Seattle Journal for Social Justice

Volume 6 | Issue 2 Article 13

June 2007

Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race

Justin Walsh

Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race

By Justin P. Walsh[1]

INTRODUCTION

On November 3, 1998, Washington State voters, by a large majority, passed Ballot Initiative 200 (I-200), the Washington State Civil Rights Act.[2] Despite its progressive title, I-200 essentially ended affirmative action in Washington by denying the state the ability to grant race-based preferences in hiring, public contracting, or education.[3] In an effort to achieve racial diversity within its schools, Seattle Public School District No. 1 had been using and continued to use race as a tiebreaker in deciding which children would attend certain schools that were perceived as "academically superior."[4] A lawsuit followed, brought by parents of students prevented from attending these schools.[5] While the suit was pending, the school district abandoned the use of the racial tiebreaker, leading to an increase in de facto segregation[6] within these academically superior schools.[7] Unfortunately, the Supreme Court ruled that the Seattle School District's use of the racial tiebreaker was an unconstitutional method of ameliorating de facto segregation.[8]

Through the lens of critical race theory, this comment argues that both I-200 and the Court's reasoning in *Parents Involved in Community Schools v. Seattle School District No. 1* (*PICS*)[9] are flawed because both are based on colorblind models that fail to account for white privilege. To this end, this comment will first give a general overview of critical race theory and contrast it with colorblind individualism. Second, this comment will provide a synopsis of the factual background and procedural history of *PICS*. Third, this comment will examine I-200, including the forces that led

to its passage and codification into law, the actual effects of I-200 and similar measures on education, and the state's arguments about I-200 in the *PICS* case. Fourth, this comment will examine the *PICS* decision and will discuss the flawed assumptions that ultimately guided the Court to rule against the school district. Finally, this comment will propose future litigation strategies that integrate critical race theory.

I. THE CRITICAL RACE THEORY FRAMEWORK

Critical race theory is a positivist body of scholarship, primarily created by people of color, aimed at breaking down the barriers of racism "institutionalized in and by law."[10]

Three concepts tied to critical race theory are utilized throughout this comment: white privilege, institutionalized racism, and structural racism. White privilege, at its core, is "an invisible package of unearned assets" that white people may rely on, though unaware of its presence.[11] The concept is likened to "an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks."[12] Institutionalized racism defines systemic barriers that operate to offer "differential access to the goods, services, and opportunities of society by race."[13] Structural racism refers to the systematic maintenance of "racial hierarchies established in prior eras by embedding white privilege and nonwhite disadvantage in policies, institutions, and cultural representations."[14]

Opponents of affirmative action contend that racism no longer exists in America.[15] While levels of overt racism have greatly decreased in the last few decades,[16] progress will be impossible without addressing other forms of racism.[17] Significantly, when "racism is embedded in our thought processes and social structures . . ., then the 'ordinary business' of society—the routines, practices, and institutions that we rely on to effect the world's work—will keep minorities in subordinate positions."[18]

The sad reality is that the ordinary business of society, even within education, reinforces this subordination. White students *do* have an advantage.[19] In one study, forty-six separate and distinct privileges were attributable to the simple fact that a person was white.[20] People are reluctant to admit that there are white race privileges prevalent in everyday life.[21] Albert Black, a noted civil rights activist and lecturer at the University of Washington, has succinctly captured the ignorance of white privilege in one demonstrative sentence: "I don't have any prejudices against blacks, but I'm not giving up my opportunities and my privileged positions."[22]

According to critical race theory, affirmative action is not a grant of an advantage, but a remedial leveler. As affirmative action is "designed to overcome the effects of discrimination," the advantage granted to nonwhites "should not be treated as ordinary discrimination."[23] Affirmative action opponents attack the views of proponents, arguing that such views actually demonstrate a diminished understanding of the subject.[24] Perhaps the biggest misconception on which affirmative action opponents operate is that the rights of the disadvantaged can be better effected through the amendment process, free speech, peaceable assembly, petition, and ballot.[25] While true in theory, the argument fails to consider the effects on the disadvantaged in relation to the curtailment of those rights. While ballot initiatives are an available process, they come at an economic price most cannot afford.[26] The political process argument entirely ignores the fact that some states have even enacted wholesale blockades to minority access to government.[27]

Because the discussion in legislation and cases currently centers around a race-neutral framework, we must craft race-neutral arguments that are based on an accurate view of race.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF *PICS*

The *PICS* case originally involved both state and federal claims, and it went on to develop a complicated procedural history. In an attempt to render the case more accessible, this section will provide the factual background of the case as well as a summary of its procedural history.

In 1997, due to overwhelming demand at five of its secondary schools, the Seattle School District instituted a system of "tiebreakers" to allocate students to the limited number of slots within these schools.[28] Students were asked to "list which high school they would like to attend in order of preference."[29] Prior to the *PICS* lawsuit, only one of the tiebreakers was based on race.[30] The first tiebreaker was based upon sibling attendance at the school of choice.[31] The second tiebreaker, utilized only where the school was considered racially out of balance, was based on the race of the student.[32] A high-demand school was considered racially out of balance if the percentage population of white to nonwhite students deviated more than 15 percent from the overall population.[33] If a school was considered racially in balance—the school deviated less than 15 percent from the general population in terms of racial makeup—the racial tiebreaker was not employed.[34] In those instances, the school district turned either to a tiebreaker based on proximity of the student's home to the school or a lottery system.[35] At the time of the district court opinion, only three of the five high-demand schools were utilizing the racial tiebreaker.[36]

After I-200 was passed, a lawsuit was brought by a group of parents whose children were either denied, or could have been denied, admission to these high-demand schools.[37] The group of parent plaintiffs, calling themselves Parents Involved in Community Schools, claimed that the district's racial tiebreaker violated I-200, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964.[38] The case led to a web of litigation and appeals. The federal district court concluded that the school district was within its rights on both the state and federal law claims.[39] The Ninth Circuit Court of Appeals reversed the

federal district court on the state law claim, and it refused to answer the federal claims on grounds of constitutional avoidance.[40]

The Ninth Circuit then made a highly unusual move—it withdrew its opinion and, in the process, certified the state law claim to the Washington Supreme Court.[41] The Washington Supreme Court ruled that the school district had not violated the provisions of I-200, thus ending the state law claim.[42] The case was then returned to the Ninth Circuit, as the resolution of the Fourteenth Amendment claim had become outcome determinative.[43] A panel of the Ninth Circuit Court of Appeals ruled that the school district's interest in promoting diversity was a compelling state interest, but that the district's means to achieve that diversity were not narrowly tailored.[44] The district then petitioned for rehearing before the court en banc.[45] On rehearing, the court en banc switched course and affirmed the district court ruling on the equal protection claim and the Title VI claim.[46] The U.S. Supreme Court then granted certiorari.[47] The Court reversed, holding the tiebreaker invalid.[48]

Due to the procedural complexity, the federal and state claims will be addressed separately in the sections that follow.

III. I-200: AN UNLIKELY FRIEND IN WASHINGTON STATE

A. Forces that Led to I-200's Passage and Codification into Law

The pertinent text of I-200, codified as the Washington Civil Rights Act, reads as follows:

> (1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> ….

> (6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
>
> (7) For the purposes of this section, "state" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.
>
> ….
>
> (9) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law, the United States Constitution, or the Washington State Constitution, the section shall be implemented to the maximum extent that federal law, the United States Constitution, and the Washington state Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.[49]

The actual language of I-200 seems to aid in the curtailment of discrimination.[50] However, by outlawing all preferential treatment based on race, I-200 fails to distinguish between preferential treatment of whites as a result of white privilege and treatment of people of color that is an attempt to remedy historical discrimination.[51] As a result, I-200 effectively put an end to state and local affirmative action and race-conscious admission processes.

Although many consider Washington a progressive state, this arguably regressive measure received 58 percent of the vote,[52] leaving many to wonder how such an initiative could have passed. Unfortunately, however, Washington is not alone in passing regressive race-based initiatives.

When looking at the initiative and referendum process from a national perspective, the statistics reveal a disturbing trend. Nationwide, between 1904 and 1949, there were no initiatives presented that were facially discriminatory.[53] However, with the onset of the civil rights movement spurring discriminatory sentiment, eleven discriminatory initiatives were

introduced, nine of which passed.[54] Then, between 1991 and 1994, five discriminatory initiatives were introduced, only two of which passed;[55] this appeared to be a cooling period, representing a reluctance to pass discriminatory legislation. However, that period was short lived. Between 1995 and 1998, four discriminatory initiatives were introduced and all passed; most notable were I-200 and California's Proposition 209.[56] This renewed vigor shows no signs of slowing—between 1999 and 2000, five facially discriminatory initiatives were introduced with only one failing in the vote.[57] Since 2000, discriminatory initiatives have been introduced in several states, including an initiative in Michigan similar to I-200 that passed due to the same forces at work in Washington and California.[58]

An exploration into this increase in discriminatory initiatives reveals that one man is primarily responsible for the most recent onslaught of such initiatives. That man is Ward Connerly, the director of the American Civil Rights Institute (ACRI).[59] Through ACRI, Connerly spearheaded the campaigns to pass Proposition 209 in California, I-200 in Washington, and Proposition 2 in Michigan.[60]

ACRI's mission is to "educate the public about racial and gender preferences."[61] However, this "educational" role has largely been aimed at the passage of state initiatives that eliminate affirmative action programs.[62] ACRI is able to finance these initiative pushes through the use of money donated by far right conservative backers.[63] The Bradley Foundation, one of Connerly's largest financers, has also bankrolled research efforts that are overtly racist in their endeavors.[64]

By engaging in inaccurate rhetoric, flaunting an ignorance of white privilege, failing to consider legitimate reasons for continuing affirmative action, and using unscrupulous campaign finance reporting (mirroring the same flawed process as was used prior with Proposition 209 in California and later with Proposition 2 in Michigan[65]), Connerly and other opponents of affirmative action were able to secure passage of I-200 by a wide margin in 1998.

First, opponents of affirmative action used inaccurate rhetoric to frame the affirmative action debate, classifying affirmative action as reverse discrimination.[66] A common reverse discrimination argument relies on the assumption that when the state grants a benefit—for instance, placement above another candidate with higher test scores—to a minority applicant based on race, the state is in fact granting that minority applicant a privilege and, at the same time, taking an opportunity away from the white applicant who did not prevail.[67] However, this view of the "innocent white victim" fails to consider that white applicants benefit from white privilege, which functions as a kind of undocumented affirmative action program.[68] If innocence centers on an "absence of advantage at the expense of others,"[69] there is nothing innocent about a white person's status entering into the application process—he or she carries the advantage of white privilege at the expense of all nonwhite applicants.[70] Rather, affirmative action, as practiced today, does not constitute reverse discrimination but functions only as a leveler.[71] The innocent white victim argument is further belied by the fact that the innocent white victims only seek redress against minority candidates that have entered into programs on the basis of subjective factors, but not against other white candidates granted admission with lower test scores than the candidate who brought suit.[72]

Second, by failing to acknowledge white privilege, opponents of affirmative action lend credence to the innocent white victim argument. The repression of the existence of white privilege makes the innocent white victim argument plausible. [73] For example, a white person may feel that he or she did not get a job because it went to a less qualified black candidate.[74] However, the reality is that the job simply went to an equally or better qualified candidate, who, through circumstances of structural and institutional racism, only appeared to be less qualified given standards of measurement favoring whites.[75]

Third, the opposition to I-200 did not consider legitimate reasons as to why affirmative action is still warranted. Specifically, minority students

and contractors do not operate on a level playing field with white students and contractors. Prior to the passage of I-200 in Washington, minority contracting only accounted for 4.9 percent of state contract awards.[76] Currently, without the use of affirmative action, less than 1 percent of contracts are awarded to minority businesses.[77] There may be an even greater need for affirmative action in education. Graduation from high school—an achievement white students rarely have trouble attaining—is often a hard-fought accomplishment for nonwhite students.[78] Race-sensitive programs ameliorate that achievement gap by continuing desegregation.[79]

Finally, campaign finance issues affected the outcome as well. Ward Connerly, through ACRI, failed to disclose campaign finance spending that completely flouted the laws of the state.[80] In the campaign for I-200, Connerly reported just over $500,000 in expenditures.[81] Several articles indicated that the disparate funding, with the campaign against I-200 garnering almost three times as much in spending, was a sure sign of the will of the voters.[82] However, a report by the Washington State Public Disclosure Commission found that Connerly failed to disclose over half a million dollars in radio ads spent to "educate the public" about affirmative action.[83] The Commission did not sanction Connerly, choosing to admonish him instead.[84]

Unfortunately, Washington was only the first state in which Connerly flouted his campaign finance disclosure obligations. He was fined $95,000 for engaging in similar tactics in a 2003 California initiative.[85] While we may never be certain how much these actions contributed to the passage of I-200, we can be assured that the added expenditures played a part.

B. The Effects of I-200 on Diversity in Education

In the eight years since its passage, I-200 has been detrimental to minority access to education. Prior to 1998, minority groups were making great strides in education via diversity programs.[86] Between 1998 and

2004, participation by minority groups actually declined, even though enrollment in professional programs at the University of Washington increased in size dramatically.[87] Similarly, the effects of race neutrality can be seen at the secondary education level. Introduced in 1998, the Seattle School District used a racial tiebreaker[88] program in order to determine placement in certain schools that, because of their popularity and perceived superiority to other schools in the district, could not accommodate all who wished to enroll.[89] Since abandoning the racial tiebreaker program, diversity has decreased by 10 percent at each of these oversubscribed schools.[90]

Washington is not alone in facing a crisis in minority education because of race-neutral admissions programs. California is also dealing with similar issues from the passage of Proposition 209.[91] As a result of Proposition 209, black enrollment at the University of California, Los Angeles (UCLA) has decreased to its lowest percentage since 1973—to just over 2 percent of the incoming freshman class.[92] Prior to the passage of the race-neutral amendment, UCLA enrolled black students at a rate close to California's black population.[93] Michigan now faces the same crisis with the passage of Proposition 2 in November 2006, which contains virtually the same language as the California and Washington legislation.[94]

Conversely, in Washington State, private universities are not subject to the race-neutral (and thus racially discriminatory) restrictions of I-200.[95] A comparison between the University of Washington and Seattle University shows that as early as 2000, just two years after the passage of I-200, underrepresented minority enrollment at Seattle University was nearly double that of the University of Washington.[96] The disparity can also be found in graduate programs, where underrepresented minorities make up 6.7 percent of the graduate student body at the University of Washington, as opposed to 9 percent of the graduate student body at Seattle University.[97] In light of these numbers, to say that race-neutral admissions programs do not hinder minority access to education is simply to ignore fact.

C. Did the School District Violate I-200?

1. State Claim at the District Court

The *PICS* plaintiffs first brought suit in federal court under a claim that the race preference plan discriminated and granted a preference on the basis of race in violation of I-200.[98] As I-200 did not define preference or discrimination, and as Washington courts had not addressed the issue, the federal district court was tasked with predicting how the Washington Supreme Court would apply I-200 to the *PICS* case.[99]

The court found that applying I-200 to the school district's racial tiebreaker program would violate the Washington State Constitution.[100] The court reasoned that, under the Washington State Constitution, school districts had a duty to "provide equal educational opportunities to students of all races, to limit racial isolation, and to provide a racially and ethnically diverse educational experience."[101] The court noted that the school board had a duty to "'act in the best interests of the majority of students,' even if to do so would be to the detriment of some students," and to not allow school boards to "take race into account in efforts to desegregate their schools 'would frustrate the purpose'" of the constitution.[102]

While the analysis could have ended there, the court also looked at the broader question of whether racial tiebreakers in and of themselves violated I-200 by discriminating or granting preference to students based on race.[103] The district court held that the use of a racial tiebreaker "does not constitute a 'preference' or 'discrimination' based on race under Initiative 200."[104] In supporting this finding, the court looked to earlier decisions that permitted school board efforts to remedy de facto segregation and to a finding by the Washington Supreme Court that such efforts were not violations of the state constitution.[105] Finally, the court turned to the language of I-200; it held that because the school district's action applied to and affected both minority and white students in the same manner, it did not discriminate or grant a preference based on race.[106]

2. State Claim at the Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals disagreed with the district court on several bases. The court first disagreed that the race-conscious tiebreaker did not grant a preference or discriminate based on race.[107] The court reasoned that "the racial tiebreaker grants an advantage or preference on the basis of race: members of one group are selected for admission, while members of another are not, solely on the basis of race."[108] The court also disagreed with the district court's constitutional analysis, reasoning although race-conscious programs were a permissible use of school board discretion under the constitution, such programs were not necessarily mandated and thus could be statutorily limited.[109]

3. Washington State Answers the Certified Question

Of course, all of that reasoning was for naught as the court of appeals then withdrew its opinion and certified the question at hand to the Washington Supreme Court.[110] The exact question certified to the supreme court was:

> By using a racial tiebreaker to determine high school assignments, does Seattle School District Number 1 "discriminate against, or grant preferential treatment to, any individual group on the basis of race, . . . color, ethnicity, or national origin in the operation of . . . public education" in violation of Initiative 200 (I-200), codified at Washington Revised Code § 49.60.400?[111]

The Washington Supreme Court held that the racial tiebreaker did not violate I-200.[112] The court first reasoned that the Washington State Constitution established a mandate, above all others, that the state provide general and uniform education. The court then reasoned that school boards were given the leeway to conclude what that constitutional requirement would entail.[113] The court explained that "allowing a referendum on administrative decisions 'would enable the voters of any community to frustrate the purpose of Const. art 9, § 1.'"[114]

Next, the court examined whether the race-conscious program was preferential or discriminatory.[115] Here, the court also largely agreed with the district court that the racial tiebreaker did not discriminate or grant preferential treatment.[116] The court rebutted the court of appeals analysis that the language of I-200 was not susceptible to multiple meanings by looking at the structure of the statute, dictionary definitions, and how preference and discrimination had previously been used in terms of affirmative action arguments.[117]

Finally, the court analyzed the ballot wording, which specified reverse discrimination measures as the focus of I-200—that I-200 "prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant."[118] Because the Washington Supreme Court could answer the certified question by interpreting the statutory language, it did not reach the question of whether the Washington State Constitution mandated efforts to end de facto segregation, but the result was the same: a holding that the school district's program was not in violation of I-200.[119]

Unfortunately, due to the outcome of the equal protection claim, the effect of the Washington Supreme Court decision was nullified.

IV. FEDERAL CLAIMS IN *PICS*

As previously mentioned, the plaintiffs originally brought both state and federal claims. When the Washington Supreme Court issued its decision, however, the state claim was resolved. The only remaining claim was whether the federal district court erred in holding that the racial tiebreaker did not violate the Equal Protection Clause of the Fourteenth Amendment.[120] In this section, this comment will first describe and then analyze the reasoning of the *PICS* case at the Ninth Circuit Court of Appeals and the U.S. Supreme Court.

In analyzing equal protection claims based on race, courts must apply strict scrutiny to the challenged program. [121] In this case, courts had to first

decide whether the school district had a compelling state interest in utilizing the tiebreaker, and second, whether the race-conscious tiebreaker was narrowly tailored to meet that end.[122]

A. District Court

The district court found that there was a compelling state interest in the use of the racial tiebreaker and that the district's program was narrowly tailored, as the ends it sought to achieve were not *just* related to diversity but also included the aim of ending de facto segregation, which requires racial diversity.[123] In addition, the court ruled the program was narrowly tailored because it was not indefinite in nature but instead had a sunset provision.[124]

B. Ninth Circuit Court of Appeals

When the case returned to the Ninth Circuit from the Washington Supreme Court, the court held that diversity was a compelling state interest, largely based on the decision in *Grutter v. Bollinger*.[125] In doing so, the court referenced a variety of briefs filed on behalf of the University of Michigan in *Grutter*, which touted scientifically and socially measurable benefits that flow from diversity.[126] The Ninth Circuit then turned to the question of whether the racial tiebreaker was narrowly tailored to achieve diversity. The Ninth Circuit held that it was not[127] because (1) "[t]he School District's racial tiebreaker [was] virtually indistinguishable from a *racial quota*;"[128] (2) the school district's tiebreaker was *inflexible*;[129] (3) the school district's use of the racial tiebreaker was *mechanical and conclusive*;[130] (4) the school district had failed to consider *race neutral alternatives*;[131] and (5) the school district's program did not *minimize the adverse impacts* on third parties.[132]

The dissent, written by Judge Graber, differed from the majority in a number of respects. First, the dissent noted that not only was diversity a compelling state interest but that ending de facto segregation was as well.[133]

Second, the dissent noted that the considerations of diversity in the high school setting might very well differ from those in the postsecondary setting.[134] Finally, the dissent expressed its view that the school district had satisfied the narrowly tailored burden and that the consideration of race-neutral alternatives was inapplicable because of the district's compelling interest in remedying de facto segregation.[135]

C. Ninth Circuit Court of Appeals, Sitting En Banc

A petition for en banc review of the decision was then granted by the Ninth Circuit.[136] From the start, the court explained that the strict scrutiny standard applied to both "deck reshuffle" (those programs that do not attempt to burden or benefit any particular group in its use of race) and "deck stacking" programs (those programs that use race to distribute a burden or benefit to a particular group).[137] The court explained that the whole point of strict scrutiny was to make the state actor prove that the motivations for a race-based system were not invidious, and there is "simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[138]

The court en banc then turned to the notion of compelling state interest. The court largely agreed with the reasoning of the district court, noting that the school district had shown its diversity rationale to be a compelling interest through (1) improved critical thinking skills for all students based on racial diversity, (2) distinct socialization and citizenship advantages, and (3) increased "opportunity networks in the areas of education and employment."[139] The court also noted that while similar to *Grutter* in many ways, the interests in the *PICS* case varied in three very real respects: (1) secondary education served a unique role in desegregation; (2) many students would not be able to reap the benefits of diverse education outside of the secondary education setting; and (3) the benefits of racial diversity are more compelling at a younger age.[140] The court held that the school

district had demonstrated a compelling state interest similar to the law school in *Grutter* "as well as the additional compelling educational and social benefits of such diversity unique to the public secondary school context."[141]

The court also agreed with Judge Graber's determination that avoiding the harms resulting from de facto segregation was a compelling state interest.[142] Using similar wording and referencing the same cases as Judge Graber, the court explained the compelling nature of reducing racial isolation.[143] The court also made short work of the plaintiffs' argument that the school district was not engaged in desegregation but rather was engaged in racial balancing. The court referred to *Brown v. Board of Education* to explain that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law."[144] Thus, *Brown* is an example of how the Supreme Court has, in the past, acknowledged the negative impact of any segregation, including de facto segregation. The court then listed several cases holding that voluntary desegregation—desegregation not mandated by the Supreme Court in *Brown*—was a "sound educational policy within the discretion of local school officials."[145]

Having determined that both sets of interests were compelling, the court then turned to whether the means to achieve those interests were narrowly tailored.[146] The court started its analysis by first recognizing that narrow tailoring depends on the particular situation.[147] The court noted a five-part test, which it had earlier outlined in its application of the *Grutter* and *Gratz* cases, designed to determine if an affirmative action plan was narrowly tailored.[148] The court explained that a properly narrowly tailored affirmative action plan contained five hallmarks: "(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group [is] unduly harmed; and (5) that the program [has] a sunset provision or some other end point."[149]

The court exempted public schools from the first requirement. The court reasoned where all children were admitted in at least one school in the district, regardless of qualifications, there were no "considerations or qualifications at issue."[150] The court also recognized that the consideration must be tailored to the compelling interests: in *Grutter*, the law school sought diversity of ideas; in the *PICS* case, the school district sought both to foster racial understanding and to ameliorate de facto segregation.[151] Given these goals, the court found that race would be a necessary factor for consideration.[152]

In addressing the second *Grutter* factor—the school district could not utilize quotas—the court held that the Seattle School District's plan did not have a quota because it did not "reserve a fixed number of slots for students based on race."[153] The court reasoned, under *Grutter*, an attention to numbers to "enroll a critical mass of minority students in order 'to realize the educational benefits of a diverse student body'" was not unconstitutional.[154] First, the court described the lack of a fixed number of slots in that the program was only instituted if the particular school was outside the percent variance limits and was oversubscribed.[155] Second, the court found similarities between the school district's program and the University of Michigan's attempt to enroll a critical mass of students in *Grutter*. The court also rejected the plaintiff's argument that because the percent of minority enrollment in the *PICS* case was larger than that in the *Grutter* case, the school district was seeking to enroll more than a critical mass and thus had sought to establish a quota.[156] Instead, the court went back to its context-specific requirement, stating that what critical mass entails for one context may not be what it entails for another, and that the percentage trigger in the school district's plan was a common one.[157]

The court then turned to the third *Grutter* factor—the school district had to have seriously considered race-neutral alternatives.[158] The court of appeals previously decided that the school district had failed to seriously consider race-neutral alternatives.[159] Reiterating the need for a racial

diversity, the Ninth Circuit, sitting en banc, examined four race-neutral alternatives that had been presented both in the briefs and during argument before the court of appeals.[160]

First, the court looked to using poverty as a tiebreaker and noted that the school board's reluctance to implement such a tiebreaker was based on valid factors that considered the connotations of classifying oneself into a lower socioeconomic status.[161]

Second, the court looked at a plan submitted by the Urban League, which looked to increase quality at all schools and to create a neighborhood school model.[162] Referring to testimony that the plan did nothing to ameliorate de facto segregation, the court held that "[i]t was therefore permissible for the district to reject a plan that neither comported with its priorities nor achieved its compelling interests."[163]

Third, the court turned to the school district's consideration of a lottery plan. The court found two major flaws with this plan. First, the argument that a lottery program was a feasible alternative to the racial tiebreaker was not once introduced at trial and was argued for the first time on appeal.[164] Second, because the issue was not addressed by the plaintiffs at trial, the lottery argument was based only on assumptions that lottery applicants would not be racially skewed themselves.[165] The court referred to testimony by the district superintendent, highlighting that the majority of applicants for a particular school were from the neighborhood; thus, the lottery pool would be skewed in favor of perpetuation of neighborhood segregation patterns.[166]

Finally, the court turned to the dissent's argument that the school district should apply an apparently successful race-neutral alternative used in San Francisco.[167] Again, the court noted two problems with the San Francisco plan. First, the plan was nowhere to be found in the record; rather, it was only offered by the dissent.[168] Second, the court noted that the school district was not forced to adopt a plan implemented elsewhere simply because the other plan appeared to be working. The court found especially

relevant the notion that states are "laboratories to be used to experiment with myriad approaches to resolving social problems."[169] The court also turned to Justice Brandeis's much-quoted dissent in *New State Ice Co. v. Liebmann* to expound on its rationale:

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[170]

Thus, if one state were required to adopt another state's plan for combating de facto segregation, no heterogeneity of solutions would develop and the notion of state experimentation would effectively be lost.

The court then turned to the fourth *Grutter* factor—that a narrowly tailored plan cause no undue harm to members of any racial group. First, the court reasoned that the burden imposed by the plan was a minimal one and was shared by all students.[171] Second, the court noted that there is no right in Washington to attend one's school of choice.[172] Third, the court recognized that public schools are different than universities in that there is generally mandatory school assignment.[173] The court then recognized that the racial tiebreaker does not burden or benefit any one race, but that all races in the school district can reap the burdens and benefits of the tiebreaker.[174]

Finally, the court analyzed the application of the fifth *Grutter* factor—whether the racial tiebreaker had a "sunset provision." The court looked to *Grutter* itself and its explanation that "periodic reviews to determine whether racial preferences are still necessary to achieve student diversity" satisfy the sunset provision requirement.[175] The court then noted that the Seattle School District revisits its plan annually and had made changes to the plan when it felt such changes were necessary.[176] Based on its conclusion that the school district had satisfied all of the applicable *Grutter*

factors, the court concluded that the plan was, in fact, narrowly tailored to achieve a compelling state interest.[177]

The dissent came to a diametrically opposed conclusion on the question of whether there was a compelling interest. First, the dissent equated the remedying of de facto segregation to racial balancing.[178] By taking this first step, the dissent was then able to analogize all cases in which racial balancing (as opposed to remedying de facto segregation) had been struck down.[179] Second, the dissent took those cases that were struck down and equated them to a rule that racial balancing could never be used, defining *Grutter* as one of two exceptions to that rule (the other exception being to remedy the past effects of de jure segregation). In doing this, the dissent was able to say that any case that did not remedy past effects of de jure segregation must look exactly like *Grutter*.[180] Third, the dissent cited *Grutter* for the proposition that any diversity plan that does not focus on the student's individual characteristics runs afoul of the Constitution.[181] It stated, "[i]n *Grutter* and *Gratz*, the Court made clear that the valid compelling interest in 'diversity' does *not* translate into a valid compelling interest in 'racial diversity.'"[182] Finally, the dissent attacked the sociological evidence relied upon by the majority, instead relying on its own handpicked evidence.[183] It then turned to the narrowly tailored issue. Based on its earlier assumption that there was no difference between the interests in *Grutter* and those in *PICS*, the dissent could apply all five *Grutter* factors rather than the four relied upon by the majority.[184] The first factor, as the dissent pointed out, failed on its face in a manner that was "self-evident."[185]

The dissent then claimed that the second factor—related to the absence of quotas—was not met because the school district used percentages compared to the population to determine if a school was out of balance.[186] Finally, the dissent pointed out a flaw in the majority's critical mass argument. In *Grutter*, the court stated that critical mass could not be used "simply to assure within its student body some specific percentage of a particular

group merely because of its race or ethnic origin."[187] With the third *Grutter* factor—that the district must have considered race-neutral alternatives—the dissent framed the issue not as whether the superintendent had considered the alternatives, but whether he had seriously considered adopting the alternatives. The dissent concluded he had not. Turning to the fourth *Grutter* factor—dealing with undue burden—the dissent again disagreed with the majority. The dissent felt that there was an undue burden in depriving children of their choice of school and in imposing a "tedious cross-town commute."[188] Finally, the dissent disagreed that the sunset provision was really a sunset provision at all, arguing that *Grutter* required both a periodic review and a logical end; thus, the periodic review by the school district did not satisfy the logical end requirement.[189]

The dissent's arguments, however, failed to explain that the majority did not attempt to make any argument based on diversity. Rather, the majority stressed a compelling interest based on racial diversity on its own, not relying on the same compelling interest used in *Grutter*.[190] By fostering those incorrect assumptions, it was able to make piecemeal comparisons to *Grutter* in deciding that the interest is not compelling.[191] It is consummately hypocritical to attack sociological evidence on the basis that it is handpicked by utilizing contrary sociological evidence that is *also* handpicked.

The dissent relied on wording from *Gratz*, which the dissent read as holding that a program or plan involved a quota if it operated on "fixed number or *percentage*."[192] Thus, the dissent utilized part of a quote by the court in *Grutter* and ignored the preceding sentence in which the *Grutter* court stated "a 'quota' is a program in which a certain number or proportion of opportunities are 'reserved exclusively' for certain minority groups."[193] However, the dissent failed to take into account that *Grutter* did not deal with a compelling interest related to ameliorating de facto segregation. Rather *Grutter* only addressed diversity. The dissent failed to recognize that the school board itself considered the other plans as outlined above.

Simply because the consideration of plans was informal and not ultimately adopted, did not make it inadequate.

In essence, the dissent implied that if you are denied acceptance to your first choice of schools, you are unduly burdened. If such an argument was accepted, every school that denied a student petition to transfer to another school, regardless of the reason for denial, could face a lawsuit on the basis that they unduly burdened their students. The same logic could be used for the commute argument in rural school districts—where children routinely face bus rides of upwards of an hour to get to the nearest school.[194] While the students in the *PICS* case complained of total commute times of four hours, there was no finding of fact as to that assertion. Given the evidence that a commute by bus from Ballard High School (the school the students in the *PICS* suit wished to attend) and Ingraham High School (where the students were ultimately placed) is roughly forty-two minutes each way, the undue burden argument starts to unravel.[195] In addition, the larger argument hits a snag, for a logical end to the need of achieving the racial diversity compelling interest would be when the city itself is no longer de facto segregated (and, thus, racial diversity would be had at every school within the district). Theoretically, the dissent would have had no problem with a twenty-five-year sunset provision if it had found that racial diversity was a compelling state interest and that twenty-five years was a reasonable time for the city to correct segregated housing patterns.[196]

Unfortunately, the dissent's reasoning was given credence at the Supreme Court, striking a blow to *Brown* and to attempts at remedying de facto segregation in public schools.

V. THE SUPREME COURT[197]

A. The Majority and Plurality Opinions

Chief Justice Roberts authored the majority, which encompases Parts I, II, III-A, and III-C of the opinion, and was joined by Justices Scalia,

Kennedy, Thomas, and Alito. In addition to establishing the facts, these sections explained that the case was not moot, that strict scrutiny applied, that the racial interest asserted was not compelling, and that the Seattle plan was not narrowly tailored.[198]

There are several problems inherent in the majority opinion. First, the plurality employed an unfounded assumption in deciding whether the case was moot. Second, the Court utilized the wrong level of scrutiny. Third, the Court used an unjustified distinction between de facto and de jure segregation. Fourth, the plurality used internally inconsistent reasoning in regards to the narrowly tailored issue. Finally, the plurality wrongly addressed racial balancing instead of racial diversity.

The plurality's first error was its assumption as to harm in determining standing. The school district argued that standing was not met because there was no imminent injury.[199] The plurality stated that simply having children in schools in the district was enough to satisfy the standing requirement.[200] However, simply being in the school is not enough. As was stated by the Washington Supreme Court in answering the certified question, there is simply no benefit or detriment to any particular child, as each child receives a Washington State basic education.[201] Thus, there would be no harm to any students assigned under the plan, as they would all obtain the same basic education.

Second, the Court utilized the wrong level of scrutiny. In deciding to use the highest level of scrutiny, the plurality stated, "[i]t is well established that when the government *distributes burdens or benefits* on the basis of individual racial classifications, that action is reviewed under strict scrutiny."[202] However, in this case, as noted above, there were no benefits or burdens distributed on the basis of race. Here, the burdens and benefits of a racial classification system were shared by all. The Court seems to think, contrary to the Washington Supreme Court, that the school district's racial tiebreaker operated in much the same way as an affirmative action program.

Unfortunately, such a view fails to take into account the aim of the program to create racial diversity for its own positive outcomes for the benefit of all students. For instance, while the students complained of the deleterious effects of being unable to attend the school of choice, the Court did not recognize that those students were in essence granted an increased chance at academic achievement.[203] In practice, students who attend more integrated schools have increased academic achievement as measured by test scores.[204] Absent a showing of a negative effect to the white students, it would seem that this is not affirmative action (the granting of privilege to one to the impairment of another), but rather a process of maximizing the effects of education across the board.

Beyond the Court's failure to utilize the correct standard, its use of strict scrutiny for segregation programs is outdated. The Court's use of strict scrutiny highlights its failure to recognize an inherent difference between discriminatory programs and those that neutralize structural discrimination.[205] Rather, the Court should use a common sense approach and recognize that programs that ameliorate de facto segregation are not discriminatory. In such cases, the Court should then apply the test to facially neutral laws, under which the Court would require both a disparate impact on a racial group as well as a discriminatory purpose.[206] In recognizing white privilege, a court would not be able to satisfy the second prong of the test in desegregation cases, and race-based programs such as the school district's would not be invalidated. This would ensure a system in which true equality of the races is the focus and not just a structure implying equality but which fails to provide it. Such an interpretation would be more in line with the framers' intent to provide true equality to the races and not simply structural equality.[207]

Third, the Court's distinction between de facto and de jure segregation is by no means justified. In outlining interests that have been found to be compelling, the court stated that "it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have

recognized two interests that qualify as compelling . . . . The first is the compelling interest of remedying the effects of past discrimination."[208]

Still, despite the Court's reluctance as a result of the belief that all segregation is harmful regardless of its source, activists have long sought the abandonment of the distinction between de facto and de jure segregation.[209] As soon as *Brown* was decided, there were calls for full integration—not just the remedying of de jure segregation.[210] Unfortunately, twenty years after *Brown*, the Court reaffirmed the distinction between de facto and de jure segregation in *Keyes*. Many scholars have seen *Keyes* as an example of the Court backing away from the promise of full integration by failing to remedy all segregation and instead narrowly requiring desegregation only in those districts where de jure segregation existed or where a showing could be made that district policies and practices intended to segregate through state action.[211] By making that distinction, the Court has effectively hindered the education of minority students, which is just as affected by de facto segregation as it is by de jure segregation.[212] The other inherent problem with limiting remedies to de jure segregation is that no effort is required to curb resegregation; this effectively allows for the loss of any progress made wherever the state did not directly participate in the resegregation process.[213]

Further, the evolution of desegregation jurisprudence has limited the scope of what can be done to remedy de facto segregation.[214] Unconstitutional discrimination was "the negative disparate effects on school children generative by various educational policies and practices."[215] Today, the definition of unconstitutional discrimination has become "racially motivated decision making which fails to treat a person as an individual,"[216]. This view severely limits the scope of what can be done to remedy de facto segregation because to remedy the effects of *any* segregation, de facto or de jure, requires more than simply removing barriers that were previously in place.[217]

Of course, the distinction between de facto and de jure segregation exposes another inherent problem with the Court's analysis: the Court's flawed perception that race neutrality can lead to just results. Much like the perpetrators of race-neutral rhetoric, the Court has, in essence, adopted a colorblind individualism as its mode of thinking.[218] The model, which claims to do away with racial distinctions by focusing solely on the individual, is inherently flawed in that it fails to take into consideration those structural privileges granted to members of the majority which do not, by nature, operate on an individualized basis.[219] The better approach would be to look for ways to create structural diversity. This would break down those structural privileges and act to create diverse relationships. Color-sensitive paradigms could be broken down at their core and not just facially.[220] In fact, the Court never recognized the existence of these structural privileges. Rather than focusing on the school district's program as a way to level access to education, the Court instead determined that the inability of the plaintiffs to regain a previously held privilege amounted to discrimination.

The lead plurality, authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito, contains similar problems. The plurality's decision on whether race alone is a compelling interest does not accord with its own reasoning. The plurality stated, "[t]he districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts."[221] The Court further reasoned:

> Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.[222]

Here the Court seems to be developing a new test for strict scrutiny to be applied where racial diversity is alleged to be a compelling state interest. However, the school district was never afforded an opportunity to present evidence on this clarified issue, and remand to the trial court would be appropriate rather than a wholesale ban on the school district's use of race in school assignments. Moreover, the Court simply glossed over the fact that such a hard use of data to arrive at the stated benefit was not required under *Grutter*.[223]

Finally, the plurality moved the conversation from racial diversity—the stated compelling interest—to racial balancing, which the school district never sought as a compelling state interest. The plurality explained, "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[224] However, the school district never sought a racially balanced school; rather, it sought a diverse school that was within large percentage ranges from the community. Under the school district's plan, a school could be racially diverse and still not be balanced with the diversity (or lack thereof) of the community.

The Court also failed to recognize that emerging sociological data may be available to lend support to the notion that racial balancing itself should be considered a compelling interest. However, to call this simply a relabeling of the key issue is to ignore the intricacies and differences between racial diversity and the diversity of ideas found compelling in *Grutter*.

B. Justice Kennedy's Concurrence

Justice Kennedy joined only in Parts I (statement of facts), II (standing and jurisdiction), III-A (application of strict scrutiny and discussion of a compelling state interest), and III-C (ineffectiveness of the Seattle plan showing lack of a narrowly tailored plan) of the plurality opinion.[225] However, Justice Kennedy expressed grave concerns that the plurality opinion was "open to the interpretation that the Constitution requires school

districts to ignore the problem of de facto resegregation in schooling," a notion he could not endorse.[226]

As admirable as Justice Kennedy's recognition of this matter was, he still refused to provide any aggressive means of curtailing the problem and instead allowed school districts only facially neutral means—such as redistricting—and those means outlined in *Grutter*.[227] This argument completely ignores the point made by Justices Stevens, Souter, and Ginsburg that using facially neutral means to achieve a race-based goal is simply sweeping the problem under the rug.[228]

C. Justice Stevens's Dissent

Justice Stevens's short dissent makes a point of agreeing wholeheartedly with Justice Breyer's dissent.[229] His dissent then addresses the plurality's use of *Brown*:

> There is cruel irony in THE CHIEF JUSTICE's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w] forbid[s] rich and poor alike to sleep under bridges, to bed in the streets, and to steal their bread." THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[230]

By bringing this proposition to the forefront, Justice Stevens was able to point out that while the Court followed the letter of *Brown,* it ignored the spirit of the case; he went on to discuss the plurality's misguided notion that strict scrutiny should always apply whenever race is used, regardless of whether the purpose is for integration or segregation.[231] He concluded his dissent by stating:

> The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.[232]

D. Justice Breyer's Dissent

Justice Breyer, who was joined by Justices Stevens, Souter, and Ginsburg in his dissent, also highlighted the lack of context in which the plurality decided the case.[233] After a lengthy discussion of the rationale behind *Brown* and its progeny, as well as a lengthy discussion of the histories of the Seattle and Louisville school districts, Justice Breyer moved on to the legal discussion. There, he discussed the applicable legal standard and then explained both the majority's misapplication of precedent and the consequences of the plurality decision.

First, Justice Breyer outlined the standards at play. The dissent noted that strict scrutiny does in fact apply.[234] However, Justice Breyer also pointed out that the application of the strict scrutiny standard differs when applied to an inclusive program as opposed to an exclusionary program. He stated:

> [T]he cases to which the plurality refers, though all applying to strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude*; they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to include.[235]

Thus, though the Court in the past has purported to apply strict scrutiny to racial classification, it actually has applied two separate permutations of the standard depending on the use.[236] Justice Breyer's contention is simple: context matters. Here, the context was that of overcoming segregation through a limited use of race.[237]

In applying the legal standard, Justice Breyer first looked at whether there was a compelling state interest.[238] His analysis largely mirrored that

of the Ninth Circuit's en banc opinion and does not bear repeating here. Justice Breyer did concede that the studies were conflicting as to whether there was a benefit that was compelling, but he noted that the "evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one."[239]

Turning to whether the plan was narrowly tailored, Justice Breyer asserted that the plans were designed to pass "even the strictest 'tailoring' test."[240] First, the dissent pointed out that the predominant factor in nearly 90 percent of assignments is based on choice, not race.[241] Second, the dissent noted that the plan, because of its limited use in only a certain number of situations, was more narrowly tailored than the plan approved in *Grutter*—the plan in *Grutter* applied to all applications to the school.[242] Justice Breyer also acknowledged that the tailoring in *Grutter* caused the possible loss of a higher education, something not at risk in the Seattle and Louisville plans. Finally, the dissent noted that the tailoring must happen at the local level due to each city's personal experience with its own history of segregation.[243] In rebutting the plurality's contention that the school district had not proven that any other set of numbers could accomplish the same compelling need, Justice Breyer noted that the Court had previously "permitted districts to use target ratios based upon the district's underlying population."[244] Looking to constitutionally viable options proposed by the plurality, Justice Breyer pointed out that these were not pragmatic:

> [A]s to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students) . . . . As to "drawing" neighborhood "attendance zones" on a racial basis, Louisville tried it, and it worked only when forced busing was also part of the plan. As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet schools," but the limited desegregation effect of these efforts extends at most to those few school to which

> additional resources are granted . . . . As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance and other statistics by race," tracking *reveals* the problem; it does not cure it.[245]

Thus, the plurality took away an option that had worked to increase racial diversity within the schools and, instead, replaced it with a list of options that were not feasible given the constraints placed upon a school district.

The dissent then turned to direct precedent regarding the plans at issue. Justice Breyer recognized that both plans, largely unchanged, and, if anything, even less reliant on race, have been found to be constitutional.[246] In regards to the Seattle plan, the "Court struck down a state referendum that effectively barred implementation of Seattle's desegregation plan and 'burden[ed] all future attempts to integrate Washington schools in districts throughout the State.'"[247] Justice Breyer found it "difficult to believe that the Court that held unconstitutional a referendum that would have interfered with the implementation of this plan thought that the integration plan it sought to preserve was itself an *unconstitutional* plan."[248] Finally, the dissent listed several consequences of the plurality opinion, including invalidation of many segregation plans, a litany of litigation where race is used as a factor, and the civic and social problems inherent in a segregated environment.[249]

Unfortunately, given the outcome, Justice Breyer wrote the dissent, and not the majority. Justice Breyer sums up the disappointment felt by many:

> The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.[250]

The Seattle School District's plan is now constitutionally invalid, and the district must look to alternatives in order to battle de facto segregation.

VI. INTEGRATING CRITICAL RACE THEORY INTO ADVOCACY

With the passage of I-200 and similar measures in other states, and given the outcome in *PICS*, a new strategy is required that applies critical race theory within the construct of our legal system. Legislators need to be aware of critical race theory and, in so doing, need to repeal legislation preventing its recognition. Within the courts, advocates need to reframe the dialogue to include notions of critical race theory. By integrating the language of this theory into legal advocacy, both the courts and the legislature will reframe the dialogue away from its current race-neutral state and toward true racial equality.

There are two avenues that future litigators must simultaneously pursue in order to effectively bring to the forefront notions of white privilege and other concepts central to critical race theory. First, advocates must integrate the language and theory of white privilege into their arguments. Second, advocates must utilize sociological data as it emerges to effectively present and argue the issues.

A. Integrating Critical Race Theory into Lawyering

Part of the problem of integrating critical race theory into judicial opinions lies simply in the fact that those notions are not being argued in court. One remedy is to integrate the theory into briefs. Rather than simply discuss how this may happen, this comment demonstrates this proposition by rewriting portions of each section of the school district's brief in the *PICS* case.

1. Questions Presented

"You never get a second chance to make a first impression."[251] This cliché has ready applicability in the legal context where the first glance at a brief can set the lens through which a court will read the rest of the brief.[252] As such, it is vitally important that an advocate set the tone for the reader

from the start by integrating notions of critical race theory in briefing. For example, an issue statement posed by the school district read:

> (2) Did the Seattle School District's limited consideration of race in its high school student assignment plan comply with the Equal Protection Clause of the Fourteenth Amendment because:
>
> (a) the District had compelling government interests in promoting the educational benefits of diverse public high school enrollments, alleviating the potential harms of racial isolation, and ensuring equitable access for minority students to the District's most popular high schools, and (b) the limited consideration of race in the District's student assignment plan was narrowly tailored to serve these compelling interests while promoting the race-neutral educational values of parental choice, neighborhood schools, and keeping families together.[253]

There are several flaws with framing the issue this way. First, the issue statement effectively swept notions of race and justice under the rug by referring to the consideration of race as limited. Though the issue may facially appear to be whether race can be used in some limited fashion in these types of cases—as several justices alluded to—this case was essentially about whether a school district may use race to remedy de facto segregation. In this context, minimizing the school district's use of race conceals the real issue. Second, the advocate again shied away from the controversy in the case by referring only to diversity instead of racial diversity. Third, the advocate used the term "alleviating the potential harms of racial isolation."[254] This weakened the idea of the harm involved by not using race as a factor. Finally, the advocate used notions of race neutrality, ignoring that the reality of racism is a very real, ever-present problem.

This issue statement could be rewritten to identify the heart of the case and, more specifically, steer the discussion to the most contentious points that the justices will confront:

> (2) Did the School District's consideration of race in its high school assignment plan comply with the Equal Protection Clause's mandate for true equality because
>
> (a) the District had a compelling government interest in promoting the educational benefits of racially diverse public high school enrollments, alleviating the real harms of segregation, and ensuring equal access to education within the District's schools, and
>
> (b) the consideration of race in the District's student assignment plan was narrowly tailored to achieve diversity while remedying the effects of current segregation within the District.

Reframing the case to be about current segregation is more forceful. No longer are we talking about some vague past nonstate discrimination. We are talking about a problem that is happening *now* that requires *immediate* attention. This problem is about one thing: race. The solution is about one thing: race. By not burying the real issues in rhetoric that panders to a highly conservative plurality, we can more effectively frame the issue for those justices who may be on the fence in the future.

2. Statement of the Case

Similarly, opportunities arise in the statement of the case in which critical race theory can be interjected without utilizing additional space. Consider this passage from the respondent's brief:

> The Open Choice plan used a series of tiebreakers to determine assignments to over-subscribed schools. At the high school level, the first tiebreaker was whether the student had a sibling already assigned to the school. The second tiebreaker was proximity of the student's residence to the school. The proximity tiebreaker was subject, at some over-subscribed schools, to an "integration tiebreaker." For the 1999–2000 school year, the integration tiebreaker applied to over-subscribed schools with enrollments deviating more than 10 percentage points from the overall district-wide racial composition. The integration tiebreaker accordingly applied in that year to four over-subscribed high schools: Ballard, Hale, and Roosevelt as to non-white students and Franklin as to

> white students. Students who did not choose a school were assigned to the closest school with space available.[255]

Again, the advocate misses several opportunities to highlight the real issues in this case, instead burying those issues in race-neutral rhetoric. The advocate fails to highlight that the key issue is de facto segregation, a current problem that requires immediate attention. Rather, the advocate should highlight that de facto segregated schools require a race-positive procedure to remedy the issue. The same paragraph could be presented in a more revealing light:

> The Open Choice plan used a series of tiebreakers to determine assignments to over-subscribed schools. In segregated schools, the first tiebreaker was whether the student had a sibling already assigned to the school. The second tiebreaker depended on the race of the student, and served to remedy de facto segregation. The third tiebreaker was proximity of the student's residence to the school. In non-segregated schools, the racial tiebreaker was not applied. For the 1999-2000 school year, schools deviating more than 10 percentage points from the overall district-wide racial composition applied this racial tiebreaker to ameliorate that de facto segregation. The integration tiebreaker accordingly applied in that year to five over-subscribed high schools: Ballard, Hale, Roosevelt, and Franklin. Students who did not choose a school were assigned to the closest school with space available.

The preceding paragraph contains several key aspects. First, it addresses race and segregation openly. To say otherwise is to pretend that those issues are not what this case is about. Second, the passage now plainly addresses that the goal of the second tiebreaker is to remedy the effects of de facto segregation. By addressing this up front, it is simultaneously asserted that this is not a race-neutral issue: race-neutral rhetoric does not lend itself to remedying the effects of discrimination, only outright racism.[256] Finally, the passage does not differentiate between schools that are segregated in favor of whites or in favor of blacks. Segregation is

segregation. Each of the five schools to which the tiebreaker applied was segregated and that point should not be divided across racial lines.

3. Argument

In this section, this comment will offer alternative approaches to some of the major sections of the respondent's brief in the *PICS* case. These alternatives provide further examples of how advocates can weave critical race theory into their arguments.

a) An Actual Case or Controversy No Longer Exists

The school district's argument that the case is moot because it was no longer using the tiebreaker does little to further the question of whether a school district has the inherent authority to use a race-conscious tiebreaker to ameliorate de facto segregation. While arguing that the case is moot may provide redress by allowing the respondent to avoid fees and costs, by doing so, the school district weakened its own argument. By arguing that because the practice is no longer continued there can be no wrong, the rest of the brief is immediately tainted. If the racial tiebreaker was never wrong, then why was it discontinued?

In order to more effectively advocate for the use of racial means to ameliorate de facto segregation, the admission of a controversy in this case must be embraced. Eliminating an argument of mootness would allow the advocate to instead argue that the case is in fact a live and real controversy. An advocate could utilize this space to explain why a race-neutral view of the case is not in fact neutral and also seek to redefine the concept of an Article III "case" or "controversy" to include the actual injuries suffered at the often invisible hand of white privilege. Over time, this method could begin to effectively seed critical race theory in the minds of judges and justices, rather than leaving the debate strictly to academia.

b) Seattle's Consideration of Race Was Designed to Further Compelling Interests

Obviously, the argument that ameliorating de facto segregation was a compelling state interest, unlike mootness, cannot be simply scrapped for the sake of introducing a new paradigm. But that does not mean that this section is not ripe with opportunities to integrate critical race theory. For example, see the following passage from the respondent's brief in the *PICS* case:

> Although this Court has never specifically held that there is a compelling interest in achieving the benefits of integrated public schools where there has not been a finding of intentional discrimination, it has repeatedly recognized both the importance of eliminating the harmful effects of racially isolated schools, regardless of the reasons that those conditions exist, and school districts' inherent authority to address this problem. This Court stated in *Brown* with respect to segregation that: "The impact is *greater* when it has the sanction of the law . . . ."[257]

Here, the advocate focuses on what the Court already has recognized, attempting the time-honored legal trick of fitting a square peg into a round hole that the Court has already accepted. Rather, the argument should instead focus on what the Court has not yet recognized, and why the Court needs to accept remedying de facto segregation as its own compelling interest. Admittedly, the brief does a great job of outlining why a racially diverse education is beneficial for all students,[258] but this largely operates on race-neutral rhetoric.[259] Rather, the argument could be easily retooled to include powerful critical race theory arguments:

> While this Court has never specifically found it a compelling interest, there are very real and harmful effects to de facto segregation. These are the same harms that come from de jure segregation. While one can begin to heal the effects of state-sponsored de jure segregation through race-neutral means, only a color-conscious solution will ameliorate the misery inherent in nonstate sponsored segregation.[260] This Court has repeatedly

> recognized this reality. This Court stated in *Brown* with respect to segregation that "[t]he impact is *greater* when it has the sanction of the law . . .," but it never stated that there is no impact when the segregation is not sanctioned by law.

In the preceding sections, there is a method. These arguments, as rewritten, do several things: they emphasize that the real issue, de facto segregation, should be addressed openly and honestly as a real, current problem; they advocate that the use of race should not be minimized or hidden; and, finally, they reiterate that race is an essential part of the solution. This open, honest discussion of societal issues around race is the heart of critical race theory.

B. Using Social Science Data to Support the Proposition that De Facto Segregation is Harmful

PICS may signal an emerging trend in cases aimed at remedying de facto segregation. Racial diversity may in fact be beneficial to both white and nonwhite alike; early studies have shown that a racially diverse classroom could improve the critical thinking skills of white students at a greater rate than minority students.[261] Unfortunately, there have been very few studies of this nature below the postsecondary level. As data becomes available, it should be easier to make a case that would allow for racial diversity to be considered in and of itself. This would lend further support to racial diversity alone being a compelling state interest at the secondary education level—an issue that the Court avoided in *PICS*.[262]

The use of this kind of sociological data to prove the disparate effects of supposed race neutrality may become commonplace within the courts. One recent case out of the Supreme Court suggests that sociological data may be gaining acceptance.

In *Miller-El v. Dretke*, the Supreme Court was asked, in a habeas petition, to examine a prosecutor's use of peremptory challenges on potential black jurors.[263] In its decision, the Court first noted that there

were problems in applying the *Swain* test: to prove discriminatory intent, the petitioner would have to show systematic discrimination, a "crippling burden of proof" to preserve one's rights under the Equal Protection Clause.[264] The Court also noted similar problems with the test set forth in *Batson*, where challenging the prosecution's individual use of a peremptory challenge could be defended by showing *any* valid reason for that particular challenge.[265] Instead, the Court looked at the fact that white jurors were found to be acceptable by prosecutors even though those jurors exhibited the very same qualities that the prosecutor put forward as *Batson* defenses (a neutral reason for excluding the black jurors) to his decision.[266] Thus, by utilizing a facially valid defense to a peremptory challenge, prosecutors are able to disclude black jurors though white jurors should have been excluded for the same reason. Though structurally racist, the burden on defendants to show that racism was too high. The Court reasoned, "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[267]

While the Court could have stopped there, it also expressed concern over data which showed a possible systemic problem of facial race neutrality masking racism.[268] First, the Court looked to the process of "jury shuffling," a seemingly neutral process whereby the order of prospective jurors is literally shuffled.[269] The Court noted that the process was applied generally to those cases in which black jurors were at the front of the jury pool, the practice being employed in the case at hand in the same manner.[270] The Court cited its previous decision to explain the problem with this process:

> [T]he prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury.[271]

Second, the Court looked to differences in questioning between black and white jurors, which showed an attempt to elicit responses from black jurors that could provide a basis for a facially race-neutral peremptory challenge.[272] More importantly, the Court considered this evidence though it was not before the state court.[273] Based on a statistical analysis of the juror questionaires in the case, the Court concluded, "The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did."[274]

Third, the Court looked to the history of juror selection discrimination as evidence of current discrimination:

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.[275]

While *Miller-El* dealt with peremptory challenges in a criminal case, two principles can be drawn from this case and applied to cases similar to *PICS*. First, the use of sociological data can become relevant to a case, even if the data was developed after the onset of the case. Thus, a district fighting de facto segregation and involved in a lawsuit based on that fight can petition studies justifying its position. Second, the Court expressed a willingness to go beyond the race-neutral rationales to look at the real effects of a practice or policy. Such tactics can be integrated into briefs to show why race neutrality is anything but neutral. While the opening created by *Miller-El* may be a narrow one, any chance to challenge the race-neutral perspective must be utilized.

VII. CONCLUSION

No one can dispute that discrimination, in any form, should have no place in our society. Since the decision in *Brown*, it is apparent that discrimination still exists, preventing us from imagining a stage where it can be forgotten. The voters of the state of Washington underscored this in 1996; voters in Michigan did the same ten years later. Misunderstandings and misstatements about what race-based programs do, and what they are intended to remedy, has only perpetuated the problem. The *PICS* case is a prime example—where courts fail to recognize systems of white privilege and instead characterize a program set up to ameliorate discrimination as itself discriminatory. But school districts cannot simply give up their attempt to solve a recognized problem. Rather, school districts need to embrace the fight to ameliorate de facto segregation. By embracing this goal, and utilizing notions of critical race theory in the process, perhaps we will be able to escape from the shadow of *PICS*.

---

[1] Justin Walsh is a 2008 Juris Doctorate graduate of the Seattle University School of Law. His previous work on race and education includes serving as a commissioner on the King County Civil Rights Commission and working on the steering committee for Project Stop Hate, which aims to create a spiraling curriculum on frank racial dialogue. He wishes to thank his family and friends, who have supported him throughout his legal education. He also wishes to thank his Father in Heaven, who has provided him spiritual guidance and strength to always strive for justice. Finally, he wishes to thank his father, Robert, for instilling in him early the truth that we are all the same.

[2] WASH. REV. CODE § 49.60.400–.401 (2006); Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25 (stating that I-200 garnered 58 percent of the popular vote).

[3] *See* Tamar Lewin, *The 1998 Elections: State by State–West; Washington*, N.Y. TIMES, Nov. 5, 1998, at B7.

[4] Jessica Blanchard, *Supreme Court to Hear Seattle Schools Race Case*, SEATTLE POST-INTELLIGENCER, June 6, 2006, at A1 (noting that much of the anger over the Seattle School District's assignment plan stemmed from assumptions that "some high schools . . . were academically superior to others").

[5] *Id.*

[6] The New Dictionary of Cultural Literacy defines de facto segregation as "[r]acial segregation, especially in public schools, that happens 'by fact' rather than by legal requirement. For example, often the concentration of African-Americans in certain

neighborhoods produces neighborhood schools that are predominantly black, or segregated in fact (de facto), although not by law (de jure)." THE NEW DICTIONARY OF CULTURAL LITERACY, 336 (E.D. Hirsch, Joseph F. Kett, & James Trefil eds., 3d ed. 2002). De facto segregation is independent of the segregation measures that were deemed illegal in *Brown v. Board of Education*. Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (holding that Brown I applied only to end state-sponsored, or de facto, segregation).

[7] Deborah Bach, *Schools Can Use Race as Tiebreaker, Court Rules*, SEATTLE POST-INTELLIGENCER, June 27, 2003, at A1.

[8] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2746 (2007), *rev'g* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005).

[9] *PICS*, 127 S. Ct. 2738.

[10] Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899 (1995).

[11] Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 246–47 (2005) (quoting Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, *in* LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 23 (1995)).

[12] *Id.*

[13] Camara Phyllis Jones, *Levels of Racism: A Theoretic Framework and a Gardener's Tale*, 90 AM. J. PUB. HEALTH 1212, 1212 (2000).

[14] Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1299–300 (2004).

[15] Bill Maxwell, *White America, Denial Won't Erase Racism*, ST. PETERSBURG TIMES, Dec. 6, 2000, at 15A; Beth McMurtrie, *Prop. 209 Leader Draws Protests*, GREENSBORO NEWS & REC., Dec. 3, 1997, at B2.

[16] Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 U. PITT. L. REV. 83, 93 (2004).

[17] *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 79 (2001).

[18] *Id.* at 22.

[19] U.S. COMM'N ON CIVIL RIGHTS, TOWARD EQUAL EDUCATIONAL OPPORTUNITY: AFFIRMATIVE ADMISSIONS PROGRAMS AT LAW AND MEDICAL SCHOOLS 92 (1978) (stating that most white students are at a relative advantage in relation to educational opportunity); Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2529 (2003) ("[D]ifferential advantage for white students arguably persists in the form of all the structural dimensions of white privilege, material and otherwise, that favor their success in the educational system."); Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1267 (2004) (noting that whites possess a real economic advantage through the use of network advantages).

[20] Stephanie M. Wildman & Adrienne D. Davis, *Language of Silence: Making Systems of White Privilege Visible*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 660 (Richard Delgado & Jean Stefancic eds., 4th ed. 2000).
[21] Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20 (1999) (noting that adoption of a color blind attitude allows whites to remain in their comfort zone by not talking about race, despite clear evidence that racial inequality exists).
[22] Jake Ellison, *Saturday Q&A: Albert Black, UW Principal Lecturer*, SEATTLE POST-INTELLIGENCER, July 12, 2003, at A1.
[23] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 344 (1994).
[24] *See* ELMER ENSTROM, JR., BUSING, NOT INTEGRATION, OPPOSED: A REASONED OPPOSITION TO RACE-BASED AFFIRMATIVE ACTION IN PUBLIC SCHOOLS 68 (1998).
[25] *Id.* at 79.
[26] Digital Video: Panel Discussion on the Initiative Process & Civil Rights with Kelly Evans, held by Seattle University School of Law (Oct. 24, 2006) (on file with author).
[27] *See* Audrey Daly, *How to Speak American: In Search of the Real Meaning of "Meaningful Access" to Governmental Services for Language Minorities*, 110 PENN ST. L. REV. 1005, 1016–18 (2006) (noting that concerns over the English-only movement are about access to government programs for non-English speaking minorities)); Associated Press, *State Halts Production of Voter Pamphlets in Spanish*, June 20, 2006, http://www.ksl.com/?nid=148&sid=318992 (noting that the state halted production of voting machine instructions in Spanish for fear of violating the state's English only law).
[28] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 137 F. Supp. 2d 1224, 1239 n.12 (W.D. Wash. 2001) (denying an injunction on the grounds that Seattle Public Schools abandoned the race conscious plan with no plans to return to it), *aff'd en banc*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006), *rev'd*, 127 S. Ct. 2738 (2007).
[29] *Id.* at 1226.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 1226. In the 1999–2000 school year, the school district was utilizing a ten percent deviation rule. *Id.* at 1226 n.2.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1226 n.4 (noting that Garfield High School is the only school under high demand that is considered racially in balance under the 10 percent plan. However, under the 15 percent plan, Roosevelt High School is also in balance).
[37] *Id.* at 1226.
[38] *Id.* at 1226–27; Deborah Bach, *Seattle Schools' Racial 'Tiebreaker' Case May Return to Court*, SEATTLE POST-INTELLIGENCER, Aug. 4, 2004, at B4.
[39] *PICS*, 137 F. Supp. 2d 1224.
[40] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 285 F.3d 1236, 1252–53 (9th Cir. 2002), *withdrawn*, 294 F.3d 1084 (9th Cir. 2002).

[41] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 294 F.3d 1085, 1087 (9th Cir. 2002); *PICS*, 294 F.3d at 1085.
[42] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 72 P.3d 151, 166 (Wash. 2003).
[43] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 377 F.3d 949, 953 (9th Cir. 2004), *cert. granted*, 547 U.S. 1177 (2006), *rev'd*, 127 S. Ct. 2738 (2007). For those wondering why neither the district court nor the court of appeals directly addressed the Title VI claim laid out by the defendants (*PICS*, 137 F. Supp. 2d at 1227), it is because Title VI claims of intentional discrimination track a XIV Amendment analysis. U. S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL § 1 (2001).
[44] *PICS*, 377 F.3d at 988.
[45] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 395 F.3d 1168 (9th Cir. 2005).
[46] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 426 F.3d 1162, 1171 n.10, 1192–93 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006), *rev'd*, 127 S. Ct. 2738 (2007).
[47] Petition for Writ of Certiorari, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 547 U.S. 1177 (2006) (No. 05-908).
[48] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2746 (2007).
[49] WASH. REV. CODE § 49.60.400 (2006).
[50] *Id.* § 49.60.400, ¶ 1.
[51] *Id. See generally* DISMANTLING WHITE PRIVILEGE: PEDAGOGY, POLITICS, AND WHITENESS (Nelson M. Rodriguez & Leila E. Villaverde eds., 2002) (giving a thorough discussion on white privilege and its discriminatory effects).
[52] Lewin, *supra* note 3.
[53] *See* INITIATIVE & REFERENDUM INST., STATEWIDE INITIATIVES SINCE 1904-2000, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf
[54] *See id.*
[55] *See id.*
[56] *Id.*
[57] *Id.*
[58] *See generally* Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16. In election years 2001–2006, eleven discriminatory initiatives have been placed on state ballots. INITIATIVE & REFERENDUM INST., FALL BALLOT MEASURES 2006 (2006), *available at* http://www.iandrinstitute.org/BW%202006-3%20(November%20update).pdf; INITIATIVE & REFERENDUM INST., ELECTION 2005 REVIEW, (2005), *available at* http://www.iandrinstitute.org/BW%202005-3%20(Election%20Review).pdf; INITIATIVE AND REFERENDUM INST., 2004 ELECTION SUMMARY (2004), *available at* http://www.iandrinstitute.org/BW%202004-10%20(Election%20Summary).pdf; INITIATIVE & REFERENDUM INST., NOVEMBER 4, 2003: STATEWIDE BALLOT QUESTIONS (2003), *available at* http://www.iandrinstitute.org/ballotwatch.htm (follow "List of all November 2003 statewide ballot and measures" hyperlink); INITIATIVE & REFERENDUM INST., INITIATIVE

AND REFERENDUM INSTITUTE'S NOVEMBER 5, 2002 GENERAL ELECTION POST ELECTION REPORT (2002), *available at available at* http://www.iandrinstitute.org/ballotwatch.htm (follow "2002 Election (PDF)" hyperlink).

[59] *See* Media Transparency, Person Profile: Ward Connerly and the American Civil Rights Institute, http://www.mediatransparency.org/personprofile.php?personID=13 (last visited Mar. 19, 2008); *see also* American Civil Rights Institute (ACRI), Ward Connerly Bio., http://www.acri.org/ward_bio.html (last visited Mar. 19, 2008).

[60] Heath Foster, *Ads and Money Shape I-200 Debate: Affirmative Action Fight May Cost $2.3 Million*, SEATTLE POST-INTELLIGENCER, Oct. 26, 1998, at A1 (noting that the American Civil Rights Coalition, the political arm of ACRI, has been the top donor of the I-200 campaign); David Postman, *California Group Pays for I-200 Radio Ad*, SEATTLE TIMES, Sept. 26, 1998, at A7 (citing Ward Connerly as the leader of the Proposition 209 campaign).

[61] *See* Media Transparency, *supra* note 59; American Civil Rights Institute, http://www.acri.org (last visited Mar. 19, 2008).

[62] *See generally* Media Transparency, *supra* note 59.

[63] *See* Media Transparency, *supra* note 59. ACRI backers include the Lynde and Harry Bradley Foundation and The Olin Foundation. The Bradley foundation has been noted as the most influential right-wing foundation. *See* Media Transparency, Funder Profile: The Lynde and Harry Bradley Foundation, Inc., http://www.mediatransparency.org/funderprofile.php?funderID=1 (last visited Mar. 19, 2008). The Olin Foundation is a large supporter of The Heritage Foundation. *See* Media Transparency, Funder Profile: John M. Olin Foundation, Inc., http://www.mediatransparency.org/funderprofile.php?funderID=7 (last visited Mar. 19, 2008).

[64] The Bradley Foundation supported Charles Murray's book, *The Bell Curve*, that supported the proposition that blacks are genetically inferior to whites. *See* Media Transparency, Funder Profile: The Lynde and Harry Bradley Foundation, *supra* note 63.

[65] Foster, *supra* note 60; Postman, *supra* note 60.

[66] *World/Nation Briefs*, NEWSDAY, Mar. 16, 1999, at A20 (quoting Ward Connerly as saying that affirmative action makes "people feel like they're a victim of reverse discrimination"); *see also* B. Drummond Ayres Jr., *Political Briefing; California G.O.P. Wary of Initiative*, N.Y. TIMES, May 6, 2001, at 133 ("Connerly . . . contends that reverse discrimination has become one of the nation's greatest problems."); Seth Rosenfeld, *Cal Hit with Race-Bias Suit: Rights Groups Launch Legal Bid on Behalf of Honor Students Denied Admission*, S.F. EXAMINER, Feb. 2, 1999, at A1 (asserting that Ward Connerly contends affirmative action is a form of race discrimination); Howard Troxler, *"Ifs" Abound in Bush's Plan to End Preferences*, ST. PETERSBURG TIMES, Nov. 12, 1999, at 1B ("Connerly's supporters believe that affirmative action is reverse discrimination.").

[67] Linda S. Greene, *From Brown to Grutter*, 36 LOY. U. CHI. L.J. 1, 14 (2004).

[68] Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) ("[T]he rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways.").

[69] *Id.*

[70] *See id.*

[71] Ashley M. Hibbett, *The Enigma of Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 HARV. BLACKLETTER L.J. 75, 98 (2005) (noting that race is an immutable detriment to people of color within similar classes, such that people of color will always be at a disadvantage to whites within the same class).

[72] RUDOLPH ALEXANDER JR., RACISM, AFRICAN AMERICANS, AND SOCIAL JUSTICE, 34 (2005) (citing the fact that in one prominent affirmative action case, the white candidate who was denied did not challenge the fact that other white students with lower qualifications were admitted, but rather challenged the fact that students of color with lower qualifications were admitted).

[73] Ross, *supra* note 68, at 312 (noting that the repression of unconscious racism allows white people to view themselves as innocent).

[74] *See* DELGADO & STEFFANCIC, *supra* note 17, at 78.

[75] *See id.* at 106–07.

[76] Carolyn Crawson, Antonio Ginatta & Peter Antolin, Supplier Diversity Presentation to Governor Gregoire's Executive Cabinet Agency Directors (2006), http://www.omwbe.wa.gov/supplierdiversity/materials/Cabinet%20PowerPoint%20Presentation.ppt.

[77] *Id.*

[78] David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1141, 1196 n. 176 (2005) (noting that high school enrollment, graduation, and gifted placement are lowest among blacks). In fact, the high school graduation rates for blacks lies at just over 50 percent, whereas white and Asian American graduation rates lie near 75 percent. *See* Julie A. Helling, *Law and Diversity Program: A Model for Attracting, Retaining, and Preparing Diverse Students for Law School*, 4 SEATTLE J. FOR SOC. JUST. 561, 569 (2006).

[79] *See generally* Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111 (Gary Orfield & Michal Kurlaender eds., 2001).

[80] *See* Letter from Vicki Rippie, Executive Director, Public Disclosure Commission, to Kelly Evans, No! 200 Campaign Committee (Mar. 23, 2001) (on file with the Public Disclosure Commission—PDC Case No. 99-066); *see also* WASH. REV. CODE § 42.17.100.

[81] Washington State Civil Rights Initiative – YES on 200!, Summary, Full Report, Receipts and Expenditure, C4 (Jan. 8, 1999) (Public Disclosure Commission form, on file with the Public Disclosure Commission of Washington).

[82] No! 200 Committee, Summary, Full Report, Receipts and Expenditure, C4 (Feb. 8, 1999) (Public Disclosure Commission form, on file with the Public Disclosure Commission of Washington); *see also* Florangela Davila, *Bills Would Let Race Be Factor In College Admissions Again; Lawmakers Want to Amend I-200,* SEATTLE TIMES, Jan. 22, 2004, at A1; Heath Foster, *Affirmative Action Rules Tossed out by State Voters,* SEATTLE POST-INTELLIGENCER, Nov. 4, 1998, at A1; Richard Roesler, *Bill Would Let Colleges Consider Ethnicity; Controversial Legislation Defies 5-Year-Old Law,* SPOKESMAN REV., Jan. 29, 2004, at B1; Herbert A. Sample, *Flush with Washington I-200*

Victory, Connerly Is Looking At Other States, SEATTLE POST-INTELLIGENCER, Nov. 10, 1998, at B3.

[83] Letter from Vicki Rippie, *supra* note 80.

[84] *Id.*

[85] CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, YEAR IN REVIEW: 2005, 17 (2005), *available at* http://www.fppc.ca.gov/Library/2005annual.pdf.

[86] A look at the ethnic makeup of the University of Washington's professional programs showed increases of 32 percent and 73 percent respectively between black and Latino students. *See* UNIV. OF WASHINGTON, STUDENT HEADCOUNT BY ETHNICITY AND STUDENT LEVEL, Table A-5 (2005) [*hereinafter* Table A-5] (University of Washington Autumn Quarter Enrollment Statistics, on file with the registrar's office).

[87] Between 1998 and 2004, black enrollment in professional programs declined by 2.5 percent. More markedly, in the same period Latino enrollment fell by over 40 percent. *Id.*

[88] Sanjay Bhat, *Racial Tiebreaker is Illegal, Says Court of Appeals*, SEATTLE POST-INTELLIGENCER, July 28, 2004, at A1.

[89] *See* Deborah Bach, *Seattle Schools' Racial Tie-Breaker Policy Upheld*, SEATTLE POST-INTELLIGENCER, Oct. 21, 2005, at A1; *see also* Deborah Bach, *Schools Can Use Race as Tiebreaker, Court Rules*, SEATTLE POST-INTELLIGENCER, June 27, 2003, at A1.

[90] Bach, *supra* note 7 (citing 10 percent reduction in minority enrollment at two predominately white schools and 10 percent reduction in white enrollment at one predominately minority school).

[91] Proposition 209 was passed in 1996 and amended the California State Constitution to disallow racial preferences. *See* CAL. SEC'Y OF STATE, PROPOSITION 209: TEXT OF PROPOSED LAW, *available at* http://vote96.ss.ca.gov/bp/209text.htm (last visited Oct. 26, 2006); Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N.Y. TIMES, Oct. 31, 2006, at A1 (reporting that Proposition 209 was also backed by Ward Connerly via ACRI); *see also* McMurtrie, *supra* note 15.

[92] Steve Padilla, *A Call to Increase Black Enrollment at UCLA*, L.A. TIMES, Oct. 30, 2006, at B4; *University of California Adopts a Holistic Approach to Reviewing Freshman Applications; Change is Most Sweeping Since Systemwide Revisions Five Years Ago*, U.S. STATE NEWS, Sept. 28, 2006, *available at* 2006 WLNR 16883237 (Westlaw).

[93] Padilla, *supra* note 92. California's population at the 2000 census was 6.7% African American. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS: CALIFORNIA (2008), *available at* http://quickfacts.census.gov/qfd/states/06000.html.

[94] *See generally* Tamar Lewin, *supra* note 58, at P16.

[95] SEATTLE UNIV., *Large, Diverse Freshman Class Expected: Seattle U Trend Continues to Buck State's Post-I-200 Higher Ed Climate*, July 19, 2001, http://www.seattleu.edu/home/news_events/news/ (click on 2001, scroll to articles in the month of July and click on article title).

[96] University of Washington enrolled 1,931 undergraduate underrepresented minorities in 2000, with a total of 25,845 students in its undergraduate program, for a total of 7.5% undergraduate minority enrollment. *See* Table A-5, *supra* note 86. Conversely, Seattle University maintained 13.5% undergraduate underrepresented minority enrollment in the same year. SEATTLE UNIV., *supra* note 95.

[97] *See* UNIV. OF WASHINGTON, GRADUATE ADMISSION SUMMARY (ETHNIC BREAKDOWN) - AUTUMN 2005 (2005), *available at* http://www.grad.washington.edu/stats/index.htm (law school admissions were omitted by author from the numbers, in order to perform like comparisons); SEATTLE UNIV., GRADUATE ENROLLMENT STATISTICS (2006), *available at* http://www.seattleu.edu/home/about_seattle_university/facts/student_profiles/graduate/.
[98] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 285 F.3d 1236, 1242 (9th Cir. 2002), *withdrawn*, 294 F.3d 1084 (9th Cir. 2002).
[99] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 137 F. Supp. 2d 1224, 1227 (W.D. Wash. 2001), *aff'd en banc*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006), *rev'd*, 127 S. Ct. 2738 (2007).
[100] *Id.*
[101] *Id.* at 1228 (citing the Washington Supreme Court's construction of Article IX § 1, of the Washington State Constitution, which provides that "the legislature shall provide for a general and uniform system of public schools").
[102] *PICS*, 137 F. Supp. 2d at 1227 (citing Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 661 (Wash. 1972)). An important distinction was thus made in the *Palmason* opinion. Washington schools have never been de facto segregated, and thus any bussing actions within the state were only to remedy de facto segregation. *See id.* at 1229 (citing Citizens Against Mandatory Bussing v. Brooks, 492 P.2d 536 (Wash. 1972)) (the Court has interpreted the Washington State Constitution to apply to instances of de facto segregation).
[103] *Id.* at 1229.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1231–32.
[107] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 285 F.3d 1236, 1244 (9th Cir. 2002), *withdrawn*, 294 F.3d 1084 (9th Cir. 2002).
[108] *Id.*
[109] *Id.* at 1248.
[110] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 294 F.3d 1084 (9th Cir. 2002), *withdrawn*, 294 F.3d 1084 (9th Cir. 2002); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 294 F.3d 1085, 1088 (9th Cir. 2002).
[111] *PICS*, 294 F.3d at 1088.
[112] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 72 P.3d 151, 153 (Wash. 2003).
[113] *Id.* at 159.
[114] *Id.*
[115] *Id.* at 163.
[116] *Id.* at 166.
[117] *Id.* at 164–65. The Washington Supreme Court maintained that the reading adopted by the court of appeals would render a section of the Washington Civil Rights Act as redundant, that other dictionary definitions of preference are in line with the school district's understanding of the word, and that an informed voter would be aware that "reshuffle" programs do not discriminate (a reshuffle program is a neutral balancing

program, as opposed to a stacked deck program, which grants a person an advantage over a more qualified applicant). *Id.* at 165.
[118] *Id.* at 165.
[119] *Id.* at 166.
[120] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 377 F.3d 949, 953 (9th Cir. 2004), *withdrawn en banc*, 426 F.3d 1162 (9th Cir. 2005). *See supra* text accompanying note 43.
[121] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2751 (2007).
[122] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 137 F. Supp. 2d 1224, 1232, *aff'd en banc*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006), *rev'd*, 127 S. Ct. 2738 (2007).
[123] *Id.*
[124] *Id.*
[125] *PICS*, 377 F.3d at 961.
[126] *Id.* at 963.
[127] *Id.* at 969.
[128] *Id.* at 969 (emphasis added).
[129] *Id.* at 970 (stating that such an "impliably reflexive use of race" cannot be narrowly tailored).
[130] *Id.* at 970 (noting that the application of the tiebreaker "is in fact a *de jure* [policy] or automatic acceptance or rejection based on a[] single 'soft' variable" (citing Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (emphasis and editing by the Court of Appeals))).
[131] *PICS*, 377 F.3d at 970–75 (explaining that the school district had failed to consider a lottery system, had not considered race-neutral factors for admission, and had not considered a plan by the Urban League working group) (emphasis added by the court).
[132] *Id.* at 975 (looking to the school district's decision making in the percent range that a school could be racially imbalanced before the racial tiebreaker was centered and noting that effect on third parties was not measured proportionally to the benefits which would be extruded through the application of the tiebreaker).
[133] *Id.* at 993–96 (Graber, J., dissenting).
[134] *Id.* at 998.
[135] *Id.* at 1005–08.
[136] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 395 F.3d 1168 (9th Cir. 2005).
[137] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 426 F.3d 1162, 1173 n.12 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006), *rev'd*, 127 S. Ct. 2738 (2007).
[138] *Id.* (quoting Johnson v. California, 543 U.S. 499, 505–06 (2005)).
[139] *Id.* at 1174–75.
[140] *Id.* at 1175–76.
[141] *Id.* at 1177.
[142] *Id.* at 1179.
[143] *Compare id.* at 1175–76, *with* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 979 (9th Cir. 2004).

[144] *PICS*, 426 F.3d at 1179 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (emphasis in original)).
[145] *Id.* at 1179; *see* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 480, 487 (1982); Bustop, Inc. v. Bd. of Educ. of Los Angeles, 439 U.S. 1380, 1383 (1978); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971).
[146] *PICS*, 426 F.3d at 1179–80.
[147] *Id.* at 1180 (citing Grutter v. Bollinger*,* 539 U.S. 306, 318 (2003)).
[148] *Id.* at 1180.
[149] *Id.* (citing Smith v. Univ. of Wash., 392 F.3d 367, 373 (9th Cir. 2004)).
[150] *Id.* at 1181.
[151] *Id.* at 1182–83.
[152] *Id.* at 1183 (citing Comfort v. Lynn Sch. Comm., 418 F.3d 1, 18 (1st Cir. 2005); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000)).
[153] *Id.* at 1184.
[154] *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 318 (2003)).
[155] *Id.* at 1184–85.
[156] *Id.* at 1185–86.
[157] *Id.* at 1186.
[158] *Id.* at 1187.
[159] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 377 F.3d 949, 970–75 (9th Cir. 2004) (explaining that the school district had failed to consider a lottery system, had not considered race-neutral factors for admission, and had not considered a plan by the Urban League working group), *withdrawn en banc*, 426 F.3d 1162 (9th Cir. 2005).
[160] *PICS*, 426 F.3d at 1188–91.
[161] *Id.* at 1188–89.
[162] *Id.* at 1189. It should be noted that under a neighborhood model, a student would remain in his or her current neighborhood. Thus, any segregation within housing patterns would not be ameliorated, but perpetuated.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 1190.
[166] *Id.* at 1189–90.
[167] *Id.* at 1190.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 1190–91 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
[171] *Id.* at 1191 (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 72 P.3d 151, 160 (2003)).
[172] *PICS*, 426 F.3d at 1191 (citing *PICS*, 72 P.3d at 159).
[173] *Id.* (citing Bazemore v. Friday, 478 U.S 385 (1986)).
[174] *Id.* at 1192.

[175] *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).
[176] *Id.*
[177] *Id.* at 1193.
[178] *Id.* at 1200 (Bea, J., dissenting).
[179] *Id.* at 1201.
[180] *See id.* at 1201–02.
[181] *Id.* at 1202–03.
[182] *Id.* at 1202.
[183] *Id.* at 1205–09.
[184] *See id.* at 1209–10.
[185] *Id.* at 1210.
[186] *Id.* at 1212–13.
[187] *Id.* at 1214 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).
[188] *Id.* at 1216 (Bea, J., dissenting).
[189] *Id.* at 1218 (quoting *Grutter*, 539 U.S. at 342).
[190] *Id.* at 1179 (majority opinion) ("[T]he District's interests in obtaining the educational and social benefits of racial diversity in secondary education...[is] clearly compelling.").
[191] *See generally id.* at 1202–04 (Bea, J., dissenting).
[192] *Id.* at 1213 (quoting *Grutter*, 539 U.S. at 270).
[193] *Grutter*, 539 U.S. at 335 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989)).
[194] For instance, in the school district of Big Sandy, Montana, students were subjected to two hours of bus transportation per day on average. Interview with Laura Edwards, former high school student of Big Sandy, Montana (Nov. 15, 2006). One 2005 report shows that such commute times are not at all uncommon for students; thus, they cannot be considered unduly burdensome. DENNIS PURCELL & REXANNA SHACKELFORD, AN EVALUATION OF THE IMPACT OF RURAL SCHOOL CONSOLIDATION: WHAT CHALLENGES MAY A NEW ROUND OF RURAL SCHOOL CONSOLIDATIONS HAVE ON THE *SAFETY, EDUCATIONAL PERFORMANCE AND SOCIAL ENVIRONMENT* OF RURAL COMMUNITIES? (2005), *available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/90/90.pdf*.
[195] Google transit instructions from Ballard High School to Ingraham High School, with an arrival time of 7:45 a.m., Google Transit, http://www.google.com/transit (last visited Mar. 20, 2008). Unfortunately, no information is available as to what the students' commute times would have been in 2001 had they been able to attend Ballard High School, nor was any determination made as to the veracity of the plaintiff's allegations as to commute times. However, given the state of public transportation and bussing in Seattle, it seems highly unlikely that any bus commute would take two hours in one direction.
[196] Twenty-five years was the period in which Justice O'Connor "hoped" that racial preferences would no longer be necessary. *Grutter*, 539 U.S. at 343.
[197] I do not address Justice Thomas's concurrence in this opinion. Suffice it to say that de facto segregation is not segregation at all according to Justice Thomas. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2768 (2007)

(Thomas, J., concurring) ("Resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation.").
[198] *PICS*, 127 S. Ct. at 2746–54, 2759–68 (majority opinion).
[199] Brief for Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2922956, at *15–18.
[200] *PICS*, 127 S. Ct. at 2751 (2007).
[201] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 72 P.3d 151, 166 (2003) ("The School District's open choice plan does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin as meant by law. To the extent the tie breaker is race conscious, it furthers a core mission of public education; to make available an equal, uniform and enriching educational environment to all students within the district.").
[202] *PICS*, 127 S. Ct. at 2751 (emphasis added).
[203] *See generally id*.
[204] Kurlaender & Yun, *supra* note 79, at 116.
[205] This is largely a result of the Court adopting Justice Powell's reasoning that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) (Powell, J., announcing the judgment of the court)). By adopting this reasoning in the *Grutter* opinion, the Court ignores the litany of sociological data that has been developed on white privilege since then. *See* Darren Lenard Hutchison, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 642 (2003) ("Justice Powell's analysis implies a desire to retire the very notions of privilege.").
[206] *See generally* Washington v. Davis, 426 U.S. 229 (2006) (laying out the two-part test for facially neutral laws, which requires a disparate impact and a discriminatory purpose).
[207] *See* SUNSTEIN, *supra* note 23, at 150.
[208] *PICS*, 127 S. Ct. at 2752.
[209] *See generally* OLIVER SCHROEDER, JR. & DAVID T. SMITH, DE FACTO SEGREGATION AND CIVIL RIGHTS (1965).
[210] *See generally id.*
[211] *See* KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 207 (2005).
[212] *See* SCHROEDER & SMITH, *supra* note 209, at 56.
[213] *See id.* at 212.
[214] *Id.*
[215] *Id.* at 15.
[216] *Id.*
[217] United States v. Fordice, 505 U.S. 717, 729 (1992) ("We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system."). As I have already demonstrated that the difference between de facto

and de jure segregation does not warrant different treatment, race-neutral action alone is insufficient to remedy de facto segregation as well.

[218] BROWN, *supra* note 211, at 190.

[219] White privilege instead operates as a package of privileges issued not on the basis of individual achievement, but on the basis of race. *See* Stephanie M. Wildman, *supra* note 11, at 246.

[220] Patricia Gurin, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 377, 386 (1999) [hereinafter Gurin Study].

[221] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2756 (2007).

[222] *Id.*

[223] In fact, Justice Breyer points out in his dissent that the white/minority differentiation may in fact be warranted given the racial breakdown and neighborhood patterns of the city. In addition, the city may have simply been following a federally mandated classification system. *See id.* at 2829.

[224] *Id.* at 2758.

[225] *Id.* at 2788 (Kennedy, J., concurring in part).

[226] *Id*. at 2791.

[227] *Id.* at 2792.

[228] Transcript of Oral Argument, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No.05-908), 2006 WL 3486958, at *20–23.

[229] *PICS*, 127 S. Ct. at 2797 (Stevens, J., dissenting).

[230] *Id.* at 2797–98 (internal citations omitted) (alterations by dissent).

[231] *Id.* at 2798–800.

[232] *Id.* at 2800.

[233] *Id.* (Breyer, J., dissenting) ("The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise.").

[234] *Id.* at 2817.

[235] *Id.*

[236] This dual-application of strict scrutiny gives all the more credence to the notion that a more lenient standard needs to be laid out by the Court for application in inclusive uses of race.

[237] *See id.* at 2818.

[238] *See generally id.* at 2811–820.

[239] *Id.* at 2821. In fact, some of the opposing studies cited by Justice Thomas in his concurrence admit that there is evidence linking integration to increased academic achievement. *See id.* at 2824.

[240] *Id.*

[241] *Id.* at 2825.

[242] *Id.*

[243] *Id.* at 2825–26.

[244] *Id.* at 2827.

[245] *Id.* (internal citations omitted).

[246] *Id.* at 2830.

[247] *Id.*
[248] *Id.* at 2831.
[249] *Id.* at 2832–34.
[250] *Id.* at 2837.
[251] W. Triesthof, A Few Interesting Quotations, http://www.cs.sjsu.edu/faculty/khuri/quotations.html (last visited March 22, 2008).
[252] *See* Stephen A. Newman, *Using Shakespeare to Teach Persuasive Advocacy*, 57 J. LEGAL EDUC. 36, 41–42 (2007) (discussing how framing issue statements prepare the reader for argument).
[253] Brief for Respondents, *supra* note 199.
[254] *Id.*
[255] *Id.* at *6 (internal citations omitted).
[256] *See* DELGADO & STEFANCIC, *supra* note 17, at 7.
[257] Brief for Respondents, *supra* note 199, at *19.
[258] *Id.* at *24–37.
[259] *Id.* at *24 ("better teaching and learning for *all* students") (emphasis added); *id.* at *27 ("as a method of ensuring *equal* school and community resources") (emphasis added); *id.* at *28 ("to enrich the lives of *all* students") (emphasis added).
[260] *See* DELGADO & STEFANCIC, *supra* note 17, at 22.
[261] *See* Gurin Study, *supra* note 220, at 389.
[262] The Court largely avoided the argument on compelling state interest, instead deciding on narrowly tailored grounds. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738, 2755 (2007) ("The debate [over whether racial diversity achieves real benefits] is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.").
[263] Miller-El v. Dretke, 545 U.S. 231, 236–37 (2005).
[264] *Id.* at 239.
[265] *Id.* at 239–40.
[266] *Id.* at 242.
[267] *Id.* at 252.
[268] *Id.* at 253.
[269] *Id.*
[270] *Id.* at 254–55.
[271] *Id.* at 254 (quoting Miller-El v. Cockrell, 537 U.S. 322, 346 (2003)).
[272] *Id.* at 255–57.
[273] *Id.* at 257 n.15.
[274] *Id.* at 260.
[275] *Id.* at 266.