

“Separate and Unequal: Big Government Conservatism and the Racial State”  
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On June 28, 2007, the Supreme Court overturned lower court decisions and ignored decades of legal precedent by declaring that modest school desegregation programs in Seattle and Louisville deprived white children and their parents of their Fourteenth Amendment rights to equal protection of the law. In a mendacious and mean-spirited opinion, the Court mobilized the full power of the federal government against local school boards who were seeking to ensure that rampant housing discrimination in their cities does not deny Black children access to high quality schools.

The Court’s decision sounds the death knell for the desegregation paradigm that started with *Brown v. Board* in 1954, but it reveals even more somber realities about the U.S. In this country, the nation state is a racial state. The privileges of whiteness are protected zealously in the legal system. One hundred and fifty years after the *Dred Scott* decision, Black people still have no rights that whites are obligated to respect.

The Court’s findings in the *Parents Involved in Community Schools v. Seattle School District No.1 Et Al.* cases clearly contradict the pledges made during their confirmation hearings by Justice Roberts and Justice Alito to uphold precedent and avoid legislating from the bench. The decision mocked the principles of federalism celebrated by conservative justices in previous desegregation decisions dating back to *San Antonio v. Rodriguez* in 1973, *Milliken v. Bradley* in 1975, and articulated as recently as *Missouri v. Jenkins* in 1995. While claiming to uphold tradition and legal precedent, both the plurality opinion by Justices Roberts, Alito, Scalia, and Thomas and the concurring

opinion by Justice Kennedy directly disavow explicit precedents in previous rulings by the Supreme Court about school desegregation in Charlotte, Cincinnati, Los Angeles, Denver, Fort Wayne and Pontiac.

The plurality and concurring opinions follow what philosopher Charles Mills (1999, p.18) calls an “epistemology of ignorance.” The Court suffers less from an inability to know than from a firm determination not to know. In order to render this decision, the plurality and Justice Kennedy embrace a series of fictions as if they were facts. The plurality pretends that *Brown v. Board* addressed only the abstract question of whether school boards could recognize race in assigning students to schools. Yet the Warren Court ruled in 1954 that segregated schools deprived Black children of the right to an equal education because segregation comprised part of a racial caste system rooted in slavery, because the all-Black schools that resulted from segregation suffered from the stigma of inferiority even in the unlikely event that their facilities, curriculum, and teachers were equal to those in the white schools. The Roberts Court rewrites this history to find the essence of *Brown* to rest in banning the use of racial identities as a consideration in assigning students to schools. They therefore hold that recognizing the race of a student in order to desegregate schools is the same thing as using race to keep schools segregated.

With this decision the very Supreme Court that finds it improper to intervene when local district officials routinely use patterns of residential segregation to draw attendance lines and locate new schools in order to guarantee whites privileged access to better education now outlaws actions by educators trying to respond conscientiously to *Brown*'s mandates to end racial isolation and equalize educational opportunity. Closing their eyes

to the history of *Brown* and the Fourteenth Amendment as measures designed to correct the injuries done to Black people by the legacy of slavery, the Court pretends that the Fourteenth Amendment and *Brown* justify protection of the hereditary privileges that whites derive from past and present racism, and puts the full power of the federal government behind that protection. As Justice Stevens notes in his concurring dissent from the plurality opinion in *Parents Involved*, it was racial injustice rather than racial recognition that motivated the plaintiffs in *Brown*. In all the years before the *Brown* decision, no white student ever came to the courts claiming to be stigmatized as inferior for having to attend all white schools. The white plaintiffs in Seattle and Louisville were not relegated to schools widely known to be inferior. On the contrary, they sought to avoid going themselves to schools that they and their parents believe are plenty good enough for Blacks.

Moreover, as Justice Breyer argues in his dissent (joined by Stevens, Ginsburg, and Souter), the Supreme Court has held repeatedly that recognizing race is one of the few ways to desegregate schools successfully, a view clearly articulated in opinions by the Court in *Green v. New Kent County* in 1968 and *Swann v. Mecklenberg* in 1971. Speaking for a unanimous court in the *Swann* case, Chief Justice Warren Burger expressly gave school districts the right to desegregate by using a prescribed ratio of Black and white students. In *Bustop v. Board of Education of the City of Los Angeles* in 1978, Justice Rehnquist declared that local school boards had the right to adopt race-conscious measures to desegregate schools even where no violation of *Brown v. Board* had taken place. Yet this entire history is erased or distorted in the *Parents Involved* opinions.

Justice Thomas takes the revision and distortion of the history of *Brown v. Board* to an unprecedented level. He contends that “segregation” only refers to a system where a school board operates a dual system with one set of schools assigned by law to whites and the other to Blacks. Thus, even if every Black student in a district attended all-Black underfunded, underequipped, and educationally inferior schools and every white student attended all-white well funded and well equipped educationally superior schools, there would be no segregation from Thomas’s perspective. Yet it has been precisely concerns about residential segregation, racial isolation, and racial inequality in schools that decided previous desegregation decisions in Denver, Cincinnati, Boston, and many other cities that never had the kinds of dual systems that Thomas claims are a prerequisite for court action.

Despite its flagrant disregard for legal precedent, the Court’s decision in *Parents Involved* does continue one tradition of Supreme Court jurisprudence about desegregation. It elevates the convenience and comfort of white people over the Constitutional rights of Blacks. When decisions by local school boards have benefited whites, the Supreme Court has been an ardent defender of local control. In school desegregation cases where nonwhite parents and children in San Antonio, Detroit, and Kansas City demonstrated that local school boards deprived minority children of equal educational opportunity, Supreme Court decisions went against them because the Court claimed that local control of public education was an overriding public good, a precious principle worthy of Constitutional protection. Yet when confronted with the actions of local school boards in Louisville and Seattle that help minority children in the *Parents Involved* cases, the Court simply jettisons the principle of local control. Chief Justice

Roberts' opinion goes so far as to claim that deference to local school boards "is fundamentally at odds with our equal protection jurisprudence." (2007, p. 37)

Deference to local control that benefited whites, however, has previously been held by the Court to be virtually sacrosanct. In the 1973 *San Antonio v. Rodriguez* case, Mexican American students and parents demonstrated that decisions by local school authorities relegated them to inferior schools. The Court did not dispute their assessment of unequal educational opportunity, but held that education was not such an important commodity that the city and state had to provide Mexican Americans with a good one. As long as the city and state gave Mexican Americans any education at all, the Court ruled, they upheld their responsibilities. The San Antonio parents complained that state-drawn district lines and state-mandated reliance on the property tax left them isolated in a district with inadequate resources. The Court, in effect, told them to accept their second class status, declaring that "any scheme of local taxation – indeed the very existence of identifiable local governmental units – requires the establishment of jurisdictional boundaries that are inevitably arbitrary." (Tribe, 1978, 53-4) The Court's decision not only tolerated these "inevitably arbitrary constructions" in San Antonio, it endorsed them as the essence of democratic government. The majority opinion in that case held that local entities should determine how local tax monies are spent, celebrating the fact that "each locality is free to tailor local programs to local needs" in a system of pluralism that would enable "experimentation, innovation, and a healthy competition for educational excellence." (Breyer, 2007, p. 48). San Antonio's "experiment" of depriving low income Mexican students of an equal education met with the approval of the Supreme Court. Yet efforts by Seattle and Louisville to make it possible for Black students to attend high

quality schools drew condemnation from the Court as a violation of the 14<sup>th</sup> Amendment rights of white students, rather than as a worthy experiment enabled by our pluralist system.

The Court established additional precedents honoring local control in *Milliken v. Bradley I and II*, the 1974 and 1975 Detroit school desegregation cases. Lower courts found that city, county, and state officials designed school district boundaries to provide white students with access to superior schools in the city and in suburban Detroit. Federal District Court judge Stephen A. Roth ruled that segregation in Detroit city schools stemmed from deliberate decisions to build new schools in the center of neighborhoods known to be largely white or largely Black and to permit white students to transfer out of majority Black schools while denying requests by Black students to transfer to majority white schools. Roth noted that the state of Michigan rather than the city of Detroit bore responsibility for these decisions because the Supreme Court of the state repeatedly ruled that education in Michigan “is not a matter of local concern but belongs to the state at large.” (Irons, 2004, p.238)

Judge Roth found the city, its suburbs, and the state guilty of violating the Fourteenth Amendment rights of Black children. He ordered an inter-district busing plan that encompassed the city and its suburbs as a remedy. Recognizing that nearly three hundred thousand children in the three county area covered by his ruling already rode buses to school, he reasoned that riding the bus for purposes of desegregation should be no more onerous than riding the bus for purposes of segregation. Yet a public outcry against his decision attracted support from political leaders of both major parties, and eventually persuaded the Supreme Court to overturn Roth’s decision. (Irons 2004, p. 242-3)

The citizens who brought the initial suit to desegregate Detroit's schools included white parents who believed that their children were harmed by state actions that deprived them of an integrated education. Their concerns were dismissed by the Supreme Court, even though they and their Black allies introduced extensive evidence that persuaded Judge Roth that private sector actions in real estate and home lending shaped the patterns of school segregation, that these patterns led residents of Detroit to assume routinely that whites had a right to expect that their children's schools would be better funded and better equipped than the schools with a majority Black study body.

The Supreme Court overruled the Detroit desegregation plan by a 5-4 margin, invoking the sanctity of local control over schools as a guiding principle. "No single tradition in public education is more deeply rooted than local control over the operation of schools," the Court held, noting "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." (Breyer 2007, p. 48) Yet the very local control honored so effusively in *Milliken* was dismissed blithely in *Parents Involved*. This "tradition" of local control invoked in the Detroit case was invented for the occasion, saluted only because it offered an excuse for protecting white privilege. As Justice Thurgood Marshall argued in his dissenting opinion, existing school district boundaries covered by the *Milliken* case did not follow neighborhood or even municipal boundaries. The state of Michigan configured school districts so that the Detroit metropolitan area contained eighty-five different administrative units. Some suburbs contained as many as six different school districts. One school district covered five different cities. Seventeen districts extended across two counties, and two districts encompassed three counties.

There was no tradition of local autonomy to uphold in Detroit. White privilege rather than local control accounted for the true reason for the Court overturning Judge Roth's ruling.

The majority opinion in *Milliken v. Bradley* contained another blatant fiction about housing segregation that subsequent decisions, including *Parents Involved*, have perpetuated. The court record in *Milliken* contained evidence of repeated and pervasive violations of state and federal fair housing laws, a pattern of law breaking responsible for the existence of largely Black cities and largely white suburbs. Yet Justice Potter Stewart's majority opinion ignored this extensive body of evidence, contending that segregation in Detroit and its suburbs stemmed from "unknown or unknowable causes." (Patterson 2001, pp, 178-81)

By banning inter-district busing, however, the *Milliken v. Bradley* decision itself became one more in a long list of completely known and knowable causes of segregation. The decision solidified the economic advantages of housing segregation for whites. As Jamin Raskin notes cogently, the decision told whites that it made sense to move to segregated suburbs. It gave "judicial impetus and imprimatur to white flight." (Raskin 2007, p. 160) *Milliken v. Bradley* rewarded those whites who resisted integration and punished those who supported it. The majority opinion provided rewards for racism and massive subsidies for segregation, granting suburbs that excluded Blacks immunity from school desegregation. It told white parents that the way to secure an optimal education for their children -- and in the process deny it to children of color -- was to move away from areas where Blacks resided.



Five years after deciding that education was not so important a right that Mexican American students in San Antonio could expect the state to provide them with a good one, the Supreme Court decided that education was now so important that the Court needed to hear the case brought by Allan Bakke. A thirty-six year-old white male denied admission to the medical school at University of California, Davis, Bakke claimed that he had been rejected from the school because the year he applied and failed to receive admission a special minority program admitted sixteen students. He argued that the admission of those sixteen students violated his rights as a white man.

Bakke contended that his undergraduate grade point average was greater than the average GPA of the candidates accepted through the special admissions program. Yet he did not make his claim on GPA alone. At least one student admitted through the minority special admissions program had a much higher GPA than did Bakke. Neither did he challenge the credentials of the thirty-six white students admitted to the UC, Davis Medical School that year who had lower undergraduate GPAs than Bakke. He did not challenge the admission of five students who secured admission to the school that year primarily because of special preferences given to applicants whose parents had attended the school and/or given money to it. Nor did Bakke challenge his rejection from several other medical schools to which he applied that year that did not have minority admissions programs. Yet he was sure that he was entitled a slot that went to one of the sixteen minority admits.

In fact, it was impossible to tell what role race had played in Bakke's rejection. It was impossible to conclude that he had been rejected for racial reasons alone. If he had been a Black child seeking admission to a white neighborhood or a white school he would likely

have been told that his exclusion stemmed from “unknown and unknowable causes.” Yet the Supreme Court sided with Bakke. It decided that the educational opportunities that the Court deemed unimportant to impoverished Mexican American students in San Antonio were tremendously important to Bakke. Moreover, the Court argued that Bakke had suffered not a personal injury, but an injury as a member of an aggrieved group. It awarded his claims the level of strict scrutiny granted by the Court since 1938 in cases that involved claims by a member of a discrete and insular minority group, a group likely to suffer from widespread discrimination. Bakke’s group was white men.

As a white man, Bakke actually had been the beneficiary of racist special preferences in his youth. He received his early education as a student in the illegally segregated elementary schools of Dade County Florida, schools that continued to deny equal educational opportunity to Blacks even after the Supreme Court called for desegregation in the Brown decision. In his ruling opinion in the Bakke case, Justice Powell acknowledged that white males were not actually a discrete and insular minority group as defined by a long traditional of judicial precedent. Yet Powell and the majority of the Court decided that Bakke should receive the protection of strict scrutiny because he belonged to the group of white people, and the special admissions policy could make him and other whites think that they were being discriminated against. On the basis of this strict scrutiny, the Court ordered the medical school to admit Bakke and to base its future affirmative action admissions program not on the principles of combating societal discrimination, redressing previous acts of discrimination the school and the state committed, or augmenting opportunities for members of aggrieved racial minorities, but instead only on the benefits that elite professional school students might get by being

exposed to diverse classmates. The opportunity to get a quality education -- not important enough for the Court to give to Mexican American children in San Antonio -- suddenly became a matter of the greatest Constitutional urgency when Allan Bakke argued that he and other whites should never be disfavored in competition with black candidates for admission to professional school. (Lawrence **and Matsuda 1997, p. 45; Harris 1993, p. 1770; Wilson 1986, p. 20**)

It was this principle of protecting whites from the possibility of unfavorable competition with minorities that the Court invoked in *Parents Involved*. The guardian of kindergarten student Joshua McDonald sued the Louisville school board because the board rejected McDonald's application to transfer to a school of his choice. In fact, McDonald missed the transfer request deadline because he had moved into the district after the application had to be submitted. The school board interpreted his application as an attempt to transfer the next year when he would have been in the first grade. They turned him down because the transfer he requested would have had an adverse desegregation impact on the majority white school into which he wished to enroll. When the district realized that McDonald wished to transfer immediately, however, they granted his request. The Louisville board questioned whether McDonald had suffered an injury in this case worthy of Supreme Court review. He had asked for a transfer and had received it. The Court ruled, however, that getting into the school McDonald wanted to attend was not sufficient. The Court held that the racial integration system the school board used might one day in the future work to McDonald's disadvantage, for example, when he entered middle school or high school. Thus the "injury" in this case that the Court believed justified overturning a successful program devised by a local board was

the mere possibility that sometime in the future Joshua McDonald might be disadvantaged in competing for a slot in a majority white school. Yet the routine exclusion of Mexican and Black students from majority white schools in San Antonio, Detroit, Louisville, or Seattle raised no similar question of equal protection for the Court.

The Court's decision in *Parents Involved* offered no opinion about why white students are concentrated on the north side of Seattle or why Louisville was able to integrate successfully only by including the entire metropolitan area in one school district. To the plurality and Justice Kennedy, systematic residential segregation in Seattle and Louisville has no known or knowable causes. Yet the segregated neighborhoods of these cities are actually *prima facie* evidence of widespread defiance of the 1968 Fair Housing Act. Justice Thomas (2007, p.3) proved especially creative in evading this fact in his concurring opinion in *Parents Involved*. Deploying the stupefying insouciant malevolence that characterizes many of his writings, Thomas writes in his concurring opinion that while "presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions including voluntary housing choices."

Although the Burger Court recognized in the 1971 *Swann* case that segregated and unequal schools shape housing choices, most subsequent rulings have attempted to deny that link out of hand. (Days, 2001, p. 159-81) While holding the Denver school system responsible for policies that intentionally segregated Black and Latino students in the 1973 *Keyes* decision, for example, Justice Powell absolved the district of responsibility to remedy "geographical separation of the races" that "resulted from purely natural and neutral non-state causes." In a 1976 decision on segregation in Austin,

Texas, Justice Rehnquist likewise asserted (without proof) that “economic pressures and voluntary preferences are the primary determinants of residential patterns.” He expanded on that theme in reviewing the Columbus, Ohio, case in 1977, claiming that residential segregation in the region resulted from a “mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments or a desire to reside near people of one’s own race or ethnic background.” (Days 2001, p. 175) Rehnquist mentions private discrimination and discriminatory school assignments only to dismiss them, to relegate them to less importance than the desire by whites to live in segregated neighborhoods which apparently in his view is a Constitutional right protected by law even though it violates the letter and spirit of the 1968 Fair Housing Act.

In attributing residential segregation to “natural,” “neutral,” “voluntary” desires, the Supreme Court has written into law the fictions advanced by guilty defendants in desegregation cases. Attorney James P. Gorton, who represented school districts in suburban St. Louis and Atlanta against desegregation orders, boasted to a reporter that he and his colleagues had established that “people live in specific school districts and urban areas based on job needs, personal preferences, and other factors – not because of race.” (Wells and Crain 1997, p. 259) Yet an enormous body of unchallenged and uncontradicted evidence demonstrates the contrary. Researchers have found consistently that the racial composition of a neighborhood is more important to whites than housing quality, levels of crime, environmental amenities, and location. (Taub and Taylor and Dunham, 1984; St. John and Bates 1990, 47-61) Even putatively non-racial considerations such as the reputation of local schools often contain perceptions about the racial identities of the student body. (Shapiro 2004, p. 271)

In the early years of school desegregation cases, judges drew upon this overwhelming evidence to rule that residential segregation stemmed from a combination of private discriminatory acts including mortgage redlining, real estate steering or blockbusting, and discriminatory public policies such as urban renewal programs that concentrated minorities in overcrowded neighborhoods by offering relocation housing only in those areas, by allocating Section 235 funds only to ghetto and barrio neighborhoods, and placement decisions about public housing projects, subsidized developments, and schools.(Bryant 2001, pp.56-8) As late as 1987, a circuit court established a mutually constitutive relationship between housing and school segregation in Yonkers, New York, fashioning a remedy that required integrated housing as well as integrated schools. (Bryant 2001, p. 58) In St. Louis, the federal courts ordered the state of Missouri to develop plans for encouraging integrated housing. Yet the Rehnquist Court, and now the Roberts Court, have consistently massaged the facts in order to excuse and enable systematic discrimination in housing. According to this line of reasoning, the existence of segregation in housing is attributed to non-racial causes. It argues that no whites move away from municipalities to secure the benefits they gain from neighborhoods and schools that are prohibited to blacks. Existing segregation is instead attributed to race neutral causes, beyond the concern of the courts.

When it comes to school desegregation plans, however, the Court rejects them because they might cause white flight; the very white flight which they claim does not exist and cannot account for segregated housing patterns. Maintaining that Blacks live in ghettos because they “choose” to live near other members of their race, the court views white flight as a tragedy provoked by plans to desegregate schools. Whites are thus

judged to be not currently race conscious in their selection of neighborhoods and schools, but they might become so, the Court complains, if faced with desegregation. (Orfield 1996, p. 96) Perhaps the most honest expression of the judiciary's evolving attitude toward school desegregation came in the resolution of the *Armour v. Nix* case. This litigation was filed by the American Civil Liberties Union on behalf of a group of impoverished black women from Atlanta as a rival to the successful *Calhoun* case that was settled in private outside public scrutiny through the legally questionable intervention of sitting Circuit Court judge and later U.S. Attorney General Griffin Bell. The plaintiffs proposed remedies far more radical than the settlement reached in the *Calhoun* case. They assembled an enormous compendium of evidence proving that repeated actions by city, state, county, and federal governments concerning housing, transportation, and neighborhood development had led to permanent and seemingly intractable residential segregation in the Atlanta area. Judge William O'Kelly conceded that the region's residential segregation had been "caused in part by the actions of government officials," acknowledging eighteen separate actions including racial zoning laws, racially based selection of public housing sites, racial designation of schools, and segregated relocation from neighborhoods cleared for urban renewal. Yet he ruled that because the schools had not *caused* residential segregation, they should not be desegregated *because* of it. Nor would O'Kelly consider systematic violations of fair housing laws a proper matter for adjudication in the courts, declaring that "to change the residential patterns which exist it would be necessary to rip up the very fabric of society in a manner that is not within the province of the federal courts." (Orfield 1996B, p. 301)

O’Kelly’s ruling at least had the virtue of a certain honesty. Apparently the injury done to blacks in Atlanta was so systematic and so successful, that remedy was now seen as beyond the power of the federal courts: to challenge the group position that whites secured from segregated housing would be to challenge the very fabric of society.

Judge O’Kelly found the proposed remedies in Atlanta too all-encompassing. In contrast, Chief Justice Roberts and the plurality of the Court in *Parents Involved* dismissed the Seattle and Louisville desegregation plans because they judged their impact to be too mild. After decades of being told that whites did not oppose desegregation but only reacted negatively to allegedly “harsh” remedies like busing, the Seattle and Louisville school boards created desegregation plans that minimized inconvenience to whites. The white plaintiffs in the Seattle case would only have been affected personally by the desegregation plan for one year, and then only if their children sought enrollment in a majority white high school that had too many applicants for the available spaces. Moreover, race was not the main factor in determining assignments, but was instead a “tie-breaker” used to decide among equally qualified applicants. The district demonstrated that at most only fifty-two students would be affected in any given year by the plan. The Louisville plan also had a similar minimal impact. Yet instead of the modesty of the programs counting in their favor, the Court held it against them. With so few students affected, the Court ruled that the gains from the program could only be small and that educational diversity could probably be achieved by other means (which the Court failed to specify) than through “odious” recognition of race.

The *Parents Involved* decision uses contradictory logic and language in explaining why school boards in Seattle and Louisville may not use race as a factor in making school



assignments. In the Seattle case the plurality opinion notes that the district had never been found guilty of *de jure* school segregation and therefore could not be subject (even voluntarily) to remedies designed for districts covered directly by *Brown v. Board*. Yet the findings in this case by the 9<sup>th</sup> Circuit Court reveal that Black parents in Seattle had long charged the school board with locating schools deliberately in neighborhoods where their population would consist only of members of one race and with allowing white students to transfer out of schools but making it nearly impossible for blacks to do so. Yet because the school district settled with these parents (to avoid litigation where the system would likely have been found guilty of deliberate *de jure* discrimination), the Court rules that these charges have not been proven in court and therefore must be treated as if they do not exist. In contrast, in the Louisville case, the Court acknowledged that the district had been found guilty of deliberate *de jure* discrimination and as a result implemented desegregation programs including plans like the one under review. Because these programs proved to be successful, however, the District Court in 2000 declared Louisville schools were now unitary and dissolved all desegregation orders. Although Louisville was no longer obligated to desegregate, the district continued to do so because it found integrated schools to be educationally and socially beneficial to the community as a whole. One study found that desegregation played an important role in reducing the Black/White achievement gap in the district. In declaring this to be illegal, however, the Court not only said that Louisville was no longer *obligated* to desegregate, that it was no longer *permitted* to desegregate in this way because the District Court ruled in 2000 that it had corrected the harm done by its previous policies. Thus, the Seattle school board could not desegregate because it had never been found guilty of deliberate segregation,

while the Louisville school board could not desegregate because it *had* been found guilty of deliberate desegregation and taken remedial action. It was no longer permitted to take the kinds of remedial action that had made it sufficiently integrated to no longer be covered by mandatory desegregation orders. Desegregation in this view is only a temporary punishment for whites, not a valuable program for society.

In both Seattle and Louisville, school boards made concession after concession to white parents over the years. They constantly refined their desegregation programs to minimize white inconvenience, to limit busing, to use neighborhood location as an important factor in making school assignments. Rather than rewarding these school boards for their conciliatory efforts, at each stage the Supreme Court condoned, encouraged, and then supported white resistance, refusal, and renegotiation of previously agreed upon settlements. Consistent with the administrative and judicial policies of the racial state in respect to employment and housing discrimination, the Supreme Court has generally responded to school desegregation suits by exaggerating white injuries and treating anti-discrimination efforts as more egregious civil rights violations than the original acts of discrimination by whites that made these efforts necessary in the first place.

With shameful hyperbole, the plurality and Justice Kennedy equate the minor inconveniences faced by the white plaintiffs in the Seattle and Louisville cases with the injustices corrected by *Brown v. Board*. Just as the Supreme Court refused to treat Mexican American students in San Antonio in 1973 as members of a discrete and insular minority even though they clearly qualified as such, while extending to Allan Bakke strict scrutiny in 1975 as a member of a discrete and insular minority when he clearly was not,

the Court compares the harm done to Linda Brown and her co-plaintiffs in the 1954 *Brown v. Board* case to the linked fate of the white plaintiffs in *Parents Involved*. In Justice Thomas's words, "what was wrong in 1954 cannot be right today." (Thomas 2007, p. 33)

What was wrong for Linda Brown and Black children all across the nation in 1954 was that a caste system dating back to government supported slavery relegated them to inferior segregated schools which stigmatized them as inferior people being trained to settle for unequal and unjust futures. The harm claimed by the white plaintiffs in Seattle was that a complicated chain of circumstances might possibly make some of them have to spend one year in a high school they might not have listed as either their first or second choice. As Ninth Circuit Court Judge Alex Kozinski observed about the Seattle plan "That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability." (Breyer 2007, 35) The injury claimed by the plaintiffs in the Louisville case was that they might be denied admission to the precise educationally advantaged schools of their choosing, a complaint that pales in comparison to the obstacles facing not only Linda Brown in 1954, but Mexican students in San Antonio in 1973, Black students in Detroit in 1975, and most Black students in Seattle and Louisville today.

The decision by the Court in *Parents Involved* exemplifies the Supreme Court's consistent support for the 3Rs, not "readin', (w)ritin,' and 'rithmetic," but the pattern of resistance, refusal, and renegotiation that permeates state support for white supremacy in the United States. (Lipsitz 2006, pp. 24-47) Even the original *Brown* decision entailed an invitation for whites to break the law. Constitutional rights in the U.S. system are

generally “personal and present”; their violation is a matter of the greatest importance, requiring immediate redress and remedy. The *Brown* decision, however, undermined its mandate for desegregation by specifying that corrective actions were to be taken with “all deliberate speed,” rather than immediately. This left both the pace and the parameters of desegregation up to the comfort and convenience of those doing the discriminating. (Patterson 2001, p. 113; Ogletree 2004, pp. 25,33,44,128,143,256, 294; Harris 1993, 1735) Thus, the Court’s own ruling incited defiance and invited delay. As many commentators have observed, the Court’s injunction to school districts to proceed “with all deliberate speed” produced much more deliberation than speed.

In *Brown v. Board*, the Court unanimously overturned *Plessy* as the law of the land. Yet as Derrick Bell reminds us, *Plessy* “is only fortuitously a legal precedent. In actuality, it is a judicial affirmation of an unwritten but no less clearly understood social compact that is older than the Constitution, was incorporated into that document, and has continually been affirmed.” (Bell 2002, p. 185) That compact entails a possessive investment in whiteness and protections for the group position of whites in perpetuity, a systematic and structured advantage. (Lipsitz 2006) In her brilliant analysis of whiteness as property, Cheryl I. Harris explains that both before and after the passage of comprehensive civil rights laws, the U.S. judiciary has honored this compact, recognizing “implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy.” (Harris 1993, p. 1731)

Even though the Supreme Court disavowed *Plessy* in 1954, five decades of court-supported “getting around *Brown*” have produced a situation that is even worse. The wording of the *Brown* decision and its interpretation by subsequent judges has allowed

school boards and state governments merely to declare non-discriminatory intentions, not actually to take anti-discriminatory actions. Consequently, unlike the regime that prevailed under *Plessy*, school boards today can operate racially unequal schools without the costs of operating dual school systems. They can and do reserve superior educational settings and resources for white children. School boards now have federal permission to do what even *Plessy* could not countenance openly: to run schools that are both separate and unequal.

Because whites resisted *Brown v. Board*, the Supreme Court was forced to issue *Swann v. Mecklenberg* allowing busing as an instrument of desegregation. When white opposition to *Swann* took violent forms in Pontiac, Michigan and Boston, Massachusetts, liberal and conservative white politicians took steps to limit desegregation and the Supreme Court supported them by issuing *Milliken v. Bradley* banning inter-district busing. The one concession made to Blacks in the Detroit decision came in the form of permissible educational enhancements for minority victims of exclusion. Yet the Court ruled in *Missouri v. Jenkins* in 1995 that these “sweeteners” could not be made so valuable that they made whites desire them, because then they would serve as an incentive for suburban whites to attend inner-city schools -- which the Court held violated the ban on inter-district busing enunciated in *Milliken*. When whites claimed that the busing remedy identified by *Swann* was offensive, the Supreme Court responded with *Milliken*. When schools in Kansas City, Seattle, and Louisville tried to follow the mandates of *Brown* and *Swann* without using the busing outlawed by *Milliken*, the Court punished them for it.

*Missouri v. Jenkins* serves as microcosm of the half century of resistance, refusal, and renegotiation central to the racial state. City and state officials in Kansas City resisted desegregation and refused to implement *Brown*'s mandates for twenty-three years until they were successfully sued in 1977. They did not come up with a desegregation plan until the courts mandated one eight years later in 1985. The plan was not implemented until 1988, another three year delay. Yet a mere seven years later, the Supreme Court ruled in *Missouri v. Jenkins* that racial inequality in education in the Kansas City area no longer stemmed from segregation, but from "voluntary" and "natural" decisions about where people live. The Court claimed, in all seriousness, that residential choices in Kansas City had nothing to do with the legacy of segregation, even though these purportedly innocent and independent decisions concentrated white people in affluent suburbs with well-funded schools while relegating blacks to poverty-stricken inner city neighborhoods where schools were literally falling apart. (Morantz 1996, 241-63) As soon as the majority of the school population became black in Kansas City, the white majority of the electorate failed to pass a single bond issue or tax levy to support the schools. (Shaw 2001, p. 263) In her dissenting opinion in *Missouri v. Jenkins*, Justice Ginsburg pointed out that the Court majority had decided that remedial programs had effectively countered in only seven years the legacy of discrimination that started in Kansas City with the proclamation of the Code Noir by King Louis XV of France in 1724, a legacy that included slavery, state laws prohibiting public education for blacks, mandatory Jim Crow segregation, and thirty-four years of resistance to the *Brown* decision. (Ginsburg 1995, p. 53)

*Missouri v. Jenkins* also broke with *stare decisis* while purporting to uphold it. Conservatives on the Court from the Nixon years through the present have claimed that liberal judges legislate from the bench while conservatives respect judicial precedent by letting legally settled matters stay settled. But as cases like *Missouri v. Jenkins* and *Parents Involved* demonstrate, the conservatives in fact throw out precedents in civil rights case routinely. As Justice Souter proved in his dissenting opinion in *Missouri v. Jenkins*, the Court was so eager to end Kansas City's seven year old desegregation program that it overruled "a unanimous constitutional precedent of twenty year standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way." Souter concluded that "the Court's failure to provide adequate notice of the issue to be decided (or to limit the decision to issues on which *certiorari* was clearly granted) rules out any confidence that today's result is sound, either in fact or in law." (Souter 1995, p. 35)

Like the San Antonio and Detroit desegregation decisions, the Supreme Court's ruling purported to support the principle of local school board autonomy. The majority declared that returning the Kansas City schools to local control was the issue of overriding importance in the case. Yet local authorities had been forced to surrender that control only because federal courts found them in criminal noncompliance with Constitutional law. The Rehnquist Court argued for the necessity of reigning in federal power and respecting traditions of local governance when it terminated the Kansas City school desegregation plan. It took the opposite position, however, when the Court freely deployed federal power to overturn the minority set-aside program for city contracts approved by the Richmond, Virginia city council in the *Croson* case, and to void the

North Carolina legislature's decision to create a congressional district with a slight majority of black residents in *Shaw v. Reno*. The principle of local control that purportedly loomed large for the court in *Missouri v. Jenkins* disappeared in *Crosby*, *Shaw*, and *Parents Involved*.

In *Shaw v. Reno*, Justice O'Connor argued that the creation of one of the most integrated Congressional districts in the nation by the North Carolina legislature was a form of racial apartheid that directly contradicted the Constitutional obligation to meld different groups together into a unified totality. Yet O'Connor did not object to legislative districts drawn to insure the election of white candidates in all white districts made possible by residential racial segregation or to the hyper-segregation of Black and Latino students in under-funded ghetto schools.

The Rehnquist Court ruled in *Shaw v. Reno* and *Miller v. Johnson* that whites are protected by the Fourteenth Amendment from dwelling in districts with irregular boundaries that have African American or Latino majorities. The Court recognizes no parallel right of African Americans and Latinos to be free from living in districts with irregular boundaries and white majorities. (Raskin 2003, pp. 3, 167; Morantz 1996, pp. 241-63; Carter 1993, pp. 86, 88) Justice Thomas supported the dismantling of the majority black Congressional district in North Carolina because of the "stigma" that would purported attach to the district, but he argued in *Missouri v. Jenkins* that majority Black schools in impoverished areas are a good thing: so good he claimed, that the lower Courts who tried to desegregate the Kansas City schools must have acted out of the belief that blacks are inferior. Thus a majority Black congressional district offends the equal protection rights of whites, but a majority Black school population in an underfunded and



underequipped school passes Constitutional muster. Educators who want to desegregate education in Kansas City become portrayed by a Black Supreme Court Justice as white supremacists who believe in Black inferiority.

Over the years the Rehnquist Court fashioned a narrative about itself as a defender of federalism, a respecter of local government, and a counterweight to unwarranted judicial activism by liberal judges. Yet its fidelity to federalism (a word that does not appear anywhere in the Constitution), did not manifest itself in civil rights cases. They did not mind intervening in local matters when white fire fighters protested against a court-approved affirmative action hiring program in Birmingham in *Martin v. Wilks*, or when white teachers litigated against a voluntary collective bargaining agreement between the teachers' union and the school board in Jackson, Michigan in the *Wygant* case. The Michigan agreement protected recently hired black teachers from budget related lay-offs because seniority-based firings would have unfairly harmed minority teachers who had less seniority only because of the district's history of discriminatory hiring. (Lipsitz 2006, p. 44) The plan overruled by the Court in the *Wygant* case would have protected more white jobs that random layoffs would have, but the Court intervened to protect the seniority whites teachers had accrued through an openly discriminatory hiring process, in effect enabling them to hold on to the benefits of past illegal discrimination as a Constitutional right.

The Rehnquist Court displayed a double standard in defense of white privilege when it came to questions of legal standing as well. In the 1984 *Allen v. Wright* case, the Supreme Court decided against Black parents who had sued to force the Internal Revenue Service to follow its obligation to enforce the law by withdrawing tax exemptions from

private schools with racially discriminatory policies. Speaking for the majority, Justice O'Connor ruled that citizens do not have the right to require the government to obey the law. She claimed that the plaintiffs were not personally harmed by the actions they protested simply because they were Black. She contended that to have standing to sue in the courts, the plaintiffs would have to prove that they suffered a concrete personal injury, not just an "abstract stigmatic injury." (Raskin 2003, p. 14) Yet in *Shaw v. Reno*, O'Connor ruled that white plaintiffs had the right to have the North Carolina Congressional district boundaries redrawn because living in a majority black district "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (Kousser 1999, p. 242) Thus whites suffered a personal injury and stigma by living in a majority Black congressional district, but Blacks suffered no corresponding stigma or injury when the federal government improperly granted tax exemptions to private schools when they violated the law by discriminating against Blacks. The question of standing was handled in a far different way, however, in the Court's disgraceful ruling in *Bush v. Gore*. In that case, the Court did not ask how Texas resident George W. Bush had standing to contest alleged denials of equal protection to an unidentified group of Florida voters. Justice Scalia and Justice Thomas joined the majority opinion, upholding Bush's claims without recusing themselves, even though one of the law firms representing Bush employed Scalia's son, and even though Justice Thomas's wife had been charged by her employer, the Heritage Foundation, to begin collecting *curriculum vitae*s to advise the incoming Bush administration on potential appointees. (Raskin 2003, pp. 14, 27)

Thus while defying crucial precedents embedded in civil rights law, the Supreme Court's decision in *Parents Involved* does adhere to a well-established pattern. Following the lead of the Rehnquist Court, the Roberts Court breaks with *stare decisis* precedents freely, choosing either to support or oppose local control on the basis of whether whites benefit from it. The Court systematically uses laws and rulings intended to end segregation to preserve it. In his ruling opinion, Chief Justice Roberts dismisses evidence about these previous decisions that contradicts his claims, calling them mere "dicta." Yet Judge Thomas's concurring opinion uses exactly such "dicta" – in this case two less than memorable quotes from himself from the *Adurand* and *Grutter* cases -- to assert as legal "precedent" an approach that no court has yet followed and which even Justice Kennedy refused to endorse.

The *Parents Involved* decision has its roots in some of the weaknesses written into the original *Brown* decision. But the decision also inherits the pernicious tradition dating back to the nineteenth century of transforming the anti-subjugation intentions of the Fourteenth Amendment into anti-racial recognition principles. This transformation makes meaningful enforcement of civil rights laws impossible. Previous decisions that argued that local, state, and federal authorities did not have to remedy racist wrongs in civil rights cases unless the state committed them in the first place, have now evolved into a doctrine that holds that local governments may not remedy problems they claim they did not cause, even if enormous amounts of evidence indicate that they actually did play a major role in causing them.

In the minds of the dominant bloc in the court, the Fourteenth Amendment now only restrains the state from recognizing race while dismissing private acts of racist

discrimination as unfortunate, but beyond the reach of the state. Yet there is no racial inequality in this country that is not rooted at least in part in state action in support of white interests in the private sector. White property remains more valuable than Black humanity in this society because the racial state has unfailingly provided rewards for racism. For example, federal home mortgage loans made on an openly and expressly racially discriminatory basis built equity in the estates of more than thirty million white families between 1933 and 1978. (Jackson 1975, p. 216) Forty-six million white Americans can trace their family wealth to the Homestead Act of 1863. This bill allocated valuable acres of land for free to white families while excluding Blacks from participation. (Shapiro 2004, p. 190) Tax codes today that allow home owners to deduct mortgage interest make the profits of past and present discrimination even more valuable than before and “lock in” for whites living today the value of assets they inherit from previous generations whose discrimination in home sales, mortgage lending, and insurance was openly proclaimed. Cuts in inheritance and capital gains taxes give special preferences to the white beneficiaries of past and present housing discrimination, while the deductions allowable for local property taxes produce massive federal subsidies for school taxes in largely white suburbs. (Rothstein 2001, p. A-17)

The racial state supports and subsidizes white opposition to desegregation. State power prevents meaningful efforts to equalize opportunity while dismissing systemic discrimination in education, housing, and employment as private actions without public causes or consequences. The racial state stands behind whites as they preserve and augment advantages crafted by overt discrimination in the past and by only slightly less covert acts of exclusion in the present. When it comes to schooling, as Gary Orfield

argues, the superiority of suburban schools is taken for granted as a right attendant to home ownership, while desegregation is viewed as a threat to a system that passes racial advantages from one generation to the next. In Orfield's words, "Whites tell pollsters that they believe that blacks are offered equal opportunities, but fiercely resist any efforts to make them send their children to the schools they insist are good enough for blacks." At the same time, "the people who oppose busing minority students to the suburbs also tend to oppose sending suburban dollars to city schools." (Orfield 1993, p. 245, 240)

The U.S. state is a racial state. The legal system zealously protects the privileges of whiteness. One hundred and fifty years after *Dred Scott* Blacks have no rights that whites are bound to respect. The injuries of the racial state require race conscious state remedies, but the racial state will not reform itself. Racial justice depends today, as it has always depended, on grass roots action, on the kinds of confrontational, participatory politics that created Abolition Democracy in the wake of the Civil War and that mobilized the Black freedom movement in the middle of the last century. We need to find ways to promote enforcement of civil rights laws and to increase penalties and extract appropriate damages from those who violate them. We need to promote asset building efforts in minority communities and pay for them by increasing taxes on those forms of income most directly connected to the rewards of past discrimination. Most important, we need to develop new strategies, raise new demands, and develop a new political culture based on realizing the unfilled promises of Fourteenth Amendment egalitarianism by creating new democratic practices and institutions.

At the federal level, Jamin Raskin proposes a Constitutional Amendment to undo the pernicious history of discrimination legalized by *San Antonio v. Rodriguez* and *Milliken*

*v. Bradley*. He proposes that we make explicit the implicit equal protection promises of the Fourteenth Amendment by declaring “All children in the United States have a right to receive an equal public education for democratic citizenship.” This would outlaw vast differences in learning conditions between cities and suburbs, and prevent privileged neighborhoods from monopolizing educational resources and opportunities. At the state level, community groups have brought successful lawsuits in state courts in California, Texas, and New Jersey demanding remedies for the formulas that funnel funds toward wealthy districts while denying equal resources and opportunities to the neediest students. While state legislatures and educational officials have resisted the implementation of these court orders consistently, in some cases they have nonetheless transferred millions of dollars of resources to needy students. At the municipal and county level, fair housing groups have started to develop new strategies to combat rampant discrimination by mortgage lenders, Realtors, insurance agents, and landlords. Functionaries in the housing industry violate the 1968 Fair Housing Law as a matter of course because the penalties are so small and the profits derived from discrimination so large. The Fair Housing groups have started to pursue creative strategies to educate the public, city officials, and judges, to persuade them to assess larger penalties based on concepts from other areas of law like the “lock in” model from anti-trust litigation and cumulative risk assessment from environmental law. They have explored lawsuits aimed at holding mortgage lenders, insurers, and Realtors liable for damages to inner city neighborhoods much in the way that tobacco manufacturers have been held liable for the profits they made from damaging public health.

These measures will surely face ferocious opposition from whites threatened by the actual prospect of the “level playing field” that they frequently affirm exists so emphatically. These opponents would no doubt receive the full support of the present majority on the Supreme Court, a Court that with their decision in *Parents Involved* has made it clear that they decide whether to support legal precedents, federalism, or counting by race on the basis of whether or not whites benefit from their decisions.

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