Solving the *Parents Involved* Paradox

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The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[1] (*Parents Involved*) presents the seeming paradox that the Constitution can on one day require a school district to take drastic measures, including busing students across a giant school district to increase racial integration in schools, and then prohibit school districts from taking even the mildest measures, such as using race as a tie-breaker in making student assignments, on the next. How, a rational observer must wonder, can this be possible? The answer is that, as usual in the making of "constitutional law," the Constitution has nothing to do with it. It is the entirely logical, though paradoxical, result of a long-established irrational and deceptive system of lawmaking by the Supreme Court on the subject of race and the schools.[2] Because the requirement of integration was falsely and illogically justified as only a remedy for segregation, opponents of compulsory integration can find the requirement inapplicable in any given case by simply pointing out that there is no segregation to be remedied, as they did in *Parents Involved.*

I. THE *BROWN* DECISION

The explanation begins with the Supreme Court's 1954 decision in *Brown v. Board of Education* prohibiting school racial segregation and the assignment of students to different schools on the basis of race.[3] It soon became clear that *Brown* actually prohibited all segregation and official racial discrimination, including segregation of beaches, golf

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1. 127 S. Ct. 2738 (2007).

2. For a full discussion, see LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (Cornell UP 1976).

3. Brown v. Board of Educ., 347 U.S. 483 (1954).

courses, and buses, even though they have nothing to do with education.[4] The Court could not and did not try to enforce *Brown* as to school segregation,[5] however, because the states of the Deep South had the option of making the holding a nullity or worse by simply closing their public schools.[6] Segregation came to a sudden and complete end ten years later when Congress enacted the 1964 Civil Rights Act authorizing the Department of Justice to sue to enforce *Brown* and providing for the cut-off of federal funds to school districts that failed to end segregation.[7] Congress in effect ratified and made effective its understanding, shared by all, of the principle of *Brown*: a prohibition of all official racial discrimination.

School racial segregation quickly came to an end as a result of the 1964 Act, but racial separation did not. The residential racial separation that existed in all urban areas with large black populations meant that race-neutral neighborhood assignment would result in many predominantly black schools. Therefore, what was in fact an historic achievement soon came to be seen by integration activists as a disappointment.[8] The effect of ending segregation in heavily black school districts (such as those in Washington, D.C., St. Louis, Atlanta, and New Orleans) was not only a failure to end racial separation, but sometimes even to increase it as whites quickly fled the public school systems.[9] It became clear that compliance with *Brown* would not result in the utopia of racially "balanced" schools (*i.e.*, schools with the district's black student population spread out more or less evenly). Therefore, the activists concluded that it

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4. *See* Gayle v. Browder, 352 U.S. 903 (1956) *aff'g* 142 F. Supp. 707 (D.C. Ala. 1956) (buses); Mayor and City Council v. Dawson, 350 U.S. 877 (1955) *aff'g* 220 F.2d 386 (4th Cir. 1955 (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955), *rev'ing* 223 F.2d 93 (5th Cir. 1955) (municipal golf courses).

5. Instead of imposing a simple and obvious requirement that students be assigned to schools without regard to race, the Court put off the question of "remedy" for reargument the following year. Then, in *Brown v. Board of Ed.*, (*Brown II*), 349 U.S. 294 (1955), it again refused to require that segregation be ended at once (at the beginning of the next school year) or within any stated time period, requiring, instead, that it be ended only "as soon as practicable" and "with all deliberate speed." *Id.* at 300–01.

6. *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (laws requiring public education repealed and 1959 order to end segregation met by closing the schools in just one county, which Court held could not be done).

7. Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1971, 2000 a–h (2000)).

8. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc* 380 F.2d 385 (5th Cir. 1967), *cert. denied* 389 U.S. 840 (1967) (non-racial assignment of students to schools does not satisfy the *Brown* requirement).

9. *See* Alexander Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

was time to take drastic action: to move from prohibiting segregation to requiring increased integration, even though this meant requiring rather than prohibiting race discrimination in apparent violation of *Brown.*

II. THE DE JURE–DE FACTO DISTINCTION

In 1968, the Supreme Court, led as usual by Justice Brennan, decided to make this move in *Green v. County School Board.*[10] *Green,* not *Brown,* is the source of our current constitutional law of race discrimination.[11] Although the Court decided to make the move from prohibiting segregation to requiring integration (one of the most daring, ambitious, and ill-conceived in its history), it could not, for many reasons, make it openly. The Court, therefore, denied that it was imposing a requirement of integration for its own sake, applicable to school racial separation everywhere in the nation.[12] The Constitution, the Court has repeatedly reassured the North and West, is not offended by a school district with all-black and all-white schools.[13] It insisted that the requirement was something very different: merely "desegregation," the undoing or "remedying" of the segregation prohibited by *Brown.*[14]

Thus was born out of necessity the *de jure–de facto* distinction[15] that is the essential basis of our current constitutional law of race discrimination, and to understanding *Parents Involved.* The distinction, however, is both dishonest in that the supposed "desegregation" requirement has been limited to undoing *de jure* segregation, and senseless in that the cause of existing school racial separation does not seem related to the benefits expected from compulsory racial mixing.

A. Advantages of De Jure–De Facto

Creating the *de jure–de facto* distinction and insisting that the requirement was not integration as such, but only desegregation, had many

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10. Green v. County Sch. Bd., 391 U.S. 430 (1968).

11. No one argues whether segregation should be permitted, only whether further steps to increase integration should be required or permitted.

12. *See Green,* 391 U.S. at 437 (the argument that the Court is "requiring 'compulsory integration' . . . ignores the thrust of *Brown II.*").

13. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 240 (1976) ("That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.").

14. All the Court was doing, it insisted in *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 5 (1971), for example, was "implementing *Brown I.*"

15. For example, the distinction between racial segregation explicitly required by a law (*de jure*) and racial separation occurring for other reasons simply as a fact (*de facto*).

advantages for the Court. First, this distinction made it appear that the requirement would necessarily be confined to the South, where there had been *de jure* segregation, not to the nation as a whole. It also seemed to mean that the requirement would come to an end once its limited purpose of undoing *de jure* segregation had been achieved. A simple requirement of integration would have applied, of course, to the racially separate schools of the North and West as well as to those of the South; it would have required racial balance, not merely undoing the effects of segregation; and it would have had no time limit. That, however, was hardly politically feasible. The North and West would have joined the South in a nationally-unified protest that would have compelled Congress and the president to intervene.[16] Instead, it seemed the North and West had nothing to fear from this requirement of desegregation, and the South, in the opinion of the North and West at the time, no doubt deserved whatever the good justices were proposing to do to it.

Second, calling the requirement "desegregation" excused the Court from the impossible task of justifying compulsory integration in terms of expected benefits. The Court's answer to the question as to why it was requiring integration was that there was no such requirement; the only requirement was desegregation in compliance with *Brown*.[17]

Third, and closely related to obviating the need to justify compulsory race-mixing, calling the requirement "desegregation" enabled the Court to overcome the huge obstacle apparently presented by *Brown*. Instead of undertaking the further impossible task of having to distinguish or qualify *Brown*'s apparent prohibition of all official racial discrimination, the Court could wrap itself in the protective mantle of *Brown* and claim to actually be enforcing it. No one, of course, could be opposed to enforcing *Brown*.

It is true that "desegregation" would require race discrimination, although the Court never quite put it that way. Such race discrimination would only be required in order to enforce *Brown*'s prohibition of it—a matter of fighting fire with fire. The *de jure–de facto* distinction was so essential as the Court's only justification for permitting or requiring

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16. The threat of interdistrict busing in the Detroit metropolitan area led to segregationist Governor George Wallace of Alabama winning the 1972 Democratic presidential primary in Michigan. *See generally* Anthony Walton, *American Histories: Chasing Dreams and Nightmares; In Making Myths, Betraying Our Past*, N.Y. TIMES, Aug. 5, 2000, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C07E3DF1331F930A15757C0A9669C8B63&sec=&spon=&pagewanted=2.

17. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968).

racial discrimination by school districts that the Court stuck to it even when ordering racial balancing in school districts of the North and West which never had *de jure* segregation. One specific example occurred with Denver's school district in *Keyes v. School Dist. No. 1.*[18] The Court in *Keyes* continued to claim that the requirement was not integration but "desegregation" which required the Court to perform the charade of first purporting to find that Denver's schools were *de jure* segregated.[19] The very liberal school board was found, incredibly, to have racially discriminated in order to segregate, when in fact it had practiced race discrimination only to integrate.[20] A final advantage for the Court of calling the requirement "desegregation" was that it made it appear consistent with the 1964 Civil Rights Act's requirement of "desegregation." In fact, the two requirements were precise opposites, because the Court required race discrimination while the Act forbids it.[21]

B. Disadvantages of De Jure–De Facto

The Court's *de jure–de facto* distinction also had major disadvantages, as noted above. The most significant disadvantage was that the distinction was merely a ruse because the Court did not observe it in what it ordered done. It was not true that race discrimination was being required, as the Court claimed.[22] Each succeeding case after *Green* made it more clear that integration was being ordered for its own sake and could not be justified as only undoing segregation. As Justice Powell pointed out in his concurring opinion in *Keyes*,[23] the busing for racial

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18. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

19. *Id.* at 195–200 ("The only other question" was whether the lower courts erred in failing to find de jure segregation in Denver's "core area.").

20. Denver's "desegregation" troubles were entirely due to its liberal school board's excessive commitment to integration. The board culminated a series of efforts to increase integration with resolutions requiring two-way (whites into black areas as well as blacks into white) cross-district busing. After pro-busing members were promptly voted out of office, the new board rescinded the resolutions before they could be implemented. This, a totally confused federal district judge concluded, converted the formerly constitutional racial separation ("*de facto* segregation") into *de jure* segregation. *See* GRAGLIA, *supra* note 2, at 162–63.

21. Title IV of the 1964 Act defines "desegregation" as "the assignment of students to public schools. . . without regard to their race . . .," and "not . . . the assignment of students to public schools in order to overcome racial imbalance." 42 USC 2000d, § 401(b) (2000).

22. *See Green*, 391 U.S. 430; *see also* Milliken v. Bradley, 418 U.S. 717, 746 (1974) ("But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.")

23. *Keyes*, 413 U.S. at 220–24 (Powell, J., concurring in part, dissenting in part).

balance ordered in *Swann*[24] could not be justified as "desegregation" as the majority of the Court had claimed,[25] because the racial separation that existed in the schools of Charlotte-Mecklenburg, North Carolina in 1971 was not different from the separation that existed in the schools of the North and West. In both areas, the separation was the result of non-racial neighborhood assignments of students in districts with areas of residential racial concentration.[26]

"Desegregation" was obviously a ruse, a cover for a requirement of integration that could not be admitted, and it enabled the Court to claim it was enforcing *Brown.* It could therefore be limited to the South and did not have to be otherwise explained. Even more clearly, the distinction is invalid as a matter of policy because the benefits, if any, and costs of compulsory integration would not seem to depend on the cause of the separation that is being overcome. If compulsory racial integration is sound social policy, it should be sound wherever racial separation exists.

III. PROHIBITING THE USE OF DISCRIMINATION TO INCREASE INTEGRATION

Even though the creation of the *de jure–de facto* distinction to justify a requirement of race discrimination to increase integration was a fraud, there is a certain justice in it being used in *Parents Involved* to prohibit race discrimination for the same purpose. *Parents Involved* can be seen as an example, in the familiar phrase, of chickens coming home to roost. The Court's claim that it permitted (or required) racial discrimination only to "remedy" race discrimination, in compliance with, rather than in violation of, *Brown*'s prohibition, left that permission vulnerable to being withdrawn and the prohibition reinstated by the simple expedient of taking the claim seriously and pointing out that in a given case there was no discrimination to be remedied.

The ease with which the *de jure–de facto* distinction could be used to prohibit, rather than permit or require, race discrimination was first illustrated by the Court's decision in *Milliken* in 1974.[27] Desegregation was required in the overwhelmingly black Detroit school district because

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24. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

25. *See id.* at 27–28 (explaining that "'[r]acially neutral' assignment plans . . . may fail to counteract the continuing effects of past school segregation resulting from the discriminatory location or distortion of school size.").

26. *See Keyes*, 413 U.S. at 222–23 (Powell, J., concurring in part, dissenting in part).

27. Milliken v. Bradley, 418 U.S. 717 (1974). *See also* Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd* 412 U.S. 92 (1973).

de jure segregation was supposedly (although falsely)[28] found there. Desegregation could not be required, however, in a much larger, predominantly white area including Detroit and surrounding school districts because there had been no finding of inter-district *de jure* segregation. A requirement based on a deception could be converted into a prohibition, not by exposing the deception, but by pretending to take it seriously. The result is the worst of both worlds: busing for "racial balance" in majority black urban school districts where majority white schools (the real objective of "desegregation") are not possible, but not in wider areas where they are possible.

This brings us back to *Parents Involved* and the question with which we started: How can a school district be constitutionally required to take steps to increase integration one day and constitutionally prohibited from doing so the next? The answer, we can now see, is simple and unavoidable. As Chief Justice Roberts and Justice Kennedy carefully and repeatedly explained, it is the necessary result of the crucial *de jure–de facto* distinction:

> [O]n the first day, the Louisville school district was required to use race discrimination because it was necessary to remedy *de jure* segregation, but on the second day—after the district was declared "unitary," free of the effects of the past segregation—it was prohibited from using race discrimination because there was no longer any *de jure* segregation to be remedied.[29]

Without *de jure* segregation to remedy, the use of race discrimination in school assignments would be simply for the purpose of seeking racial balance, and that is not only not constitutionally required, but as Justice Powell pointed out in *Regents of University of California v Bakke*,[30] "facially invalid" as "discrimination for its own sake."[31] It is true that in addition to its use as a remedy, race discrimination may be used, *Grutter v. Bollinger* told us, to achieve an overall, many-element diversity in the university context.[32] But that is only because First

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28. *See* GRAGLIA, *supra* note 2, at 204–06 (explaining how the Detroit school board, like Denver's, was actually committed to increasing integration by, for example, holding teacher positions open to be filled only by blacks).

29. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2761 (2007) ("The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations.").

30. 438 U.S. 265 (1978)

31. *Id.* at 307.

32. 539 U.S. 306, 326–29 (2003).

Amendment considerations are involved and achieving many-element diversity on the basis of individual consideration of each applicant is necessary for effective higher education. The *Parents Involved* cases, however, involved only a grade school context and race was the only element of diversity that the schools sought.

While Chief Justice Roberts and Justice Kennedy insisted that the dissenters simply failed to understand the importance of the *de jure–de facto* distinction to the law of race discrimination,[33] the chief difference between the two sides probably lies elsewhere. A cynic might suggest—indeed, at the *Brown* conference Professor Paul Finkelman[34] uncharitably suggested—that the real difference is that only the dissenters are truly committed to the cause of racial equality and therefore willing to uphold any practice or activity supposedly directed to advancing that cause.[35] A more likely explanation is a fundamental difference in views as to the long-term effects in our multiracial society of an official government policy of race discrimination, classifying individuals by race for differing treatment.

The dissenters in *Parents Involved* are surely correct that there is an important difference between official race discrimination meant to segregate and discrimination meant to integrate the races. *Plessy v. Ferguson*[36] failed to see that segregation is necessarily a denial of equal treatment to a minority, if for no other reason than the difference in numbers. Confinement to, say, 13 percent of the population, as in the case of blacks, is not equal to confinement to 87 percent. Differences in wealth and social status between blacks and whites in the American context make the inequality even greater. If political equality is the objective, such discrimination separating the races must, as *Brown* held,[37] be prohibited.

That compulsory segregation is inconsistent with political and social equality is reason to prohibit it in a system that professes equality. However, it does not follow that going beyond a prohibition of race dis-

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33. *Parents*, 127 S. Ct. at 2761 ("'Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.' The dissent elides this distinction between *de jure* and *de facto* segregation[.]") (*quoting* Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)).

34. Professor Paul Finkelman is a professor at Albany Law School. He is a President McKinley Distinguished Professor of Law and Public Policy and Senior Fellow at the Government Law Center. Professor Finkelman participated in the February PICS Symposium with the author.

35. Statement made by Paul Finkelman at the Brown Undone? symposium held at Seattle University School of Law.

36. 163 U.S. 537 (1896).

37. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

crimination to segregate and moving towards a requirement of race discrimination to increase integration is a step in the direction of equality. It is difficult to state useful general principles, but a prohibition of all official race discrimination may be as close to one as we can come. It may be that only a total and near-absolute prohibition of official race discrimination can take on a moral quality similar to "natural law" that may be necessary to make the prohibition effective and secure. As Alexander Bickel and Philip Kurland famously put it:

> For a least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.[38]

In *Adarand Constructors, Inc. v. Pena*,[39] Justices Scalia and Thomas forcefully expressed the view that the long-range consequences of official race discrimination should proscribe its use "despite," in Justice O'Connor's phrase, "the surface appeal of holding 'benign' racial clarifications to a lower standard."[40] Rejecting the use of race preference in government contracting, Scalia stated:

> To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.[41]

Justice Thomas was, if anything, even more forceful. Responding to Justice Stevens' contrary view, he stated:

> I believe that there is a "moral [and] constitutional equivalence," . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.[42]

He then spelled out the basis for the belief in some detail in a statement worth quoting at length:

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38. ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975).

39. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

40. *Id.* (quoting City of Richmond v. J.A, Carson Co., 488 U.S. 469, 492 (1989) (O'Connor plurality opinion)).

41. *Id.* at 239.

42. *Id.* at 240–41.

> Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression," . . . . It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," . . . . But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[43]

The strength of *Brown,* and the reason it led to the 1964 Civil Rights Act, was Congress's understanding that it established an absolute prohibition of official race discrimination.[44] The result was to inculcate, through the educative capacity of law, the ideal that race is unimportant. One enormous advantage was to make legally irrelevant the contentious and divisive question of possible group-wide racial differences. The official use of race discrimination, regardless of its purpose, inculcates the opposite view: that race is so important that government may properly classify and deal with individuals as members of racial groups entitled to differing treatment. The result requires individuals to organize into racial and ethnic groups, as is now universally occurring,[45] to fight for group racial advantage and defend against disadvantage. Acceptance as official government policy of the view that race is important cannot be the road to greater integration; it would seem, rather, a renunciation of hope for an integrated multiracial society.

The *Parents Involved* decision is indeed paradoxical and irrational, but only because all of the Court's compulsory integration decisions be-

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43. *Id.*

44. *See* GRAGLIA, *supra* note 2, at 48 (Congressman Emanuel Celler of New York, floor manager of the bill in the House, stated that the act's prohibition of all official race discrimination "would simply implement the law of the land" as declared in *Brown*).

45. Congress and many state legislatures now consider it necessary and appropriate to organize into a Black Caucus, Hispanic Caucus, and Asian Caucus.

ginning with *Green* are dishonest and irrational. The fraudulence of the *de jure–de facto* distinction that made the move from prohibiting to requiring race discrimination possible also makes possible a return to the prohibition by simply treating the distinction as valid. *Parents Involved* takes the Court that decided *Green* at its word that race discrimination is permissible, consistent with (indeed required by) *Brown*, only when used to remedy segregation. Surely, taking the Court at its word is commendable, even if hypocritical. The result is to limit the use of official race discrimination, which is almost surely a step in the right direction in a multiracial society.

IV. CONCLUSION

Whether overturning results reached in the ordinary political process is a step the Court is justified in taking in our supposed governmental system of representative democracy is a different question. If the Court's intervention is justified, it is not because its decision in *Parents Involved* is mandated by the Constitution. It is not. It can only be because if the Court was authorized to intervene in *Brown*, which no one will deny, to create a constitutional prohibition of all official race discrimination, it must be authorized to continue to intervene to enforce it.