. As written by Chief Justice Warren:

> [t]he words of the [Fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right,… - [the right to] exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[138]

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[135] *Parents Involved,* 127 S. Ct. at 2798 (Stevens, J., dissenting).
[136] 347 U.S. 483 (1954)
[137] 323 U.S. 214 (1944)
[138] *Brown*, 347 U.S. at 492.

In subsequent cases it was declared that it is invidiously discriminatory classifications that offend the Constitution.[139] Conversely, benign classifications or classifications used to bring the races together are not unconstitutional. Thus, the Equal Protection Clause does not prohibit all uses of race conscious criteria or race classifications, but instead prohibits only invidiously discriminatory classifications.

Since it is only invidious discrimination that is prohibited by the Equal Protection Clause, this should be the starting point for analysis. Purposeful discrimination, as defined and applied in the analysis for race neutral government action with a discriminatory impact, is invidious discrimination. Purposeful discrimination has been defined by the U.S. Supreme Court as government action taken for the purpose of, not merely in spite of, its adverse effects on an identifiable group.[140] The fact that the Court defined purposeful discrimination as action taken for the purpose of its adverse effects upon individuals within a particular class shows that purposeful discrimination and invidious discrimination are one and the same. When the claim involves race neutral government action, the burden is on the plaintiff to show the existence of purposeful discrimination. Once the plaintiff meets its burden then the government official(s) have a defense if it is proven that the particular action was taken for a nondiscriminatory purpose, despite the alleged discriminatory purpose.[141] Conversely, under the current law, when the claim involves a facially evident race classification, then the plaintiff bares no initial burden of proof and that classification is automatically subject to the strict scrutiny test. Since the Equal Protection Clause only outlaws invidious discrimination,[142] it is illogical to consider the presence of invidious discrimination in the race neutral government action analysis while not questioning the presence of invidious discrimination in the race evident classification analysis. It is illogical because both analyses seek to answer the same question: whether the Equal Protection Clause has been violated?

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[139] *See* Williamson v. Lee Optical of Okla., 348 U.S. 483, 489 (1955) ("The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."); *see* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) ("Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."); *see* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) ("Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."); *see Parents Involved,* 127 S. Ct. at 2834 (Breyer, J., dissenting) ("the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.").
[140] *See Feeney*, 442 U.S. at 279.
[141] *See supra* note 20 and accompanying text.
[142] *See supra* note 135.

When an Equal Protection claim involves discrimination resulting from a facially evident classification,[143] the presence of invidious discrimination should be questioned. This can be achieved by placing a burden on the government official(s) to disprove invidious discrimination. Thus, unlike the analysis for race neutral government action with a discriminatory impact, which imposes no initial presumption against government officials, the analysis for a facially evident classification would impose an initial presumption that government use of the classification is invidiously discriminatory. If the government officials fail to meet the initial burden of disproving invidious discrimination, then the classification will be deemed unconstitutional and impermissible. If the government officials meet their initial burden, then the burden shifts to the plaintiff to show that the law still requires the classification to be subjected to a level of scrutiny more exacting than rational basis review. This could be accomplished by showing that the classification infringes upon the Bill of Rights or fundamental rights, or by showing that the classification burdens a discrete and insular minority group. A plaintiff may also show that the classification should be subjected to heightened scrutiny by demonstrating that use of the classification infringes upon any of the other rights mentioned in footnote 4 of United States v. Carolene Products Co.[144] Once the plaintiff has met the burden of showing that the classification should be subjected to heightened scrutiny, then the burden shifts back to the government officials to establish that the classification satisfies heightened scrutiny. This analysis draws a clear, logical line between what the Equal Protection Clause permits and what it prohibits. This analysis permits school systems to use race conscious criteria to bring the races together and to combat the de facto resegregation of public schools.

This analysis comports with Brown and is not in contravention with Brown's promise of equal educational opportunity for all. In Brown, the plaintiffs asserted that they had been subjected to facially evident classifications by government officials, and the government officials were unable to disprove the presumption of invidious discrimination. Thus, the Brown decision was based on a finding of invidious discrimination. The classifications used were intended to exclude and denote inferiority of the Black race. Consequently, the Court deemed the classifications unconstitutional.

For discussion purposes, we will apply the analysis as if the government officials in Brown had met their burden of showing the classification was not invidiously discriminatory. At this point, the burden would have shifted back to the plaintiffs to show that the law still requires the classification to be subjected to a level of scrutiny more exacting than rational basis review. The Brown

[143] Discrimination is facially evident when it is imposed by a law or by government action that by its very terms expressly draws distinctions among people based on some particular characteristic.
[144] *See Carolene Products Co.*, 304 U.S. at 153.

defendants would have met this burden by showing that the Black race is a discrete and insular minority, and therefore the use of the classification at issue must be subjected to heightened scrutiny.[145] Under the heightened scrutiny standard of review, the government officials in Brown would not have been able to justify their use of the classification. When a classification burdens a discrete and insular minority, then that classification should be subjected to strict scrutiny.

Conclusion

Many in the civil rights community fear that the plurality decision in Parents Involved in Community Schools v. Seattle School Dist. No., 1 will invalidate Brown v. Board of Education[146] by leading in a direction where all capability to pursue the goal of equal educational opportunity for all and to combat de facto segregation will be lost. The educational gap between Whites and minorities will only increase with the de facto resegregation of America's public schools. [147] Thus, the very promise of the Brown[148] decision, the promise of greater racial integration and equal educational opportunity for all,[149] has been threatened.

The anticlassification view of the Equal Protection Clause is currently the dominating view within the U.S. Supreme Court. The decision in Parents Involved in Community Schools v. Seattle School Dist. No., 1[150] is an example of the consequences when anticlassification is the dominating view; in that case an attempt by school authorities, to bring the races together and to help prepare students to be good citizens in a pluralistic society, was deemed unconstitutional. The anticlassification view ignores the obvious difference between classifications which are meant to separate, stigmatize, and denote inferiority and classifications which are meant to bring the races together. This difference is one which a federal court could easily identify. It is at odds with reason to equate the race based decision making by a segregationist, during the segregation era, with the

[145] *See Brown,* 347 U.S. at 490 ("Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.").
[146] 347 U.S. 483.
[147] *See* Campbell, *supra* note 2, at 691 ("At a 2003, 'Back-to-School Address,' Rod Paige, former Secretary of Education stated: We are facing an unrecognized educational crisis in this country. Our wide and sometimes growing achievement gap confirms that there is a two-tiered educational system. For the lucky few, their education is the best in the world; virtually ensuring those students have wonderful opportunities for further education, economic security, professional rewards and personal freedom. For others, there is an underperforming system.").
[148] 347 U.S. 483.
[149] *See supra* note 32.
[150] 127 S. Ct. 2738.

use of race by the Seattle and Louisville school systems to bring the races together. However, this is what is advocated by Supreme Court Justice Thomas, who holds an anticlassification view of the Equal Protection Clause. In the end, the result of a prevailing anticlassification approach to the Equal Protection Clause analysis is the preservation of the status quo, and thus the preservation of a nation where there is not equal educational opportunity for all.

The de facto resegregation of America complicates efforts to pursue the goal of equal educational opportunity. Furthermore, the current dominating view of the Equal Protection Clause complicates efforts to combat de facto segregation/resegregation. In Brown, the U.S. Supreme Court interpreted the Equal Protection Clause so that it would prevent the subordination of a race and so that it would protect and further the aim of equal educational opportunity for all.[151] In order to be in accord with and further the spirit of Brown, the antisubordination view must be the foundation of the Equal Protection Clause analysis. This would allow for furtherance of the goals of greater racial integration and equal educational opportunity for all.

[151] *See supra* note 32.