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in the absence of merit: an analysis of the supreme court's stance on racial balancing in public schools

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In The Absence of Merit: an Analysis of The Supreme Courts Current Stance on Racial Balancing in Public Schools

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by

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For, the University City

A truly pluralistic neighborhood

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Introduction

The Individuals

Andy Meeks was a white 8th grade student who suffered Attention Hyperactivity Disorder and Dyslexia and lived in Seattle, Washington in 2001. Although middle school was difficult for him, he showed great improvement when working hands on in small groups. For this reason when it came time to choose a high school, Andy and his mother Jill Kurfust decided to apply to a small Biotechnology program run through the large Ballard public high school. Andy was accepted into the small program, but was told that he would be unable to attend Ballard because of his race. If Andy had attended Ballard, it would have become "racially imbalanced" meaning that its racial makeup would not closely reflect the racial demographics of the overall district.[1] In response his mother, Jill Kurfurst joined the nonprofit organization Parents Involved in Community Schools, which filed suit against the Seattle School district for using race as a decisive factor in school assignments, arguing that this violated the Equal Protection Clause of 14th Amendment.

In August 2002 Crystal Meredith moved into the Jefferson County School District, located in Louisville Kentucky and attempted to enroll her son Joshua in kindergarten at their neighborhood school located a mile away. However there was no space at this school so Joshua was assigned to Young elementary located 10 miles away. Meredith attempted to transfer Joshua to another school, Bloom Elementary, which was also only a mile away from their home. However Joshua's transfer was denied because "it would have an adverse affect on the

[1] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

desegregation compliance."[2] This led Meredith like Kurfurst to file suit against the Jefferson County School District for violating the Equal Protection Clause of the 14th Amendment.

Eventually Meredith's case (*Meredith v. Jefferson County*) was merged with Kurfurst into one large Supreme Court case, *Parents Involved in Community Schools v. Seattle School District No .1*. The result of this 2007 case was a controversial Supreme Court decision in which both Seattle and Louisville's race conscious plans were declared unconstitutional because the way each considered race in public school assignments violated the Equal Protection Clause of the 14th Amendment.

In my opinion the decision in *Parents Involved* has the potential to change the way race is factored into public education. It could have very important consequences for our nation's schools because it could possibly prevent school districts from adjusting to inequalities that occur from the currents of society that disadvantage many minorities, which are known as de facto. This case dealt specifically with racially isolated schools and whether a state has the same power to combat schools which are products of de facto segregation as it does schools which are the result of government enforced segregation, which is known as de jure.

I will argue that the reasoning used to determine the verdict in the decision adopts a controversial reading of the 14th Amendment. This reading has arisen out of a lack of clarity in a number of Supreme Court decisions concerning race and public education, especially in the landmark case *University Regents v. Bakke* decided in 1979. In my opinion this reading is inimical to the original purpose of the 14th Amendment and the Supreme Court that decided *Brown v. Board of Education*, along with its subsequent decisions concerning school desegregation.

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[2] *Meredith v. Jefferson County*, 551 U.S. 701 (2007)

This reasoning has steadily gained speed to the point that it was almost endorsed by a majority of the Supreme Court in *Parents involved in Community Schools v. Seattle School District No.1*. Some theorists such as Michael J. Gerhart have commended this decision as a prime example of the judicial prudence because they believe that it followed the correct precedent.[3] I do not agree with this claim and throughout the rest of this text I will prove why this reading of the 14th Amendment is not applicable to public education and also show how this reading has gained so much prominence. However before delving into this argument it is important to further understand the case *Parents Involved in Community Schools v. Seattle School District NO. 1* and the history of the two school districts associated with it.

[3] Michael Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008), 200.

Chapter 1

The Districts

In 1963 the city of Seattle operated a highly segregated school system. This segregation was never enforced by law, but was due to residential de facto desegregation. The NAACP along with other local groups convinced the School Board of Seattle to adopt a race-transfer policy, which explicitly stated that a black student could transfer to a predominately white school and a white student could transfer to a predominately black school. At that time Garfield, the central district high school was 2/3 minorities, while the majority of the other public high schools were all white.[4] The plan employed by the district did not satisfy the NAACP. In 1969 it filed a federal lawsuit against the school board claiming that the board had "established and maintained" a system of racially segregated public schools using techniques such as "drawing…boundary lines" and "executing school attendance policies." [5] In response to this suit the school board introduced a mandatory busing plan that utilized race based transfers between the districts "white" and "minority" public schools. This plan was instituted from 1976-1977 and involved roughly 2000 students out of the districts total population of 60,000.

"Busing" by its general definition is the mandatory transfer of students to public schools other than those closest to their homes for a specific purpose. Most busing plans are invoked so that each of districts schools will contain a racial demographic that relatively reflects that of the district as a whole. During the time that Seattle adopted its plan busing was not new or unique, but rather common in many school districts. During the early 1970's the NAACP filed numerous

[4] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)
[5] *Ibid*

suits against many school districts throughout the country. Those unlike Seattle that did not comply often were taken to court where they usually lost and were forced to adopt busing plans.

Although the Seattle school board had instituted a large plan, by 1977 the board continued to describe 26 of its 112 schools as segregated or "racially identifiable." Racially identifiable means that one race is much more heavily represented in a school compared to others and consequently characterizes the school.[6] The NAACP brought another suit claiming that the school board had not complied with the previous suit and exhibited a pattern of "delay in respect to the implementation of promised desegregation efforts"[7] and had continued to perpetuate unlawful segregation. Instead of going to court the two sides entered into a settlement known as "the Seattle Plan" which was implemented in 1978. This unlike the first plan, which was half hearted at best, resembled the extensive busing plans that were instituted after 1973. This plan considered any school that had a race that was not within 20% of district's total demographics as imbalanced. To achieve the goal of racially integrated schools the district employed extensive busing services; about half of all the districts students attended a school other than the one closest to their home.

The School District achieved its goal of racial diversity but at a high cost. Many White families objected to busing plans of 1970s and either moved to the suburbs or enrolled their children in private schools. This symptom was known as "White Flight." By 1988 Seattle had fallen victim to white flight and the school district's total population had dropped from 100,000 to 50,000 with a makeup of 43% percent white, 24% black and 23% Asian or Pacific Islander with Native American and Hispanics making up the other 10%. This shift in demographics greatly reduced the Seattle Plan's effectiveness. This combined with the public's growing

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[6] *Green v. School Board of New Kent County*, 391 U.S. 430 (1963)
[7] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

opposition to the plan and the costs of the extensive busing associated with it led the school board to abandon it for a more lenient student assignment plan.[8] The new plan, which was instituted in 1999, was what is known as a "choice plan." It sought to relax racial constraints, which in the previous busing plan were extremely rigid and increase a student's choice in schools.

Choice plans are combinations of neighborhood schools assignments, which simply assign students to schools closest to their homes and busing plans.[9] Choice plans allow students and their parents to list the schools available in their district according to their preference. Students are then assigned to one of their chosen schools based on a set of criteria chosen by the school board. A student's choice is the primary tenet for assigning schools, but should a school become oversubscribed the district will employ a tiebreaker based on its chosen criteria to determine student's placement.

Many school districts such as Seattle stopped busing and began using what are known as "controlled choice plans" to increase student choice and still maintain racially balanced schools. This simply means that districts incorporate certain criteria into their tiebreaker process to create schools that are not racially identifiable. Some districts, such as Wausau Wisconsin are able to use other factors such as geographic and socioeconomic facts as criteria to achieve desired racial proportions.[10] However others districts such as Louisville, Kentucky, Seattle, Washington, Knoxville, Tennessee, La Crosse, Wisconsin and Boston, Massachusetts have had to use more overt racial criteria in their tiebreakers.[11] Using such criteria means that some students depending

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[8] *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982)
[9] David J. Armor, *Forced Justice: School Desegregation and the Law* (New York: Oxford University Press, 1995) 15.

[10] *Ibid*., 224.
[11] *Ibid*., 218, 115

on their race may not get into their first choice if their acceptance would cause a racial imbalance in the school.

The choice plan adopted by Seattle was not a normal choice plan, but a "controlled" one that used race based constraints. For example in high school assignments, a student was able to list his or her top three choices.[12] In assigning pupils to schools the district would first take into account whether or not that student had a sibling already at their desired school. Second the tiebreaker considered that student's race in relation to the racial makeup of that school. If the student attending a school would cause one race to become "over represented" in relation to the demographics of the district the spot would go to another individual of a different race. In Seattle's plan schools had to have racial percentages that fell within 10% of the district. The third aspect used in the criteria was how close that student lived to the school, and the fourth was if the student received childcare in the neighborhood. After attending a previously assigned school for a year individuals could transfer to any school of their choice and not have their race taken into account. During the period that the tiebreaker was used (1999-2001) between 89% and 97% percent of students received their first or second choice assignments and those that did not were able to transfer the following year. It is important to note that the few students denied their first choice were not only white students, but any student whose race would throw the school outside 10% of the district.

Unlike Seattle, Louisville and the entire state of Kentucky did operate legally sanctioned segregated schools and the district was therefore subject to a court order to desegregate after the decision in *Brown v. Board of Education*. After the *Brown II* hearing in 1955 the Louisville Board of Education adopted an open transfer policy to facilitate desegregation. About 3,000 of

[12] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

district's 46,000 students applied for transfer. The plan overall had little effect on the district's dual school system because the district was also racially polarized residentially. In 1972 "Fourteen out of the district's nineteen non-vocational middle and high schools were close to totally black or totally white. Nineteen of the district's forty-six elementary schools were between 80% and 100% black and twenty-one elementary schools were between roughly 90% and 100% white."[13] Because the school district's plan had such a minimal effect it should come as no surprise that in 1975 a conglomerate of parents and civil rights groups brought suit against the school board in federal court and were victorious.

The new plan adopted was expansive and diverse in the methods that it employed to achieve its goal. It first amalgamated several school districts into one, now known as the Jefferson County School System, which had a total of 134,000 students, 20% of whom were black. Under this plan, for an elementary school to be considered desegregated it would have to have at least 12% to 40% of it pupils black, and for secondary education a school would have to be 12.5% to 35% black. To achieve this result the school board closed 12 schools, redrew its attendance zones and then implemented an extensive busing system, which transported some 23,000 students daily. This plan was effective in achieving its desired goal of eliminating the districts racially identifiable schools. Even though the case was removed from the courts docket the district was still expected "to continue to implement those portions of the desegregation order which are by their nature of a continuing effect."[14]

In 1991 the school board decided that change in the district's demographic make up had rendered the plan ineffective. The board worked hard with community groups and parents in the district to devise a plan that would fit the needs of the community. The result was a new plan

[13] *Ibid*
[14] *Ibid*

labeled "Project Renaissance." Project Renaissance modified the percents of student populations to 15% to 50% black in elementary schools, along with minimum of 15% of the general percentage for both Blacks and Whites in all middle and high schools. Elementary students would be assigned to their neighborhood schools with the limitation that only a black student could transfer from a predominately black school to a predominately white school and vice versa. Middle school students were assigned to neighborhood schools and high school students were subject to open enrollment in a similar manner to the choice plan adopted by the Seattle School District.

In 1996, to adjust to changing demographics, the Louisville School board modified Project Renaissance, resulting in its final desegregation plan, which was in effect during *Parents Involved in Community Schools v. Seattle School District No.1* decision. The plan removed "racial guidelines", set the racial limits in terms of percentages at 15% to 50% black for all schools, withdrew assignment boundaries and expanded the transfer system accorded to high school students to both the elementary and middle school systems. The one new precept of this transfer system was that a student could not transfer to school if that transfer would result in that school falling out of its racial boundaries. This plan proved very effective and consequently the court order was dissolved in 2000. The federal court acknowledged that the districts compliance and methodology stating that, "overwhelming evidence of the Board's good faith compliance with the desegregation decree and its underlying purposes."[15]

The court order was eventually dissolved because district had eliminated all vestiges of its previously state imposed segregated system. After this the district was no longer obliged to continue maintaining racially balanced public schools, however it continued to do so. As the court noted when dissolving the order the school district had, "treated the ideal of an integrated

[15] *Ibid*

system as much more than a legal obligation--they consider[ed] it a positive, desirable policy and an essential element of any well-rounded public school education."[16] It was for this reason that the board continued to implement the policy. Not because it had to, but because it felt that racially balanced school were desirable end.

The Decision

Seattle and Louisville lost *Parents Involved in Community Schools v. Seattle School District NO. 1*. As a result both are now practically barred from using any racial considerations in their school assignments. The court was essentially split right down the middle in its verdict. The majority featured more conservative judges Chief Justice Robert and Justices Alito, Scalia, Thomas and Kennedy. Justice Kennedy concurred only partially with the majority opinion, but still gave it the necessary vote to decide the case. The majority decided that Seattle and Louisville did not have the compelling interest required to consider race in the manner they did in public school assignments.

The Supreme Court has three levels of review, which it uses to determine whether a state's action is a constitutional violation.[17] The first and lightest form of review is "rational basis" in which the court determines whether a government action is rationally related to a legitimate interest. The next level is "intermediate scrutiny" in which the government must first establish that it has an important interest and that the policies or laws it uses contribute substantially to that important interest. The last level of review is "strict scrutiny", which is invoked if a government action possibly violates a constitutional right or uses suspect

[16] *Ibid*
[17] footnote 4 of *United State v. Carolene Products Company*, 304 U.S. 144 (1938) is seen as the starting point for the differing levels of judicial scrutiny

classifications such as race or religion. When strict scrutiny is invoked the government must prove that it has a compelling interest for employing it policy or statute. Once this is established the state must prove that its action is "narrowly tailored" enough to achieve it desired interest. The majority of cases where the Supreme Court invokes strict scrutiny the government statute or policy under review is deemed unconstitutional. Strict scrutiny is always applied to any racial classifications.[18]

The majority stated that for a state to use racial classifications in educational assignments it must have a compelling state interest. In other words a state can only use racial considerations if it is for a necessary purpose in which race is a last resort:

> Because racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification…governmental distributions of burdens or benefits based on individual classifications…Thus, the school districts must demonstrate that their use of such classifications is "narrowly tailored" to achieve a "compelling" government interest.[19]

Justice Roberts in the plurality's opinion asserted that in terms of education there are only two state interests that the court has recognized as compelling enough to legitimize a state's to use of racial considerations in public schooling. These are "remedying the effects of past intentional discrimination" (i.e. legally enforce segregation) and "in broadening student body diversity..."[20] In this second interest race must be one of many factors, such as having a second language or overcoming personal adversity, which are all valued equally.[21] The Robert's plurality did not find that either state had a compelling interest in remedying the effects of past intentional

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[18] *Adarand Construction Workers, Inc v. Pena* (1995)
[19] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)
[20] *Ibid.,* Kennedy did not concur on this point and wrote a separate opinion to make clear that there were some instance which he felt could constitute a compelling interest for state that were not either of the two mentioned in Robert's opinion
[21] *Ibid*

discrimination. This is because as stated before, Seattle was never under a court order for de jure segregation, and Louisville had already had its court order dissolved.

The only interest that either district could use as compelling was diversity in student body.[22] It was therefore not surprising that the court found that neither district was able to prove that it was "narrowly tailored" enough to legitimize it use of race in broadening the diversity in either student bodies. The plurality insisted that "race was not considered as part of a broader effort to achieve exposure to a widely diverse people, cultures, ideas, and viewpoints… race, for some students, is determinative standing alone"[23] and amounted to nothing more than racial balancing in other words racial integration. The plurality claimed that racial balancing was and still is "an objective this Court has repeatedly condemned as illegitimate"[24], illustrating its position that absent any constitutional violation the use of race even used to prevent racial identifiable schools is unconstitutional.

The main thrust of Justice Robert's opinion is the rejection of the idea that school integration is a constitutionally acceptable interest. This rejection is based on what I will call the "anti-classificationist" reasoning. This reasoning is the belief that according to the 14th Amendment's Equal Protection Clause the government should not use racially classifications, and any which it does are automatically suspect. Whether the classification used is for inclusive or exclusive purposes is of no consequence. This reading of the 14th Amendment professes a belief that the amendment was created to assure neutrality in government action. The government should not have any biases in terms of race even if it is for the purpose of creating

[22] It is important to note that the educational plan that the Supreme Court has accepted as narrowly tailored enough to achieve this interest, was one used by the University of Michigan Law School in *Grutter v. Bollinger*, 539 U.S. 306 (2003)
[23] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)
[24] *Ibid*

equal opportunity. In closing Justice Robert's elucidates this belief in his interpretation of *Brown*:

> 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… The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[25]

Robert's makes it clear that even racial considerations used for integration goals such as creating a pluralistic society is constitutionally wrong.

The other side consisting of Justices Ginsburg, Stevens, Breyer and Souter dissented, asserting that both districts did have compelling interest in maintaining a racially balanced school system. In the case of Seattle, Breyer claimed that even though the Seattle district had not come under a direct court order and was never segregated by law, it had settled two suits with the NAACP, which essentially amounted to an admission of being guilty of practicing segregation. Therefore it in a sense did have a legitimate claim that it was "remedying past intentional discrimination."[26] If districts could only desegregate under a court order what was to be made of the Southern districts that had practiced segregation by law, but had settled in court and thus had not come under a court order. Breyer questioned were these districts not obligated to desegregate their schools to the extent of those that had come under court order? Breyer also stated that some districts, such as Jefferson County, even though already unitary had seen the educational benefits of their desegregation plans and for that reason still intended to utilize them even after their court orders were dissolved:

> …Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan before the court dissolved the order, but with every intention of following the plan even after

[25] *Ibid*
[26] *Ibid*

> dissolution. How could such a plan be lawful the day before dissolution but then becomes unlawful the very next day? [27]

He also went on in his dissent to claim that the histories of both districts suggested that each tried a number of methods such as busing to desegregate their schools and had steadily worked their way to the current plans under review.

In his book *Forced Justice: School Segregation and the Law* David Armor discusses the difficulty of school boards have in determining what types of desegregation and racial balancing plans to use. Throughout the book he asserts that are no plans at all that are proven to be effective in every context, and that many states consequently have had to gradually figure out what works for their specific district.[28] He also notes that many districts have steadily gravitated toward "controlled choice plans"[29] as strategies. Justice Breyer seems to feel the same way because he thought that both the Jefferson and the Seattle District's several changes constituted good faith consideration of the of board's policies and were thus narrowly tailored enough to use race in school assignments.

The rest of Breyer's dissent is based on his rejection of the plurality's conviction that there are only two compelling interests that permit the use of race in school assignments. He asserted that school districts do have a compelling interest in maintaining racially integrated schools aside from the diversity interest and past discrimination. This interest he labels "racial integration":

> By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the school districts' schools and each individual student's public school experience.[30]

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[27] *Ibid*
[28] David J. Armor, *Forced Justice: School Desegregation and the Law* (New York: Oxford University Press, 1995) 208-210.
[29] *Ibid*., 218,116.
[30] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

Breyer argues this point quite eloquently, relying on numerous court decisions that followed the influential *Brown* decision.

Both sides based their judgments in the notorious *Brown v. Board of Education* decision. Each side essentially accused the other of misinterpreting the meaning of the decision and consequently how the 14th Amendment is meant to apply to race in public education. Justice Robert's anti-classificationalist opinion completely rejected Justice Breyer's argument that racial integration is a legitimate interest absent any previous de jure segregation. Joshua and Meredith were individuals whose race could not be a decisive factor in school assignments because the 14th Amendment guaranteed them racial neutrality with respect to public education. Breyer's opinion sided with Seattle and Louisville because he believed that 14th Amendment was intended provide security to minority groups who would otherwise fall victim to majoritarian forces of society which could subjugate them.

I agree with Breyer on this point because I believe that the framers that 14th Amendment were aware that a complex milieu of state, local and private interferences could prevent minority groups, particularly African Americans from enjoying equal protection of the law. I feel that Robert's position misinterprets the true intentions of *Brown* and the purpose of Equal Protection Clause of Fourteenth Amendment which were meant to reject not all racial classifications only those that oppress racial minorities. The 14th Amendment does allow for a state to take account of individual's race in public school assignments so that it can protect minority students from societies harmful current such as residential segregation, which is a growing problem in this country.[31] To prove this I will first provide what I believe is an accurate reading of the 14th Amendment in accordance with the intent of its framers. Second I will illustrate how *Brown*

[31] Bob Herbert, "Separate and Unequal" New York Times, March 22, 2001.

produced no precedent and was rather ambiguous as to how it should be applied, even though it simply sought to eliminate segregation in American education. Third I will show how the intent of *Brown* became clear in its preceding cases and produced a very clear precedent for preventing racially identifiable schools. Fourth I will illustrate how there is another precedent for reviewing racial considerations in government-funded education, which arose from Supreme Court decisions concerning higher education in which merit was involved. In this work I will attempt illustrate how Justice Robert's conflates these two precedents and misapplies the one meant only for higher education into lower education in *Parents Involved.*

Chapter 2

The New Birth Amendments

In this chapter I will first discuss the creation of "the New Birth Amendments", particularly the 14th before discussing *Brown v. Board of Education*. If one is to understand how the 14th Amendment should apply to race and public education it is essential to understand it in the context that it was created because this particular amendment is now the primary source of disagreement in *Parents Involved*. The Civil War took place in large part over the issue of slavery specifically "the Great Compromise of 1850" and the "Fugitive Slave Act" associated with it.[32] This act allowed slaveholders to protect their "property" within many northern states where slavery was banned. Along with this legislation Congress created a "*posse comitatus"* of federal commissioners whose job it was to recapture slaves if they escaped into any of the free states. If any private citizen was caught interfering with this process the federal commissioners had the power to arrest and imprison him. The Northern states felt the federal government in passing the Fugitive Slave Act had violated their sovereignty in order to appease the slave holding Southern states. After the *Dread Scott* case allowed the new territories to become slave holding, the Northern states were convinced that compromise on the subject of slavery was impossible which largely contributed to the Civil War.[33]

After the Civil War the 13th Amendment ended slavery forever,[34] however the Southern states disrespected the amendment and simply passed a series of statutes called the Black Codes,

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[32] *Fugitive Slave Act of 1850*, 31st Cong. 1st sess. (September 18, 1850)
[33] Nathan Newman & J.J. Gass, " A New Birth of Freedom: The Forgotten History of the 13th, 14th, and 15th Amendment" *Brennan Center For Justice at NYU School of Law* (2004): 7.
[34] U.S. Constitution, amend. 13, sec 1.

which were designed keep African Americans in servitude, but not under the explicit title of slavery. In response to these statutes Congress passed the Civil Rights Act of 1866 to guarantee Blacks the rights necessary for a free existence:

> The Civil Rights Act of 1866… [guaranteed] blacks the same right in every state and territory of the united states to make and enforce contracts to sue, be parties and give evidence, to inherit, purchase, sell and convey real and personal property; and full and equal benefit of the laws and proceedings for the security of person and security as is enjoyed by white citizens"[35]

In order to enforce these rights so that they would be respected by all of the states and not be overturned in the future, Congress passed the 14th Amendment.[36] The language of the 14th Amendment is directed at the states[37], which were trying to deprive African Americans of the vital rights recently granted to them by the Civil Rights Act. The 14th Amendment codified the Civil Rights Act of 1866 so that it would not be overturned by a future congress and so that the states couldn't impede on African American rights.

The 14th Amendment contained Section 5, which stated that, "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[38] Robert Newman and J.J. Gass illustrate in their article " A New Birth" that Section 5 was written not just so Congress could have the power to secure the new rights against the states but also against private actors. White society in the Southern states and many states in the North were not ready to accept African Americans into society as agents in themselves. Section 5 was written with the understanding that these individuals and society at large might try to prevent the Blacks from enjoying benefits of the rights they had just received:

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[35] Nathan Newman & J.J. Gass quoting *Civil Rights Act of 1886*. 39th Cong. 1st sess., (April 6. 1866) in " A New Birth of Freedom: The Forgotten History of the 13th, 14th, and 15th Amendment" *Brennan Center For Justice at NYU School of Law* (2004):
[36] *Ibid.,* and Berger, *Government By Judiciary*: *The Transformation of the Fourteenth Amendment* (Indiana: Liberty Fund Inc. 1997) 48.
[37] U.S. Constitution, amend. 14, sec 1, 2, 3, 4.
[38] *Ibid*., sec 5.

> Congress could invoke section five authority whenever individuals were prevented from – enjoying as a practical manner – the rights guaranteed by section 1. Even if states maintained facially nondiscriminatory laws, their failure or inability to prevent private actors from interfering with civil rights would give congress license to remedy the situation… The private terror aimed at blacks and republicans during Reconstruction of left unchecked, would effectively overturn the New Birth Amendments.

Section 5 was modeled after the Fugitive Slave Act but for an opposite purpose. It made no difference whether the agent interfering with the rights of Africans Americans was a state or whether it was a private one from society. The federal government had the power to keep it in check.[39] Even if it was a matter where the state government failed to protect it citizens, the 14th Amendment gave the federal government the right to intervene.[40] This is a very important point because the federal government forced legislation on states not only for disobeying, but also for failure to act.

Although some assert that the purpose of the 14th Amendment was to "establish and defend" the equality of African Americans this is actually a very controversial claim. Many historians of the congress that passed the amendment such as Raoul Berger have argued that this congress viewed African Americans as inferior and for that reason did not intend for African Americans to be equal. They argue that the 14th Amendment was only meant to protect the specific enumerated rights contained in the Civil Rights Act of 1866 everything else should be left to the states:

> No trace of an intention by the Fourteenth Amendment to encroach on State control—for example, suffrage and segregation—is to be found in the records of the 39th congress. A mass of evidence is to the contrary, and as will appear the attachment of the framers to State sovereignty played a major role in restricting the scope of the amendment.[41]

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[39] Nathan Newman & J.J. Gass, " A New Birth of Freedom: The Forgotten History of the 13th, 14th, and 15th Amendment" *Brennan Center For Justice at NYU School of Law* (2004): 15.
[40] *Ibid*
[41] Raul Berger, *Government By Judiciary*: *The Transformation of the Fourteenth Amendment* (Indiana: Liberty Fund Inc. 1997) 17.

The 14th Amendment's meaning is now very controversial and there are many theories as to its intent back then. For the purposes of this paper I will adopt Bickel and Berger's rigidly originalist view, which is devoid of any interpretive qualities except historical context.[42] If it was not enumerated right in the Civil Rights Act, the federal government could not enforce it upon the states in the intense manner that it could one that was enumerated.

If one adopts such a view it is impossible to believe that African Americans were supposed to be alleviated by the 14th Amendment to the extent that they were equal to whites. They were only supposed have the rights necessary to be considered free.[43] This is why the Fifteenth Amendment was adopted because the Civil Rights Act did not enumerate the right to suffrage and thus African Americans could not vote until the amendment was passed. Although Congress had the intention of protecting African Americans constitutional rights the Supreme Court during the late 19th century severely limited the scope of its power. Decisions such as *The Slaughter House Cases* in 1873, *Unites States v. Reese* in 1875 and *United State v. Cruikshank* in 1875 reduced the federal government's ability to protect African Americans from state and private action. African Americans after the period of reconstruction were restricted to an inferior status in terms of political and civil rights because the federal government could only enforce what was enumerated in the Civil Rights Act. Everything else was left to the recalcitrant state governments who would never voluntarily lend blacks a helping hand.

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[42] Perretti explains the individuals such as Berger believe finding the intent of framers of laws and amendments is the correct way to interpret laws. While I disagree with this belief I do believe that Berger's emphasis on history makes his analysis of context helpful for practical purposes. Terri J. Perretti, *In the Defense of a Political Court* (Princeton: Princeton University Press, 1999) 17

[43] Alexander Bickel, "The Original Understanding and the Segregation Decision", *Harvard Law Review* 69 (1955): 7-8.

Separate But Equal

Although slaves had been freed, states practiced de jure segregation, especially in the South under the title of "Jim Crow Laws." Jim Crow Laws were usually state or local ordinances that legally separated Whites from Blacks in public facilities such as restaurants, hotels, theaters, waiting rooms, buses, trains, restrooms and even beaches. For many years after Reconstruction the South and a large part of America operated dual systems, one for Whites and the other for Blacks. The backbone of this segregated system was thought to be public education, as starting in elementary school children practically grew up in a one-race world.[44] Southerners felt that public schooling was the most important place that segregation operated. When *Brown* ended school segregation it affected some 11.5 million students, both black and white and affected nearly 11,173 school districts, which amounted to 39 percent of all of school children in the United States.[45]

Although there were a number of decisions, which preceded it such as *Roberts v. Boston*, the despised case *Plessy v. Ferguson*, decided in 1896 by the Fuller Supreme Court, provided the constitutional legitimacy for legal segregation. The case focused on Homer Plessy an African American who bought a ticket for a white car on a train in Louisiana and was removed from it as soon as he was identified as black. Plessy filed suit, asserting that the statute was a violation of the Equal Protection Clause of the 14th Amendment because it denoted inferiority to his race. The case challenged the constitutionality of segregation on the basis that it denoted inferiority on the African American race. However the court voted 8 to 1 against him. The court's opinion as delivered by Justice Brown held that "…we cannot say that a law which authorizes or even

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[44] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), 81.
[45] *Ibid*., 17

requires the separation of the two races in public conveyances, is unreasonable, or more obnoxious to the fourteenth amendment. "[46] And that "Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of the other."[47] The reasoning revolved around the idea that if segregation denoted racial inferiority to African Americans it was only because they chose to interpret it that way, not because it was actually true. The decision in *Plessy* constitutionally legitimized what became known as "the separate, but equal doctrine" and set the precedent for de jure segregation in later decisions such as *Cumming v. Richmond County School Board* 1898 and *Gong Lum v. Rice* in 1927 that reinforced the platform for segregated schools.

Even though the *Plessy* decision is remembered as a stain on Supreme Court's record, it nevertheless contributed to the dialogue for racial equality in American society. Although facilities and services could be separate, they needed to be equal to be constitutional. During most of the time that Jim Crow was implemented most African American facilities including school systems were inferior to that of whites:

> The system...dumped black children, two-thirds of whom still lived in the southern and border states, into poorly funded, often ramshackle schools. In 1940 public spending per pupil in southern black school was only 45 percent of that in white schools. In South Carolina, Georgia and Alabama it was only 33 percent; in Mississippi, it was 15 percent. At that time, white officials in hundreds of heavily black counties in the South authorized little of no high schooling for blacks.[48]

It was quite clear that in most instances separate but equal did not actually mean equal. This fact served as a starting point for opponents of segregation who exploited it in court. "Separate but

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[46] *Plessy v. Ferguson,* 163 U.S. 537 (1896)
[47] *Ibid.*
[48] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), 17.

equal" as doctrine served as a platform for African Americans along and civil rights groups to attack Jim Crow statutes and the segregated system associated with them.

The assault on segregation began in higher education, because it was a much harder area for states to prove that separate facilities were equal. Due to the amount resources and capitol needed to run such institutions it was much hard to provide truly equal accommodations for both races. The first case of this sort was *Missouri ex. Rel Gaines v. Canada* decided in 1938. Lloyd Gaines applied to the law school at the University of Missouri and was not admitted, however it was not because he was unqualified, but because of a statute prohibiting black students from attending the institution. The State of Missouri as compensation offered to pay his tuition at another law school out of state. The Court however sided with Gaines, holding that it was unfair for a state to provide higher education in state for only one race and not for another.[49] Some states did run completely separate institutions instate such as Texas. However even these were eventually forced to integrate because segregation in higher education was gradually held unconstitutional in the cases *Sipuel v. Board of Regents of Univ. Okla.* decided in 1948, *McLaurin v. Oklahoma State Regents* and *Sweatt v. Painter* both decided in 1950. The end result of these cases was that "separate but equal" was unconstitutional in higher education because segregated institutions lacked important academic resources such as libraries and because of other intangible factors such as isolation from the future professionals in their fields.[50] The holdings in these cases concerning higher education helped pave the way for NAACP lawyers who would attack segregated education in America in whole in *Brown v. Board of Education*.

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[49] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)
[50] *Sweatt v. Painter,* 339 U.S. 629 (1950), *Sipuel v. Board of Regents of Univ. of Okla*., 332 U.S. 631 (1948) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)

School expenditures for African Americans did increase in1954, but funding per black pupil in southern states, "was still only 60 percent of that for southern whites."[51] This statistic reflects the gross inequalities in public education that were still present during the time of *Brown*. The NAACP eventually got tired of arguing that individual segregated institutions were unequal under the "separate, but equal doctrine" and instead strove for the ultimate goal of destroying the doctrine itself. NAACP lawyers began *Brown v. Board of Education* in 1951. The lawyers sought to break away from the equity arguments that they had been using, and instead returned to the argument used by Plessy. They argued that segregation enforced in public education was inherently unequal because it gave black students a feeling of inferiority, which in turn retarded their motivation to learn. The lawyers employed numerous sociological findings such as those by Kenneth Clark and Gunnar Myrdal to support their arguments.[52]

They also argued that the framers of the "New Birth Amendments" had intended to stop all forms of segregation and that these efforts had been hindered after reconstruction ended and at the very least "the framers surely had not foreclosed future generations from overturning segregation, either by congressional action or judicial review."[53] The *Brown* decision consisted of 4 different individual cases in Clarendon County South Carolina; Prince Edward County, Virginia; Wilmington, Delaware; and Topeka Kansas.

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[51] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), 17.
[52] Myrdal, *The American Dilemma* and K. B. Clark, Effect of Prejudice and Discrimination on Personality Development
[53] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001), 39.

Brown v. Board of Education

Brown v. Board of Education was decided in 1954, and the "separate but equal" doctrine emanating from *Plessy* was overturned unanimously in the context public schooling. Chief Justice Earl Warren wrote the opinion himself, which greatly affected how the ruling was constructed. He felt that fairness was embodied in the constitution, specifically in the Equal Protection Clause of the 14th Amendment.[54] It was from this simple conviction that Warren found segregation in schools to be unconstitutional:

> I don't see how in this day and age we can set any group apart from the rest and say that they are not entitled to exactly the same treatment as others. To do so would be contrary to the Thirteenth, Fourteenth, and Fifteenth Amendments. They were intended to make slaves equal with all others. Personally, I can't see how today we can justify segregation based solely on race.[55]

Although Chief Justice Warren was firm in his conviction as were some of the other justices on the Court, there were other such as Justice Reed and entire parts of the country that were not comfortable with the change.[56] Warren was very conscious of this fact and consequently it greatly shaped how the decision in *Brown* was phrased and implemented. It prompted the Chief Justice to convince all of the nine justices that *Brown* needed to be a unanimous decision written in one opinion, which it was. In knowing that he and his court were overturning a doctrine that had shaped American society in a fundamental way, Warren made his opinion easily accessible to the public. He constructed it so that the average person could understand it by avoiding technical terms, legalisms, complex Latin and by making it extraordinarily short. The *Brown* opinion is only ten pages in length.

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[54] Phillip B. Kurlad, *Politics, the Constitution, and the Warren Court* (Chicago: University of Chicago Press, 1970), 150.
[55] Bernard Schwartz, *A History of the Supreme Court*. (New York: Oxford University Press, 1993.) 292.
[56] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001) 37.

Warren argued a number of different points in his opinion for *Brown v. Board of Education*. The first point was that "the Fourteenth Amendment was at best inconclusive at to its intended affect of public education" because when looking at history it was almost impossible to know if the public education would have been considered an enumerated right. At the time the New Birth Amendments were passed public education did not play nearly as large a role in society as it did during the time of *Brown*.[57] Warren's next point was that for that reason the case must be decided not on the role of public education when the 14th Amendment was adopted but "in the light of the full development of public education and its present place in American life throughout the Nation."[58] Warren claimed that in this context the founders of the amendment would have considered public education an enumerated right.

Many have argued that the Court had no power to practically add and enumerated right to the constitution.[59] This is definitely a reasonable argument considering that the court was acting of its own accord with out the total support of Congress, the Executive Branch or public consent. However I do not feel the need to diverge on this tangent because the court did do just this. American society has adjusted to the verdict in *Brown* and to the perception that segregation is unconstitutional. Therefore there is no point in discussing if the court was wrong or not because *Brown* is much to far in the past.

Because the Court felt that public education was now to be considered an enumerated right public education it would have to be "equal on all terms."[60] Warren then turned to segregation stating that, "Segregation of white and colored children in public schools has a

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[57] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[58] *Ibid*
[59] See, Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 1977) and Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962) for arguments against the decision in *Brown*
[60] *Brown v. Board of Education*, 347 U.S. 483 (1954)

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."[61] To support this assertion the Court famously relied the on the social experiments presented by the NAACP lawyers in the now infamous footnote 11. It is unclear how much weight Warren intended to give to these studies in his reasoning. Today they are quite controversial in terms their accuracy, but at the time were considered cutting edge. Because they were not nearly so disputed in time of *Brown* it seemed that it had declared segregated schools inherently unequal and therefore unconstitutional specifically because of these findings. The point was not that racial classification was wrong in itself. It did not rule all segregation unconstitutional such as miscegenation laws, only segregation in schooling because these social studies proved that it denoted feeling of inferiority to African Americans.

David Armor in his work *Forced Justice* labels the reasoning that the court used "the harm and benefit thesis." He claims that whether on purpose or not, by relying on social science studies to support its claim in *Brown* the Court endorsed this reasoning.[62] The social studies that support that the reasoning and the theory it self have both changed greatly since *Brown*. The theory has become very complex and significantly more controversial, but at the time of the decision it was relatively simple. It had two basic points, one positive, and one negative:

> The first component holds that segregated schools harm the education and academic achievement of minority children, in part by reinforcing negative stereotypes and damaging personal self-esteem. The second component is a reasonable corollary to the first: Desegregation benefits the self-esteem, academic achievement, and long-term educational and occupational outcomes for minority children while improving race relations for everyone[63]

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[61] *Ibid*
[62] David J. Armor, *Forced Justice: School Desegregation and the Law* (New York: Oxford University Press, 1995) 50.
[63] *Ibid*., 8

I am not going to say that this reasoning is correct or necessarily true. The argument to support this theory has greatly changed overtime and theory is far less dogmatized than it was for many years after *Brown*. It is a debatable whether the Court meant to adopt it in *Brown* or was simply trying to use social science as a side note to give more legitimacy to it decision overturn school segregation. Armor argues is undeniable that by employing social science *Brown* gave this theory an "enormous boost elevating it from academic theory to moral authority."[64] On this point I have to agree with him. By seeming to rely heavily on findings from social science in such a short opinion, whether it meant to or not the Court put itself in a position that implied that integration was its necessary end.

Brown II was delivered in 1955 to instruct the school districts on what they needed to do. In this resolution the court did not specify that school districts needed to dispose of their dual system. Only that black plaintiffs should be admitted to schools on a nondiscriminatory basis, free from legal constraints that took account of their race. This was not the same thing as forcing states to have racially mixed schools. Only that all statutes which denied black plaintiffs to schools specifically on their account of their race should be removed. The Court did not state whether it was requiring schools to desegregate or not. It only declared statutes that explicitly segregated schools unconstitutional, not necessarily the racially segregated school system itself.

The Court decided that because *Brown* effected so many different localities the "School authorities [would] have the primary responsibility for elucidating, assessing, and solving these problems; courts [would] have to consider whether the action of school authorities constituted good faith implementation of the governing constitutional principles."[65] It essentially gave the district courts the responsibility of making sure the districts eventually transferred to a

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[64] *Ibid*.
[65] *Brown v. Board of education*, 349 U.S. 294 (1955)

"nondiscriminatory system." In working with the districts the courts could "take into account the public interest" in the transition period. To induce this change the local courts could alter a couple aspects of a district:

> …The courts may consider, problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.[66]

The Court stated that the school systems should be made to admit students on a nonracial basis but did not say what a non-discriminatory basis actually meant.[67] It was unclear exactly what objectives it was pursuing in *Brown II*. The Court offered little guidance concerning to the action it expected to happen after its decision, its objective was vague, and the means it prescribed to achieve this objective were also equivocal and poorly defined.

Neither *Brown I* nor *Brown II* addressed whether districts actually needed to integrate their schools or were just barred from explicitly using race to prevent Blacks from going to school with Whites. It is possible that the court thought that by removing such statutes Southern school districts would desegregate on their own. This would be naïve if one remembers that these same Southern states were so hostile to Congress's attempts to dispose of the black codes during reconstruction. Congress during Reconstruction was resolved that it would to go to great lengths to secure the rights it had established for blacks. The Supreme Court by comparison was indecisive and soft in its judgment considering the magnitude of its decision. It appeared that it was not going require states to actually integrate. As previously articulated integration was the necessary end of the reasoning it used to declare segregation in public education unconstitutional.

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[66] *Ibid*
[67] *Ibid*

In his article "Towards Neutral Principles of Constitutional Law" Herbert Wechsler criticizes the reasoning used in the argument in the *Brown* decision. He makes a similar point, that the Court by declaring segregation unconstitutional because of harm inflicted on African Americans necessarily put itself in a difficult position.[68] He reduced *Brown* to a matter of association, "… If the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."[69] Wechsler was critical of the reasoning in *Brown* because he noted that by its argument *Brown* necessarily would require forced integration. This forced integration is necessary as remedying past intentional discrimination."[70] One of the interests compelling enough for Chief Justice Robert's, Wechsler felt that if the court was going use this reasoning it would in turn have to be fairly clear as to what changes it was going to force on society,[71] something that it did not do.

Wechsler argued that it would have been far more advantageous for the Court to adopt an anti-classificationist position that simply forbade all racial guidelines in legislation on the basis of freedom of association. This reasoning would not require the integration of schools. Instead it would only require school districts to drop explicitly racial statutes. It would be neutral because the decision would not allow statutes that excluded Blacks, but would not require that they go to school with Whites.

I do not adopt Wechsler's position that it would have been better to adopt an anti-classificationist argument, but I do think that his critique of *Brown* is accurate and serves to elucidate the problems with the reasoning the court invoked to end segregation in education. The

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[68] Herbert Wechsler "Toward the Neutral Principles of Constitutional Law" *Harvard Law Review* 73 (November 1959) 33.
[69] *Ibid. 34*
[70] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)
[71] Herbert Wechsler "Toward the Neutral Principles of Constitutional Law" *Harvard Law Review* 73 (November 1959) 33.

decision stated that legally segregated schools were harmful to African-Americans academically and therefore was unconstitutional accordingly. The end of this reasoning would necessarily be to force integration because going to school separately was unconstitutional. It declared the segregated school system of the South unjust and unacceptable because of it effects, but did not say what should go in its place. The Court in its decision implied that integration would be necessary but gave no guidelines as to how this integration should occur. It in this way dug itself into hole because in *Brown I* its reasoning seemingly suggested integration as an end. However *Brown II* apparently did not specify that its goal was integration even though this was the logical end to the courts reasoning.

Some have attributed the ambiguity and vagueness of the Court's in *Brown* to it being considerate of the Southern and border states. The Court knew that it was singling out an entire region of the country and condemning its practices when many of the northern state's school systems were highly segregated, although not by law. It was also aware that it was reversing a way of life that had prevailed since reconstruction and was thus aware that the decision might invoke a massive backlash such as the one that occurred after the Civil War when "the New Birth Amendments" were passed. Whatever the case it was particularly ambiguous concerning how the decision should affect the school districts involved. For this reason during the first 15 years following the *Brown* decision the Southern schools saw little change in their racial make up and remained segregated although not by law. The Southern states tried as hard as they possibly could to prevent change in the system that that they found so important to their way of life. They resisted desegregation through a number of strategies both in government and bureaucratic policy and in private actions.

The South After Brown

The first of these techniques was to simply interpret *Brown* in a manner that did not require the districts to desegregate. In 1955 the 4th circuit court discussed the case *Briggs v. Elliott* one of the 5 cases in *Brown* which was concerning Clarendon County South Carolina. In this case Judge John Parker invoked what became known as the "Briggs Dictum" which became the motto of the South:

> It [the supreme court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right to choosing the schools they attend. What it has decided…is that a state may not deny any person on account of race the right to attend any school that it maintains…if the schools which it maintains are open to children of all races, no violation of the constitution is involved even though the children of different races voluntarily attend different schools…the Constitution, in other words does not require integration. It merely forbids discrimination.[72]

Thus Southern schools did not have to actually integrate they simply had to remove racially discriminatory statutes, even if the point of the statute was to propagate segregation. For the decade after *Brown* this dictum reigned supreme in how Southern school boards went about postponing desegregation their schools almost more vehemently than before *Brown*. It was clear during this stretch that they had not intention of giving African Americans any remedies.

The states instituted massive amount of legislation to make sure that sure that their school districts remained either black and or white. The motto was if "we can legislate, we can segregate."[73] One method was to simply legislate against integration. For example Mississippi and Louisiana made it illegal for children to attend schools that had both Black and Whites and Georgia had statute that made it illegal for a public official to allocate funds to any school that

[72] *Briggs et al v. Elliot* 342 U.S. 350 (1952)
[73] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001) 77.

was desegregated. The states also invoked laws that forbade teachers from being associated with the NAACP. Along with this legislation, states appropriated large sums of money to attorneys to combat the NAACP. These attorneys thought up numerous strategies under the motto "all deliberate delay" which exhausted the NAACP and drained much of its resources.

Some of the primary strategies that school districts employed, to perpetuate segregation were "pupil placement laws." These were statutes that perpetuated black and white school assignments although not using race but rather a complex evaluation psychological and academic performance. These mandated that school districts had to take account of a certain set of criteria, usually "student preparation, aptitude, morals of conducts, health and personal standards"[74] in assigning students to schools. The plans were so effective that they made it almost impossible for black students to attend white schools, for example, " under Virginia's law, school authorities considered hundreds of thousands of placements without discovering one black student qualified to be in a white school."[75]

Districts also utilized "freedom of choice plans" which actually did allow African American parents to send their children to any school of their choice. This on paper was fair, however parents would have to decide if attending a white school was best for their children or even their families. Many white communities resorted to private scare techniques similar to those invoked during reconstruction. KKK membership surged during these years and white on black crime greatly increased, "between 1954 and 1959 there were 210 recorded acts of white violence against black people in the south, including six murders, twenty nine assaults with fire arms, forty-four beatings and sixty bombings"[76] Along with these violent groups there were others that were non-violent known as "White Citizens Councils" which focused on economic forms of

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[74] *Ibid.,* 100.
[75] *Ibid*
[76] Randall Kennedy, *Race, Crime and the Law* (New York: Vintage Books, 1997) 78.

intimidation. These groups focused on deterring people from joining the NAACP and African Americans from voting or sending their children to white schools. If some one did one of these things the citizens council would try to make sure that they were denied mortgages and medical insurance or laid off from their professions. By 1957 the group had an estimated 250,000 members.[77] It was estimated that from 1955-1957 NAACP membership dropped from 130,000 to 80,000.[78] It was obvious that the South had no " good faith" in implementing non-discriminatory racial school assignments and had no intention of moving forward with "all deliberate speed" but rather was trying to do the exact opposite.

In 1966 sociologist James Coleman did a report for the U.S. Office of Education funded by the Civil Rights Act of 1964. Its purpose was to assess the equality of individuals in the nations education system on account of race. The report was named *Equality of Educational Opportunity* and was the largest survey and study of that kind for it time. The reports are now considered controversial as to their accuracy and effectiveness,[79] but at the time reflected how minimal an effect *Brown v. Board of Education* had on African American's students. David Armor summarizes these conclusions:

- Twelve years after Brown, the overwhelming majority of white students attended predominately white schools and a majority of black students attended schools that were majority black.
- Contrary to expectations, within regions of the country the distribution of school facilities and resources---expenditures, teacher-background, equipment, textbooks---were largely equal between black and white schools, and where there were differences, they tended to be small and could favor blacks or whites.
- The academic achievement of blacks lagged substantially behind whites at all grade levels, and the small differences in school resources

[77] James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001) 99.
[78] Numan Bartley, *Massive Resistance:* Race and Politics in the South During the 1950's (Louisiana: Louisiana State University Press, 1969) 114.
[79] David J. Armor, *Forced Justice: School Desegregation and the Law* (New York: Oxford University Press, 1995) 66.

contributed very little to these achievement differences; however the achievement levels of both blacks and whites were strongly associated with the socioeconomic characteristics of their families

- Black students in desegregated schools had higher achievement levels than black students in predominately black schools, although this difference was reduced substantially when family socioeconomic levels were taken into account (that is blacks in desegregated schools were from families with more education, income and so forth)[80]

It was clear the *Brown* had accomplished little in terms of remedying the harm that had been inflicted upon blacks. All that had happened was that the race had been in dicta removed from the laws that forbade Blacks from going to school with Whites. True there were a few token cases where black students went to predominately white schools, however the majority of the country remained segregated and Whites academic performance was still significantly ahead of Blacks.

The Court was in some ways at a crossroads. It needed to reflect on whether this was the result that it had intended in when it decided *Brown*. Was this the change that it had meant to invoke for race in public education? The nation was in the middle of the civil rights movement and the legitimacy of all forms of legally enforced segregation and inequality were being vehemently attacked. The Court joined in and made the decision to proceed from *Brown* and began to walk down the path towards desegregation. For the next 20 years it would work to establish an education system that was fully desegregated. Over these 20 years it would have to clarify what this new system should look like and more importantly how it should be achieved and what means it would use. The next chapter will cover what techniques the court would require, accept and forbid districts to use in integrating both the nation's public education systems. I will show in the cases following *Brown* that the Court firstly did intend to destroy all vestiges the dual system and would accept and in some cases require, numerous strategies to

[80] *Ibid*., 66

achieve this goal. A state pursuing this end today would be trying to prevent racially identifiable schools, the issue in *Parents Involved*.

Chapter 3

The Civil Rights Act of 1964 and Public Education

Brown I and *Brown II* did not significantly alter the racially polarized quality of America's school system during the later part 1950's and early 1960's. The obligation to desegregate was placed on the school districts and was to be enforced by the district courts. The *Brown II* decision was extremely vague in what it actually sought to accomplish. Was it trying to eliminate the dual school system? Or simply forbid statutes that made school assignments on explicitly racial and discriminatory basis? Whatever Warren and the rest of the Court's intentions were in the decision, ten years after *Brown* public education had changed little in the South. All deliberate speed apparently meant the pace of "an extraordinarily arthritic snail. "[81] Ten years after the decision only 2.3% of Blacks in the South attended schools with any white students. However, there was another offensive that actually sought to desegregate all of American society and did not come from the Court or NAACP, but the federal government.

On July 2, Congress passed the Civil Rights Act of 1964, to rid American society of segregation and racial discrimination. Congress and the Executive now joined the Supreme Court under the contention that segregation was an ill that had to be removed as soon as possible. It did not only apply to public education, but all public accommodations such as restaurants, hotels, gas stations, theater etc.[82] It was not just a group of nine judges and a few civil rights lawyers, but the entire federal government of the United States government backing this goal. Desegregation was now an inevitable reality that the south and the rest of the country had to face.

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[81] Walter Gellhorn, "A Decade of Desegregation—Retrospect and Prospect" 9 *Utah Law Review* 3 (1964) 6.

[82] *Civil Rights Act of 1964*, Title II, 88th Congress

The Civil Rights Act of 1964 had a large impact on how public school districts could desegregate. Before the act many districts had considerable leeway in their plans, which often meant that their plans didn't have any intention of actually desegregating at all. The Civil Rights Act intensified the pressure applied to these districts through an influx of legislation. First and foremost if gave the department of Health, Education and Welfare (HEW) the large responsibility of establishing guidelines for Southern desegregation, which were finalized in 1965. These guidelines were much tougher and clearer than many of the previous court orders.[83] The guidelines stated that for a plan to be acceptable it would have to, "… actually be working to eliminate the dual school structure… to the extent to which Negro or other minority students have in fact transferred from segregated schools."[84] Thus the guidelines actually forced schools to adopt plans, which would actually desegregate even though this was in itself unclear because it did not specify how many blacks should be transferred for a school to be considered desegregated.

To make sure that states complied with these guidelines, HEW and the Justice Department were given two different powers. The first was that the Attorney General and the Justice Department could bring class action lawsuits against school districts if local parents or groups complained of racial discrimination. This would bring legitimate government litigation, which wielded much more power than the NAACP possibly could. This in turn took a lot of pressure off the district judges and the NAACP who until that point had been the only agents responsible for enforcing desegregation in the South.

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[83] *Revised Statement of Policies for School Desegregation Plans* HEW U.S. Office of Education, *Civil Rights Act of 1966*, Title IV, 88th Congress.
[84] *Ibid*

The other power, which Congress created to force states into compliance, was the ability to cut off federal funding for any school district that failed to meet the HEW guidelines.[85] The possibility that a district would have its funding terminated was definitely a powerful symbolic gesture of federal government's resolution to force the districts to desegregate. However it was actually rather ineffectual for practical reasons. The first of these was that to cut off funds the actions of the districts actions would have to be deemed unjustifiable in court. This litigation took a long time because "funds could not be terminated until there was a hearing, which included and express finding of non-compliance entered in the record and notice to the affected party of failure to comply, and until attempts at securing voluntary compliance had broke down."[86] Not only would litigation take a long time, but federal funding did not make up a large percent of a school district's budget, as Wilkinson notes it only amounted to "8 percent of the average school district budget, much less than the state or local share."[87] Thus if a school district wanted to snub HEW guidelines and federal funding it was not out of the question, but rather quite feasible. In fact by August 1967 only 25 school districts had come back in compliance with the HEW guidelines after termination hearings and 55 simply accepted being ineligible for federal aid.[88] Although the Civil Rights Act of 1964 had its flaws, it showed that all three branches of government were now one on the opinion that southern segregation needed to be disposed of. The stage was set the state for the Supreme Court to further elucidate the ideal it first asserted in *Brown,* but was so unequivocal about in *Brown II*.

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[85] *Ibid*
[86] *Ibid*
[87] Harvie J. Wilkinson, *From Brown to Bakke The Supreme Court and School Integration: 1954-1978* (New York: Oxford University Press, 1979) 107.
[88] *Ibid*

Green

Desegregation orders occurred in most school districts of the South, but most of the attention in terms of enforcement focused on large urban districts with the hope that other rural districts would follow voluntarily. However many rural districts did not, and remained highly segregated by instituting freedom of choice plans and utilizing pupil placement legislation. This was the case with Kent County in eastern Virginia, which operated only two schools in the entire county, New Kent and George W. Watkins which both served grades kindergarten through eight. Although the county was highly integrated with no residential segregation the schools remained segregated after the *Brown*:

> Racial identification of the systems 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. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "White" and part "Negro."[89]

There was no residential racial segregation in the district. If the district had simply assigned students based on proximity, neither of the schools would have been racially identifiable. However the district maintained two separate schools one white, and one black through a system of busing. The district was complying with the desegregation order with a "choice plan" in which a student could transfer in every grade except for first and eighth. However for a while after *Brown*, the district had a series of pupil placement statutes that made it very difficult for an actual transfer to happen. These pupil placement laws were removed by 1966, when the new HEW guidelines arrived, but by1967 only 15 percent of black students attended the predominantly white school and no white students attended the totally black school.

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[89] *Green v. School Board of New Kent County*, 391 U.S. 430 (1963)

In this case The Court took the opportunity to clarify what its actual intent was in *Brown II*. It made clear that creating a unitary school system was its final goal and thus banished the "Brigg's Dictum" along with the dual school system. In a considerably short decision it explained that the racially identifiable schools that were being propagated by the Kent County School District were precisely the result it had not intended in *Brown II* and was in fact the exact opposite. Justice Brennan in his opinion explained that *Brown II* had required school districts "to effectuate a transition to a racially nondiscriminatory school system, "[90] Which "was a call for the dismantling of well-entrenched dual systems tempered by an awareness."[91] The only reason why school boards were permitted to continue operating segregated schools after *Brown II* was because the Court had realized how difficult it would be for a district to effectuate such a transition. This is why it had simply required "good faith implementation" and "with all deliberate speed."

The Court seemed to finally acknowledge that the logic it had invoked in *Brown,* that the racially polarized school system negatively effected African American's academic performance, and consequently that this school system which characterized most of the South had to be dismantled. Although New Kent no longer had laws restricting African Americans and Whites from attending either school, both schools were identifiable in every aspect as black and white. This was not due to specific statutes, but to the freedom of choice plan which allowed the segregation to continue. Brennan and the rest of the Court in *Green* denounced this passive technique, which did not force children to integrate asserting that from now on districts would be forced to adopt plans that had a "promise of aiding a desegregation program to effectuate

[90] *Ibid*
[91] *Ibid*

conversion of a state-imposed dual system to a unitary, nonracial system."[92] From this point forward African Americans and Whites had to attend the same schools together. Although the Court did not declare freedom of choice plans impermissible it did in the case of New Kent County where geographical zoning would have been very effective. What it was most clear on was the fact that desegregation was its final goal and that any plan that did not actually seek to achieve that end was unacceptable.

After *Brown I* the Court never again relied on social studies to legitimate its belief that segregated schools negatively affected African American students academically. Its dedication in *Green* and the consequent decisions, which forced school districts such as Kent County to dispose of their racially identifiable schools, affirmed that it had accepted that complete school desegregation was its final goal. In the case of New Kent there were no longer any laws maintaining the segregation in the school system, it was simply just a fact. The Court asserted that there was no other choice of action, schools must desegregate and eliminate the dual school. This meant not simply removing racial classifications from statutes, but forcing association between the two races. What remained was for it to define exactly what extent a district's schools would need to integrate to be considered desegregated and what specific steps would be necessary to achieve this.

Swann

Three years later it would clarify both of these issue in the famous *Swann v. Charlotte-Mecklenburg Board of* Education, which dealt with what methods and burdens a district court could impose on a school board. It specifically discussed how quotas could be used, the

[92] *Ibid*

existence of racially identifiable schools and how race could be used in school assignments with respect to zoning and transportation. The Charlotte-Mecklenburg school system during the time of the decision was the 43rd largest in the country. In its 550 square mile area were some 84,000 pupils, including some 24,000 blacks. Before 1968 the system had operated a desegregation plan that utilized a mixture of zoning and "free choice" for public school assignments. After a couple of formal complaints from local African Americans that the plan was ineffective and the decision in *Green*, the district court reviewed the plan and concluded that it indeed "fell short"[93] of achieving a unified school system now required. The district was residentially segregated because a large majority of the districts African Americans lived in its northwestern part. In June 1969 21,000 of the total 24,000 black students went to schools in this region and two thirds of those students attended all black schools.[94] It was clear that the desegregation plan was not achieving unitary schools and that geographic zoning and "free choice" techniques employed by the district were ineffective because of the predominately black neighborhoods in the North West. The district court ordered the board to create a new plan that would actually be effective.

The school board failed to present a completed plan to the district court and in response it hired sociologist Dr. John Finger to create one for it. In 1970 Finger presented a plan known as "the Finger Plan" and school board in response presented another known as "the Board Plan." The two plans were fairly similar with respect to how each dealt with high schools and middle schools. Both treated the highly black residential area as the centre of a circle and then divide said circle like pieces of a pie so that smaller parts of the highly segregated neighborhood would have access via busing to the more rural parts of the city.[95] However the plans differed greatly on the issue of elementary schools. The Board Plan amounted to simple gerrymandering, "more

[93] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)
[94] *Ibid*
[95] *Ibid*

than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro; approximately half of the white elementary pupils were assigned to schools 86% to 100% white."[96] The Finger Plan went much farther than The Board Plan in this respect and instituted numerous pairing, grouping and rezoning techniques that would result 9%-36% African American in most of the elementary schools.[97] The district court in response adopted The Board Plan for high school and middle schools, but The Finger Plan for elementary schools.

Both of these plans would assign students to schools on a racial basis. Each school in the district needed to somewhat reflect the demographics of the district as whole. In other words each school had a quota for how many blacks and whites could attend. Instead of attending the schools closest to their homes pupils were assigned based on their race so that all the schools met the quota. Students, both black and white were forced to take long bus rides every morning which were all paid for by the city. Even though desegregation was done with the purpose of improving the quality of education for both African, the busing plan in *Swann* put an extremely high premium on it because of the weight that it placed pupils for that purpose.

The district argued that the court was overstepping its authority in terms of the types of remedies it could be forced to adopt. The board felt that the plan the district court was forcing upon it presented an "unreasonable burden on the systems pupils" particularly on those in its elementary schools. This was the issue the Supreme Court had to resolve. The Supreme Court did not agree that it was unreasonable. In a unanimous opinion written by Chief Justice Burger the Court clarified what techniques a district court could impose on a school board in order to assuredly effectuate the transition to a unitary school district. It is important to note that the decision says very little about what types of plans the district could adopt voluntarily, rather it

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[96] *Ibid*

[97] John Finger, "Why Busing Works" in *School Desegregation: Shadow and Substance* ed. Levinson & Wright (Chicago: Chicago University Press, 1976) 63.

only covered what plans the district could be forced to adopt finding a violation of the 14th Amendment. It would seem logical that the district itself could adopt measures that the even the district court could not impose. The distinction between forced and voluntary action is crucial to *Parents Involved* and I will discuss it at length later on.

The first and in many ways most important findings that the Court declared in *Swann* was that district could be forced to use racial quotas in assigning students to schools. It was very clear that districts could be forced to use racial quotas to reflect the demographics of the district as a starting point in creating unitary schools:

> School 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. As with any equity case the nature of the violation determines the scope of the remedy. 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 system.[98]

The Court the was not stating that this would necessarily make a school district unified or that every school district schools always needed to reflect the proportions of the district as whole to be considered desegregated. Rather it was a simple suggestion that it could be a useful starting point. It was not an "inflexible requirement."[99] It was simply stating that the school districts did have this power and that if they did not attempt to comply with desegregation the district court would then subsume such power and force whatever plans it felt necessary on them.

The board tried to argue that the district court could not impose a policy that used quota. Title IV of the Civil Rights Act of 1964, has a clause which states that, "desegregation shall not

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[98] *Ibid*
[99] *Ibid*

mean the assignment of students to public schools in order to overcome racial imbalance."[100] This clause on it face seems to suggest that racial balancing is a violation of Title IV. The Court argued however that the clause was intended to prevent district courts from imposing desegregation orders on districts that had racial imbalances not of their own making. Chief Justice Burger clarified this position stating that in writing Title IV Congress was primarily concerned, " that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools, but with no showing that this was brought about by discriminatory action of state authorities." It was unconstitutional for the federal government or a district court to force a district to integrate absent a violation, but not if that district had a desegregation order.

This is not the position that the Robert's court took, which is that school boards themselves could not take this route voluntarily absent a previous violation. It is simply that districts were not obligated to maintain desegregation measure absent a constitutional violation. This implied that once a district had achieved unitary status, meaning it had fully eliminated all vestiges of previous its segregation practices, annual adjustments in school composition are not required and "further intervention by a district court should not be necessary."[101] Nowhere in Title IV or anywhere else for that matter is there any clause that explicitly states that a school board cannot voluntarily adopt a quota. This is the issue in the *Parents Involved*, whether a school board voluntarily can integrate its schools using race as a decisive factor.

The Court was clear that one-race schools were constitutional as long as they did result from school board actions implemented with the intention of propagating segregation. It had already acknowledged that there were forces in society that could create de facto segregation

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[100] *Civil Rights Act of 1966*, Title IV, 88th Congress.
[101] David J. Armor, *Forced Justice: School Desegregation and the Law* (New York: Oxford University Press, 1995)

such as the residential housing patterns in the northwestern portion of the city. As long as this segregation was purely de facto, a school district would not have to adjust to it. This is not to say that the Court did not think that de facto segregation was not just as detrimental as de jure, only that a district was not obligated to eliminate it because it had not created it.

The Court was expanded on what it felt could be considered de jure segregation into policies and other actions, not just statutory segregation. It explained that if a board wanted to it could work with de facto segregation to keep schools racially identifiable. Some districts such as Charlotte-Mecklenburg had closed schools in areas in which they were likely to become racially mixed after desegregation or conversely opened up new ones in areas where the school was bound to be one race because that geographic zone lacked diversity:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods… In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system… such a policy… may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races.[102]

This was an important point because the Supreme Court suggested that school boards could be held responsible for continuing segregation or producing it with out statutes, but rather other methods such as careful geographic planning. It acknowledged a certain degree of responsibility belonged to school boards if their actions were done for the purpose of segregating. If a school board acted in this fashion it would now be held accountable for those racially identifiable schools. This would serve as the basis for the verdict in *Keyes* decided two years later, which extended desegregation orders to states that were never had any statutory segregation.

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[102] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)

The Court realized that using geographic zoning and choice plans might not be effective in situations where segregation had been maintained through these types of techniques that worked with de facto segregation. For this reason the court expanded the types of measures that a school district could be required to use. The court did acknowledge that there were limits to what extent a district court could force a school board to make school assignments that were based purely on race, but also was crystal clear that it could prescribe a large variety of remedies if it felt they were necessary for desegregation:

> …all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system.[103]

This statement does not explicitly express considerations of race, but what Burger means by "impose burdens on some" means taking race into account and assigning burdens on that basis.[104] In this context he was referring to busing elementary students long distances because they were a certain race. Where segregation had been maintained by numerous methods, not just through state imposed statutes, a vast number of techniques might be necessary to provide a remedy. To achieve the end school districts could take account of race in school assignments. Burger does even specify that this could be done only as a last resort.

Swann did not revolve around what a school board could do on its own rather what a district court could force it to do if it did not try to desegregate. It did not address what methods were restricted to the school board only the district court. However what it allowed the district court to do in this context was quite a lot, it would be conceivable that the school districts if they felt it necessary would have had even more lee-way in creating measures effectively destroy their

[103] *Ibid*
[104] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

dual systems. In *Green* it had stated that the intent of *Brown II* was to create a unified school district. It had now in Swann illustrated a light conception of what a unified school district would look like and more importantly what measures a school board could be forced to take.

Keyes

Things would get more complicated two years after in the *Keyes* decision, which erased a large part of the distinction between de jure and de facto segregation. Although it was not the last Supreme Court case that expanded the desegregation decree, *Keyes* v. *School District NO.1, Denver, Colo*. is the last great leap the Supreme Court was willing to take in it commitment to desegregate public schools. It expanded its definition of de jure segregation from declaring school districts that had explicitly racial segregation statutes to any school board policy that had intentionally perpetuated and created segregation. Districts that were never by law segregated could now be forced to desegregate. It was the final step to the full realization of *Brown*, all intentional forms of government segregation had to be removed and remedied no matter was its form.

Although the city of Denver had never been segregated and had a relatively clean track record of race relations, by 1969 certain parts of the district had become highly segregated particularly the Park Hill area and the core district located downtown. To combat the growing segregation the school district adopted the "Noel Resolution" which instituted a mandatory transfer system where blacks and white were bused to different schools. However this plan offended the city's Whites, which made up 66% of the cities total population, with African Americans at 14% and Hispanics at 20%. When elections took place the following year a new

school board was reelected and rescinded the "Noel Resolution."[105] Black parents filed suit and more plans were brought up, but were denied by the district court which felt that a system wide desegregation plan was to large for the harm committed. In essence it felt that the plan exceeded detriment inflicted by the board. The Supreme Court granted certiorari to the decision and eventually voted 7-1 that the situation required a system wide busing remedy.

A system wide desegregation plan could be made mandatory even though its segregative policies may have only been employed in parts of the district. It found that the school board had employed a couple of measures that created a dual school system such as, zoning which resulted in one race schools, building new schools in racially identifiable areas, using mobile classrooms to oversubscribe schools and the assignment of staff and transportation on a "racially identifiable basis."[106] The Court stated that because of the school board's practices in Park Hill it was "both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent."[107] Its reasoning was that if one part of the district had been found guilt of segregation it should also be responsible for proving that all of its other racially identifiable schools were created with race neutral intentions. Desegregation was that important of an end.

The district could not prove that the racially identifiable schools in the core part of the city were not because of the school board's actions, which is the reason why The Court allowed for a district wide busing system not just one for the Park Hill neighborhood. One large acknowledgement that the court made in this case, which is often overlooked, is its definition of a disadvantaged racial minority:

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[105] Harvie J. Wilkinson, *From Brown to Bakke The Supreme Court and School Integration: 1954-1978* (New York: Oxford University Press, 1979) 197.
[106] *Keyes v. School v. School District NO.1, Denver, Colo*., 413 U.S. 189 (1973)
[107] *Ibid*

> …though of different origins, Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanics included in the category of "segregated" schools.[108]

This is an important acknowledgement because it affords the benefits to the harm inflicted not just on African Americans who suffered segregation by law, but also other minority groups which had not. This pronouncement runs contrary to the anti-classification position that the Equal Protection Clause guarantees neutrality and protects individual rights. It draws attention to fact that entire groups have suffered from society and for that reason need special solicitude as entire groups.

Keyes initiated a wave of desegregation that expanded out of the South and into many districts in Northern states, which had never had segregation statutes such as Massachusetts, Michigan, Indiana, Minnesota, Nebraska and Ohio. It made desegregation not just a Southern movement, but one that encompassed the entire nation. It represents the pinnacle of the Supreme Court's commitment to desegregating the nations public schools.

The first 10 years after *Brown* had little effect on segregation in the South and did little more than remove explicitly racial provisions from statutes and the states were thus able to perpetuate the segregation by a mixture of state policy and private insurgency. The *Green* decision marked a turning point in the significance of *Brown* and the word desegregation for American society. It proved that the Supreme Court did intend to follow through on its apparent promise in *Brown* to remedy that harm that was inflicted on African Americans by making the elimination of racially identifiable schools a policy objective for school boards and the district court, not just dictum. *Swann* set guidelines and limits to the measures that a school board could adopt and in many ways expressed how salient the elimination of racial identifiable school was

[108] *Ibid*

to the Court. In this decision school districts could be forced to adopt plans that would assign it students on an explicitly racial basis for quotas. Finally the *Keyes* decision illustrated that the Court was not only trying to get rid of state mandated segregation, but all segregation that had been inflicted by school districts. This decision also recognized that African Americans were not the only minorities, which could be subject to discriminatory practices.

The Courts commitment to desegregation over the years has not diminished since these cases. It has been quite clear that desegregating racially identifiable public schools if they are in any way attributable to prior intention is a must. To achieve this goal the court has often compelled school boards to adopt means such as busing, which assign students to schools on explicitly racial terms and bus them accordingly. Even if a school board was only minimally responsible for that racial imbalance it was still forced to eliminate all vestiges of that prior imbalance. The Court was clear that once a school had acquired unitary status, meaning that it had fully disposed its dual school system and all of the racially identifiable schools associated with it, it would not be obligated to maintain racially balancing or maintain quotas. The Court's insistence on explicitly racial measures for even the smallest infractions suggests that it did view integrated schools as an extremely desirable goal. In my opinion it would be logical to infer that if a school board could be forced to adopt such measures for relatively minimal infractions it would also seem that a school board could voluntarily pursue this goal by employing similar means for the goal of maintaining a school system that relatively reflects the overall district. This is what both Seattle and Louisville were doing in *Parents Involved*, voluntarily creating racially balanced schools. I will return to this point later, but now would like to turn to the topic "affirmative action" and the way the court has dealt with cases concerning it.

Chapter 4

The Civil Rights Act of 1964 and Job Discrimination

President Kennedy first used the words "affirmative action" in their current sense in executive order 10925. In this order he asserted that the government should make sure that it and the businesses associated with it, such as contractors, should create equal opportunity for minorities in the U.S. He stated that, "…contractor[s] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin."[109] Kennedy along with vice president Johnson and his administration dedicated a large amount of effort in their term to promoting equality for minorities in the U.S. One of their largest tasks associated with this goal was promoting equality in the work place.

In 1960 job discrimination like school segregation before *Brown* was fact of life for African Americans, and it had an equal if not greater impact on their lives. The average income for a white family at that time was around $5,800, for a black family it was only $3,200.[110] This was because the majority of employed blacks worked menial and labor jobs, which was at least partially attributable to differences in education mentioned previously.[111] From the 1950's to the 1960's black owned business declined by a third, the number or self employed blacks declined by 10,000 and the unemployment rate remained double that for whites. A large reason for

[109] Executive Order no. 10925, Code of Federal Regulations, (1961-1964).
[110] Anderson, Terry H. Anderson. *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 20001) 56.
[111] *Ibid*

Black's high unemployment rate and lack of income was because of work place discrimination. Many unions, business and training programs would not hire or allow minorities to participate.

The administration's first step was to eliminate discrimination in employment practices. It at first seemed that the administration like the Court for the ten years that followed *Brown* was simply trying to make sure that hiring practices were completely race neutral. Many of JFK's orders similar to 10925 did not stipulate that there was a set number for how many minorities should be hired. Rather most simply asserted that discrimination should be eliminated, defining discrimination as "refusing to hire people because of their race, color or creed."[112] This was fairly general, it did not articulate what determined discriminatory practices. Did this mean not hiring entire minority groups based on that fact alone? Or did it mean that it was wrong to make a decision on two equal candidate based on their race? From this point of view it would appear that the administration wanted to simply remove the explicit nature of job discrimination in a similar way that *Brown* had removed the legality of school segregation. It did not explicitly suggest that it was trying to increase minority representation in employment.

In 1964 as stated previously the government pass the Civil Rights Act of 1964, ending all legal segregation and eliminating all forms discrimination in government funded programs under Title VI.[113] The act also contained Title VII, which, forbade discrimination in all forms of employment according to "race, color, religion, sex or national origin."[114] It gave courts the power to enforce the title and order remedies such as reinstatement of employment with back-pay and other equitable relief excluding punitive damages. However it did state that businesses were allowed to institute different standards for hiring based on seniority or merit as well as skill

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[112] Anderson, Terry H. Anderson. *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 20001) 61.
[113] *Civil Rights Act of 1964*, Title VI, 88th Congress
[114] *Civil Rights Act of 1964*, Title VII, 88th Congress

tests to find the best candidates. In constructing Title VII the administration was careful not to use quotas because Kennedy among others felt that it was too volatile of an issue and stated in one of its clauses that they were not permissible. Title VII also established the Equal Employment and Opportunity Commission (EEOC), which was in charge of enforcing compliance with the clauses of Title VII in the nation. This agency could investigate business, hiring practices, and mediate disputes. Title VII and the EEOC were extremely significant as they expressed the federal government's dedication to eliminating desegregation in the work place and creating equal opportunities for African American and other minorities.

Although Title VII was monumental, its effects after 1964 were not perceptible and changed relatively little in terms of the opportunities that were accessible to African Americans. It was instituted in a gradual manner, which began in 1965 with all business that had 100 employees and did not apply to businesses with less than 25 workers until 1968.[115] Only 40 percent of the total work force consisted of businesses that had 25 or more employees leaving 60 percent unaffected by the decision. Too avoid hiring minorities many businesses invoked skill tests in a similar way as pupil placement statutes used in the South during school desegregation to maintain discriminatory practices. The seniority clause made it so that the last hired was the first fired meaning that most of the minorities that were recently been hired during the previous years according to the administrations requirements were fired.

EEOC also was not nearly as effective as anticipated. EEOC could investigate complaints and mediate disputes, but could not utilize punitive measure or even issue "cease and desists orders." Also until that point the government and most businesses did not keep track of the number of minority workers they employed. Civil rights groups had made sure that there was no national database existed so that southern states could not bar black from jobs. There was no way

[115] *Ibid*

to know if a corporation was complying or not, especially because the administration had resisted using quotas or numerical ratios compliance criteria. Thus the act was passed, but it had little effect in terms of actually increasing jobs for blacks and other minorities, and even in some sense got in the way.

True Affirmative Action

The riots of 1966 and 1967 in San Francisco, Cleveland, Dayton, Newark and Detroit illustrated how angry Blacks were with their present stake in the nation's jobs. Studies such as the one conducted by Illinois governor Otto Kerner (The Kerner Report) concluded that the riots were due black's frustration with institutional racism[116], which African Americans believed was the cause of their lack of jobs. The report concluded that "The more educated, the more experienced, and the more integrated the Negro labor force becomes the less tension and the fewer problems would occur."[117] Reports such as these shifted the government's goal from eliminating work place discrimination to instead simply integrating the American work force so that more minorities had jobs. This change of goals resulted in what is now known as "affirmative action."

Starting with the construction industry the federal government began establishing dates to correct the deficiencies of minority representation in America's work force. Starting in the Nixon administration the Federal Government began arranging "targets" or "goals" which were pretty much a mixture of loose quota's combined with timetables to makes sure businesses integrated their work forces. These methods or mandates were the plans what one now thinks of as

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[116] *Report of National Advisory Commission on Civil Disorders*, 88th Congress, (February 1968)
[117] Anderson, Terry H. Anderson. *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 20001) 99.

affirmative action and by 1970 all businesses and unions that accepted $50,000 or more in federal contracts had to have affirmative action plans in place. Anderson in his book *The Pursuit of Fairness* describes one of these plans as it was applied to sheet metal workers:

> Sheet metal workers…had 1 percent minorities in 1969; because of retirements and attrition it hired about 10 percent new workers annually. That union could qualify for a contract if it made " a good faith effort" to have between 4 and 8 percent minorities by the end of 1970, escalating to between 19 to 23 percent by the end of 1973. Thus the union was in compliance. If it did not comply, the contractor would trigger and investigation and in the future might not be eligible for federal funds. [118]

The government made clear that its aim was not to simply end worker discrimination, but to increase minority employment. Many whites were enraged by these plans because they felt that their jobs were being given away in these plans because a greater percentage of jobs were being taken and given to minorities. Individuals tried to claim that these sorts of plans violated Title VII on the basis that it gave minorities an un fair advantage and simply amounted to a quota.[119] However the administration would not hear of it, claiming that the plans were simply hiring goals and timetables made to correct the "underutilization" of minority workers, not quotas that reserved spot for workers according to specific percentages.

Bakke

State universities received large amounts of funds from the federal government and thus were also forced to begin hiring minority faculty. HEW was left to enforce compliance, and immediately began attacking the "old boy tradition" which characterized many universities by insisting that they take up affirmative action plans in order to hire both racial minorities and

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[118] *Ibid*.,117.
[119] *Civil Rights Act 1964* Title VII, 88th Congress. Specifically forbids quotas

women faculty members. HEW made schools publicly advertise position openings and allow spouses to teach at the same school. Although there were number of women who had PhDs, African Americans only amounted to 1 percent of all PhDs in the whole nation. There was not a large pool of minority professionals that schools could use to increase their minority faculty. Universities would have to attract minorities in their undergraduate and graduate programs to create a large pool of minority professionals and professors to fill their positions. In addition to the duress applied by HEW, many medical and legal societies put pressure on all universities to increase the number of minorities so that the programs were more representative of the regions demographics.[120] It was for these reasons that affirmative action programs for minorities were first invoked in higher education.

To achieve a higher degree of racial diversity some universities adopted flexible admissions plans that took account of many different features of an applicant such as race, geographic origin, character traits, parent's alumni status etc. However other universities instituted policies that had strict numerical targets in terms of how many minority candidates they would accept. These plans were essentially quotas. At the time the time there were disputes over how rigid numerical need to be in order to constitute a quota. As illustrated before the Nixon administration got away with calling what today would be considered quotas "hiring goals."

It was this type of plan that was at issue in the first Supreme Court case involving affirmative action in higher education, *Regent of the University v. Bakke* decided in 1978. The *Bakke* case formed the basis for the reasoning the Court would use to decide which affirmative action plans a state funded university could adopt and which it could not. This case is essential to understanding *Parents Involved*. Before its verdict affirmative action sought increase minority

[120] *Ibid.,*151.

representation in public universities, but after the decision in *Bakke* this goal was fundamentally altered. The reasoning that altered this goal was invoked specifically for higher education and nothing else. However has now been applied in *Parents Involved* and could be potentially destructive to much or what *Brown* and its progeny sought to accomplish.

The Medical School of University of California Davis had a special enrollment program to make sure that it maintained substantial minority representation in its student body. Of the 100 total spots available in each freshmen class 16 spots were reserved for students from the special enrollment program, which left only 84 spots for normal applicants. To be accepted into one of the 84 spots individuals were evaluated by a committee of five members, each of whom could give a total score of 100 points. These points were derived from a combination of an applicant's MCAT scores, letters of recommendation, extra curricular activities and other biographical data, which were added together to form a benchmark score. The highest total score candidate could get was 500 because each member on the committee could give a total of a 100.[121]

The 16 other spots were decided in a different manner. Individuals could only be evaluated by this committee if they were, "economically or educationally disadvantaged", and were members of a minority group, which consisted of "Blacks, Chicanos, Asians or American Indians."[122] Once in this program individuals were evaluated by the committee in a similar fashion, and also given a benchmark score. However the evaluation process was far more moderate than the normal program. For example, individuals did not have to meet 2.5 GPA standard that applied to normal applicants but were still able to compete for the 84 normal spots as well as the 16 spots reserved only for them.

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[121] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
[122] *Ibid*

Allan Bakke, a blonde White male of Norwegian heritage, majored in mechanical engineering at the University of Minnesota, graduated with a straight A average and went on to get a masters degree at Stanford. In 1973 and 1974 Bakke repeatedly applied to 12 medical schools and was not accepted into any of them.[123] After being denied for the second time from the University of California Davis and learning of their special program, which had allowed applicants with far less merit than him to be accepted Bakke filed suit. He claimed that the university had violated Title VI of the Civil Rights Act and the Equal Protection Clause as he had not been able to compete for those other sixteen spots, because of his race, and consequently those spots had gone to minorities with far less credentials. This he claimed amounted to racial discrimination in a government funded program and was a violation of his personal rights. The original California trial court ruled against the University, but did not grant Bakke admission because he failed to prove that he would necessarily have gotten in absent the special program. He appealed the case to the California Supreme Court, which ordered he be accepted. The university in turn appealed and the case went the Supreme Court to be decided.

The Court failed to produce a unanimous decision or even a real majority opinion in its verdict. Justices Stevens, Rehnquist, Stewart and Burger formed a plurality that sided with Bakke under the judgment that in fact Title VI did prohibit the school from excluding applicants from equal consideration on the basis of their race. For judicial prudence sake these judges felt there was no reason to even address whether there was a constitutional violation because they felt it did violate Title VII. Another plurality consisting of Justices Brennan, White, Marshall and Blackmun felt that the university had committed no wrong and that the program was not a violation or unconstitutional because those minority groups had been previously disadvantaged. Justice Powell played the role of a swing judge. Placed in the middle of the dispute, Powell could

[123] Lindsey "White, Caucasian and Rejected" NY times, 1977.

chose either plurality and thus swing the majority in its favor. However instead of siding with one side he chose to agree with only on certain points of both the pluralities in a separate opinion that he formulated on his own. Although the reasoning behind each of the plurality's positions is interesting and very important, Justice Powell's opinion was the verdict on the case and as will be explained later has become the conventional of position of the Court in terms of how a university can consider race in accepting applicants.

Powell did feel that the purpose of the 14th amendment was to create equality for previously disadvantaged minorities. However he was disturbed by the reverse racism associated with affirmative action in higher education. He was sympathetic to Bakke's argument that he was being deprived the equal protection of the law. Was it not indeed reverse racism to distribute government benefits that are customarily based on merit to less qualified candidates because of their predicaments? He felt that racial considerations were necessary, but felt that if they gave minorities an uneven advantage in distributing benefits that were supposed to be assigned only according to merit. Powell was in difficult position as he felt that both the *Bakke* and the university had legitimate claims and for that reason could not decide between either of them. This is the reason why Powell did not concur totally with either but constructed a separate opinion that would conciliate both sides, not dismiss either as incorrect. I think Powell does a good job of mediating the dispute, but feel that in this he was forced to adopt a controversial reading of the 14th amendment and by doing so consequently sidesteps important facts.

The first part of Powell's argument discussed the claims of Bakke. Bakke's lawyer claimed Davis's plan was a violation of the protections he was guaranteed by Title VI of the Civil Rights Act, which forbids racial discrimination in institutions that are federally funded and by the 14th Amendment. Powell denied that this claim violated Title IV explaining that it only

"proscribed those racial classifications that would violate the Equal Protection Clause of the 14th amendment."[124] Thus for him the issue at hand was simply whether the plan employed by Davis violated the 14th Amendment because Title VI could not exceed it in scope.

Powell needed to work out was what level of scrutiny to apply to the Davis's program. Bakke and his lawyer's arguments were based in an individualist understanding of the Equal Protection Clause. Bakke argued that although he was a white male, which as a group has never been victimized in US history, he was still being deprived benefits on account of his race. Powell agreed with Bakke on this individualist reading of the Equal Protection Clause. In doing so he read the 14th Amendment's Equal Protection Clause as providing rights for individuals to assure neutrality, not for protecting entire groups. It is this same method of reasoning that the Court used to scrutinize the plans that is now at issue in *Parents Involved* that " Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[125]

Powell's take on the 14th Amendment acknowledges that the purpose of the amendment was to "bridge the vast distance between members of the negro race and the white majority",[126] but at the same time rejects the University's assertion that discriminating against the white majority in a "benign" manner was not against the 14th Amendment. The previous chapter clearly illustrated that the Supreme Court was willing to "impose burdens in some"[127] particularly Whites to bridge that vast distance and to assure equal opportunity in lower education for minorities. Powell sidestepped this fact by arguing that the U.S. is was no longer a country in

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[124] *Ibid*
[125] *Ibid*
[126] *Ibid*
[127] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)

which one racial minority dominates society and is actually composed of many different minorities:

> The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments…Not all of these groups can receive preferential treatment and corresponding judicial tolerance for distinctions drawn on race and nationality, for then the only "majority" left would be a minority of white Anglo Saxon protestants. There is no basis for deciding which groups would "merit judicial solitude" and which would not.[128]

It might seem quite obvious which groups would need judicial solicitude. As described in *Swann* or *Keyes* it would be the groups who have suffered discrimination by American society at large and the laws and are consequently and much more frail when it comes to success in American society. Those minority groups that have not been disadvantaged and are not debilitated do not.

Powell dealt with this issue in an odd way arguing that the university could compensate for past injustices only in cases where there was a clear constitutional violation on the part of the actor and that there was none in *Bakke* because the university was never by law segregated. This the is same point that the Robert's court makes, essentially that absent any constitutional violation racial considerations should not be invoked. Powell stated that in the absence of a constitutional violation "we have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative, findings of constitutional or statutory violations."[129] As I have already explained, the14th Amendment was made to account for private actions occurring from society, which could exert significant for on its own. School desegregation cases also advocated extensive use of race for remedies for constitutional violations that were not even the result of specific statutory violations but rather school board

[128] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
[129] *Ibid*

policies combined with de facto segregation. Powell did not want to budge that compensatory arguments were not valid absent a constitutional violation.

Justice Powell according to his reasoning would not budge on the fact that strict scrutiny was the only option in evaluating programs such as the one employed by Davis The University would have to demonstrate that it had a compelling interest associated with its plan which in turn was narrowly tailored enough to pass strict scrutiny. The university asserted four target purposes. The first one was to create higher amount of integration in the medical profession. The second was to counter prior societal discrimination. The third was to increase the number of physicians willing to work in underserved areas and the final purpose was to "obtain the educational benefits that flow from and ethnically diverse student body."[130]

The first interest Powell simply rejected flat out, stating that, " preferring members of any one group for no reason other than race or ethnic origin is discrimination for it own sake. This the constitution forbids."[131] As one would expect, countering the effects of societal discrimination was not legitimate because the University was not fully responsible for societal discrimination. Also Powell rejected classifications, which imposed disadvantages upon persons that were in no way responsible for the harm that the beneficiaries of the program had suffered.[132] He also disregarded the university's third goal, the desire to increase the number of individuals in the medical profession willing to work in communities that are underserved. This was not satisfactory because as the university conceded, there was no way to actually know if the minority doctors would actually work in underserved communities and conversely there were more efficient ways to achieve this goal.

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[130] *Ibid*
[131] *Ibid*
[132] *Ibid*

The last objective was accepted by Powell as an interest compelling enough for a university to consider an applicant's race in its decision process. This interest was not for the minority individuals applying, but rather the benefits that a diverse atmosphere of students would produce. This diversity is not the same as having certain proportion of minorities, but rather a diverse group of individuals Powell described this conception of diversity:

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[133]

The only way that race could be used in compliance with such a standard is in a plan that does not use race as a decisive factor in itself. He noted that the 1st amendment does protect a university's freedom to choose its own student body and that this would be a legitimate goal for it to seek to achieve in choosing its applicants. [134]

The plan in used by Davis clearly did not meet this criteria because the only way an applicant could be accepted into the specific program was according to his race. According to Powell's position an individual's personal rights guaranteed by the 14th Amendment were being violated by plans that reserved a "specific percentage of seats":

> The fatal flaw in the petitioners preferential treatment program is its disregard of individual rights as guaranteed by the fourteenth amendment. Such rights are not absolute. But when a state's distribution of benefits hinges on ancestry or the color of a person's skin that individual is entitled to demonstration that the challenged classification is necessary.[135]

Powell's position is essentially that if a university or any institution of higher education, which are going to use race as a consideration must use it as one of many other considerations so that it

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[133] *Ibid*
[134] *Ibid*
[135] *Ibid*

is not decisive in itself. Powell went on to describe one admission plan used by Harvard law school that would work because it had deemed race or ethnic background "a plus in a particular applicants file…without race being a decisive factor…compared with…personal talents, unique work or service, experience, leadership potential, maturity etc.…"[136] This plan was flexible enough to use race as a factor because it was not decisive in itself.

Powell mediated both sides of the argument by substituting the conventional argument that historically disadvantaged minorities need special aid or compensation with one that was distributive. Diversity would be better for the entire university not just the historically disadvantaged minorities and could thus be taken into account. Diversity of this sort did not specifically disadvantage candidates because they were white and allowed a university to still consider a minority's race in a manner that would enable them to be accepted not exclusively on merit. In this way Powell was able to navigate the troubling paradox created in the 14th Amendment that occurred when merit and compensation for historically disadvantaged were came together.

This position became that of the Court after *Bakke*. *Bakke* did allow higher education to use racial considerations, but in this limited sense, which was distributive and not specifically compensatory. However *Bakke* was far from a unanimous decision unlike most of the school desegregation cases discussed earlier. It was rather highly contentious and did not even wield a majority till *Grutter v. Bollinger* and *Gratz v. Bollinger* argued in 2003.

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[136] *Ibid*

Grutter and Gratz

In 2003 the Supreme Court decided two cases in reference to the affirmative action methods used by the University of Michigan. One concerning its law school *Grutter v. Bollinger* and the other concerning its undergraduate program, College of Language, Science (LSA) and Arts *Gratz v. Bollinger*. The decisions were divided into two separate cases, but were decided at the same time in 2003 with differing verdicts. The Law School's admission program was upheld in *Grutter v. Bollinger* on the basis that the plan was narrowly tailored enough to achieve the compelling interest of a "diverse student body" described by Powell in *Bakke*. However the plan involved in *Gratz v. Bollinger* was repudiated because it was not narrowly tailored enough to achieve the compelling interest of promoting a diverse student body. These decisions like *Bakke* were not unanimous by any means and like *Bakke* do not carry the same weight as the unanimous decision[137] in *Brown*, *Green* and *Swann* do or even *Keyes* for that matter which was 7-1. However they do create a significant foundation for the types of plans and interests, which are constitutionally acceptable in higher education and those that are not. This foundation is based on the reasoning created by Powell in *Bakke*.

In *Gratz v. Bollinger* the University of Michigan employed an affirmative action program, which sought to make sure that there was a representation of ethnic minority groups. The admissions process awarded points based on an applicant's grade point average, standardized test scores, high school, curriculum, personal essay, in state residency etc. The highest possible score and applicant could receive was 150 and all applicants with a score of 100 and above were admitted. Part of the scoring process in the plan was that any minority applicant in an "under-represented" group would receive 20 points just for being part of that group. This

[137] Michael Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008) 83.

meant that applicants who were such minorities only had to receive a score of 80 to be admitted, because they had already received 20 points.

The majority in the case consisting of justice Rehnquist, who wrote the opinion, O'Conner, Kennedy, Scalia, Thomas and Stevens first stated that "all racial classifications reviewable under the equal protection clause must be strictly scrutinized…the standard of review…is not dependent on the race of those burdened or benefited."[138] This should come as no surprise considering that Powell in *Bakke* had essentially declared the same thing. Rehnquist then went on to analyze the plan employed by LSA. As one would expect the majority found that any plan which awarded " one fifth of the points need to guarantee admission" to any underrepresented minority regardless of their back ground did take not race as one of many factors but placed a large weight on it. This Chief Justice Rehnquist demonstrated in a hypothetical situation and concluded that the program was "not narrowly tailored to achieve…asserted compelling interest in diversity"[139] for this reason and therefore violated the individual protection afforded by the Equal Protection Clause of the 14th Amendment reaffirming Justice Powell's position in *Bakke* that race had to be one of many factors.

Grutter V. Bollinger is more instructive than *Gratz v. Bollinger* because it illustrated what type of affirmative action plan is narrowly tailored enough to pass strict scrutiny. In this case Barbra Grutter a white woman, disputed her rejection from the University of Michigan Law School. She based on claim that the plan had violated her rights protected by the 14th Amendment because the school had used "race as predominant factor, giving applicants who belong to certain minority groups a significantly greater chance of admission than students with

[138] *Gratz v. Bollinger*, 539 U.S. 244 (2003)
[139] *Ibid*

similar credentials from disfavored racial groups."[140] However the Court ruled the plan constitutional and deemed it flexible enough to pass strict scrutiny for the purpose of increasing diversity in a student body. The criteria used by the University in many ways corresponds to the one employed by Harvard that Powell described in *Bakke*[141] that is designed to increase diversity in the student body taking into account race as one of many considerations and not decisive on its own. The plan was so flexible that the mechanics of it could not be divulged in the case.

The most interesting thing about the Court's acceptance of the plan was that it praised it because it was flexible "enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and place them on the same footing for consideration, although not necessarily affording them the same weight. "[142] This was an extremely important finding because even though race could not be decisive in itself the Supreme Court found that it could be given significantly more weight than other factors. The law school could give a large amount of weight to students of minorities that had been historically discriminated against because there was an interest in a "critical mass of [underrepresented] minority students …to ensure their ability to make unique contributions to the character of the law school."[143] The reasoning why the Court accepted the law schools interest in attaining a critical mass of underrepresented minority students was because it was necessary for "minority students to participate in the classroom and not feel isolated."[144] The concept was that if there were not enough minorities in the classroom, minority individuals would feel marginalized by racial stereotypes and not feel comfortable expressing their views.[145] With a critical mass the

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[140] *Grutter v. Bollinger*, 539 U.S. 306 (2003)
[141] *Ibid*
[142] *Ibid*
[143] *Ibid*
[144] *Ibid*
[145] *Ibid*

stereotypes would lose their force because nonminority students learn that there is no minority viewpoint but rather a variety of viewpoints. The university did not specify that there was a specific number or percentage for a critical mass rather only that it could not be accomplished with only a token amount of minorities.[146]

This point is not the same as *Brown*. It is not that separation denotes feelings of inferiority. However it does acknowledge that there is certain number of minorities needed to receive the benefits of a diverse student body and that a token number is not acceptable because those minority students will be too intimidated to express their view otherwise. It also acknowledged that significantly more weight could be given to race of historically disadvantaged minorities in the application process because otherwise they could not achieve a critical mass necessary.[147] The Court accepted that the law school could maintain a critical mass of Jewish or Asian minorities without placing significant weight on their race because there were many with adequate academic standings or test scores. However for other minorities such as Hispanics, African Americans and Native Americans this was not the case and for this reason university could, "place all pertinent elements…of each applicant on the same footing for consideration and although not according to equal weight.[148] This could not be done without some consideration of race and the court also noted that, "narrowly tailoring does not require exhaustion of every race neutral alternative." Thus the admission program was allowed to remain in place and still give certain races an advantage. This recognizes that individual rights guaranteed by the 14th Amendment can be disregarded to a certain extent to increase minority representation in institutions of higher education, which would otherwise not be possible even though it may not be attributable to the university or the state but rather societal discrimination.

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[146] *Ibid*
[147] *Ibid*
[148] *Ibid*

The fact that universities could not employ quotas or make decisions based primarily on race, because of individual's rights which the court afforded protection by the 14th Amendment is significant. This is the Anti-Classification principle the court applied to public education in *Parents Involved*, which is that absent any state intended action which requires a remedy a school district can only take race into account for this type of diversity not for preventing racial isolation and maintaining unitary schools. Also such a plan must be narrowly tailored so that all aspects of diversity and of a student [not an applicant] are taken to account, not just race itself. This reasoning was created to conciliate the paradox created in the 14th Amendment when benefit that would normally be awarded based on merit are mixed with racial considerations. This reasoning has now been brought down to public education which is a benefit not distributed by merit but to everyone because no one could expect to succeed in society without it.

Conclusion

I began with the case *Parents Involved in Community School District NO. 1*. and am now returning to it after exploring the history of which it is a result. In the next chapter I elucidated the creation of the 14th Amendment. The purpose of the amendment as intended by its framers was to enable the federal government to ardently protect the rights that it had just endowed to African Americans from both state and private interference. Some have claimed that this power was meant to create equality for African Americans, but it is clear that in the eyes of the framers the protection only for the rights enumerated in the Civil Rights Act of 1866. All other rights not enumerated in the act were to be left to the States. Although the meaning of the 14th Amendment today has been greatly debated and is in many respects controversial, it remains clear that the intent of its framers at a minimum was to protect those rights of African Americans which they felt were necessary to have a free existence in the United States of America.

Most of the Supreme Court's history concerning the use of race in public education has dealt with the issue of states segregating their public schools and depriving minorities of equal opportunities. The cases that it has decided have only been discussed in the context of the amount and types of compensation states could be forced to distribute to minorities debilitated by their harmful policies. *Parents Involved in Community School District NO. 1*. marks a turning point in this history. Its concern is not with what a state must be forced to do, but what a state may voluntarily do. This case had the difficulty of reconciling two difficult readings of the 14th Amendment both originating in education. One which rejects all racial classifications no matter their nature in order to secure neutrality of all individuals despite the fact of race, color, sex, religion etc. This reading focuses on individual rights. The other is one that is the original intent

of the 14th Amendment, which was "to secure the rights necessary for Blacks and other minorities so that they could bridge the vast distance between members of the Negro race and the white majority."[149] This reading focuses on the rights of disadvantaged groups. The plurality represented by Justice Roberts chose to accept the former, that absent any prior violation a state cannot invoke racial classifications to combat societal discrimination. According to Robert's opinion states do not have a compelling interest in preventing racially identifiable schools, which are not of their making.

In the third chapter I attempted to trace the history of the 14th Amendment protecting the rights of minorities in public education. The major starting point in this history was *Brown v. Board of Education*. This case contrary to public opinion did not hold segregation itself to be unconstitutional. What it did do essentially was make public education an enumerated right protected by the 14th Amendment. Chief Earl Warren in his famous opinion proclaimed:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws… 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. [150]

Warren in this proclamation made clear that during the time the 14th Amendment was created, public education was one of those rights, left to the states under the 14th Amendment. However his opinion is straightforward that in the present history of the United States public education has such a large role that it would have to be considered an enumerated right . It therefore was a right "which must be made available to all on equal terms."[151]

The reason why legally segregated schools were declared unconstitutional in *Brown* was not because segregation was unconstitutional, but because public education had achieved such a

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[149] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
[150] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[151] *Ibid*

high degree of importance that it had become an enumerated right. The other part of the *Brown* decision was that it overturned the "separately but equal" doctrine in public school because it was not actually equal. Segregated schooling was unconstitutional because it negatively affected African American academic motivation, which consequently deprived them that right to public education.

The *Brown* decision although revolutionary was naïve in many respects. It was seemingly unconscious of the implications of the fact that it was elevating public education to such a high level and then declaring the segregated school system unconstitutional because of its effects. By declaring segregation unconstitutional because of the ills associated with it, naturally suggested integration as logical means to eliminate those ills. When the Civil War was over Congress knew that the South would be extremely recalcitrant in respecting the rights of African Americans. This is why it created the 14th Amendment. The Supreme Court did not have such prudence and was relatively unclear and unassertive in its prescriptions. The Court would learn in the years directly following *Brown* that simply guaranteeing neutrality in public school assignments even in places such as Kent County would not produce the change it had envisioned. It was clear that society apart from the states could wield enough force to maintain segregated schools. *Brown* did not acknowledge that to eliminate the dual quality that characterized the American school system, it would have to force integration.

In the fourth chapter I attempted to recount the Court's path to realizing what it would take to get the states to desegregate after *Brown*. First the court made clear in *Green* that eliminating the dual school system was its goal, not just creating a race neutral environment. Its objective was to actually force Blacks and Whites to associate with each other in school, not just to remove the walls that had separated them. The next decision was *Swann* where the Court

approved of a district court forcing a school board to adopt a plans that much more drastic than the school district thought appropriate. In this decision the it unanimously acknowledged that it was acceptable and even in some cases necessary to force a school board to adopt remedial plans that assigned pupils to schools on an explicit racial basis, all for the purpose of desegregation. In requiring such a plan the Court acknowledged that there were other government actions besides explicitly racial statutes, which could create segregation. To adequately remedy the effects of these techniques it was necessary that districts be forced to adopt complex plans specified to actually resolve their predicaments. The next step was *Keyes*, which was not unanimous but still a 7-1 majority. This required school boards to adopt plans even absent an explicit segregative statute. All that was needed was simply covert school board policies combined with de facto discrimination that to create racially identifiable schools. This case also acknowledged that there were other minorities besides African American that could be victims of racially identifiable schools.

In recounting these cases it becomes apparent that the Supreme Court after *Brown* made clear that its goal was to force districts to eliminate all racially identifiable schools even if those districts were only minimally responsible presence of those schools. This dedication suggests that the court decision in *Brown* was not to create neutrality but rather equal opportunity in public education. This goal was of the utmost importance to the extent that the rights of state sovereignty were almost entirely negligible if those states did not actively try to pursue integration. Entire districts were forced their children to take long bus rides to get school and made their parents pay for it with their taxes.

It is true that the court made clear that districts would not have to eliminate racially identifiable schools if those schools were not in any way attributable to a district's policies.

However the emphasis the court gave to eliminating racially imbalanced school should not be overlooked. The plurality opinion written by Justice Brennan in the *Bakke* decision did interpret this history as allowing states to voluntarily prevent racially identifiable schools:

> …school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school.[152]

Justice Brennan felt that it was not even a matter of dispute that racially balancing schools was a permissible state activity. None of the opinions in the *Bakke* decision reject this statement in at all or even address it. The question of whether a state could protect its minorities from society's private forces in the realm of public schools appeared to be determined by the time of the *Bakke* of the decision.

However in *Parents Involved* Robert's plurality rejected preventing racially identifiable schools as a compelling interest for a state to voluntarily pursue. Robert's rejection was based on the precedent created by Powell's opinion in *Bakke* as well as its progeny opinions, *Gratz v. Bollinger* and *Grutter v. Bollinger*. What this plurality failed to realize I think was that the reasoning invoked in this precedent is far more defensible in the context of higher education. Justice Powell in his opinion recognized that racial considerations affecting the distribution of government benefits that would customarily be distributed on the basis of merit were much harder to justify than those that did not. Unlike public school assignments, which were after *Brown* were essentially considered an enumerated right, acceptance into an institution of higher education was a privilege based on what one had accomplished. To be denied this privilege on the basis of race and not solely because of lesser merit was a much more serious deprival than not being able to attend the school closest to one's home. The former was not able to get a degree

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[152] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

while the latter is not able to attend school within walking distance from home. Powell recognized the difference between the two and for this reason formulated a new justification for using racial considerations in higher education.

Powell's reasoning is rooted in the idea that diversity is an acceptable goal for an institution of higher education to pursue in its student body. This diversity is not simply based on race, but on numerous factors. By using diversity Justice Powell justifies racial considerations by a distributive rationale, not one that is compensative. Diversity in a student body would be better for the learning environment and thus everyone in the institution, not just minorities. This is why it has become a compelling interest that is pursuable higher education. If Powell had intended for this reasoning to be applied in lower education it would seem logical that he would have said so explicitly in *Bakke*, especially in response to Brennan's assertion that this was implicit in *Swann*.

The *Grutter v. Bollinger* added to Powell's reasoning in such a way that suggests that even for the distributive goal of diversity, race can be given greater weight than other factors. The Court recognized for minority applicants to participate effectively in class there needed to be a "critical mass" of them in order to break stereotypes. To achieve this critical mass certain races would have to be given more weight in the application process. Certain minority groups that have been historically discriminated against would not have been able to attain a critical mass in the university otherwise. Thus even in higher education there is evidence that the court does acknowledge that historically disadvantaged minorities need to be afforded more weight according to their race than others because they lag behind in academic performance.

By taking this reasoning used by Powell and the Court in *Grutter v. Bollinger* and applying it to a case concerned with public schools Justice Roberts makes a large philosophical shift. He diverges from the compensative rational that has been unanimously applied to public

schools in desegregation for one that is not by any means unanimous even for affirmative action. Powell's is the product of a man who tried to grapple with the perplexing paradox created by the 14th Amendment that occurs when merit comes into play. This reasoning is not applicable in the absence of merit because public education is a practically enumerated right that states have been forced to respect and should be able to voluntarily protect from all forms of interference. It makes little sense that school districts, which have been forced over the years to compensate for racial inequalities and pursue integration in their schools, are now not allowed to take these same steps voluntarily for that same purpose.

Since *Brown v. Board of Education* America has been on a long journey to realize equal opportunity for all races in public education. The first step was to remove the walls that separated races. Simply removing these walls was not enough to create unitary schools where different races would go to school together. Society by itself wielded enough strength to keep races apart even once the laws dividing them were removed. Integration if it were to happen would had to be forced. This process is not over. One would be crazy to believe that inequalities such as residential segregation and racially isolated schools do not still plague many of the minorities that reside in the U.S. Although we have made great progress there is still a long way to go. The decision in *Parents Involved* has the potential to stop this progress.

The United States of America is made up of numerous races, ethnic groups, religions etc. It is the epitome of a pluralistic society. For this society to be fair and function to the best of its abilities its citizens must grow up understanding that they are part many cultures not just their own. Racially isolating children in one of their chief learning environments is detrimental to this purpose. Children of different races need to grow up with one another so that they understand that America as a society is based on the ideal of racial neutrality.

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