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Calcifying Sorting and Segregating: *Brown* at 60

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Abstract

The 2007 Parents Involved in Community Schools v. Seattle School District No. 1. *Supreme Court 5:4 decision suggests that the Court is divided in its interpretation of* Brown *and its intent in addressing racial segregation. Although* Brown *intended equal educational opportunities through desegregation practices, local attempts to achieve racial balance created microclimates for continued minoritization. The* Parents Involved *decision seems to have impacted Seattle's implementation of the Individuals with Disabilities Education Act (IDEA), suggesting seepage between limits on* Brown *and increasing disproportionality. Additionally, local school and housing policies collude with cultural practice to maintain a social and political order that continues to disadvantage students who belong to minoritized groups segmented by race, ethnicity, immigrant status, and language, often cloaked as a response to disability.*

Policy has the potential to be one of the most important tools for leveling the playing field for historically minoritized people. It is also double-edged. It can and, we argue, has been used recently to reverse the promise of *Brown.* We use the term "minoritized" throughout this article to recognize the social construction of minority status in contemporary U.S. society. Harper (2012) notes that people are not minoritized in every social context; rather, specific contexts produce minoritization through cultural practice. Social, legal, and financial systems operate in ways that marginalize some groups of people in some common spaces, often ones in which power and privilege accumulate over time, benefitting some groups while damaging others (Artiles, 2014). Policy could be a vehicle to moderate, even transform, these processes. The *Brown* decision is an example. But, in our attempts to improve something, we also create the opportunity for appropriation, and new forms of reproduction cloaked in the rhetoric, not the intent, of the ruling and its subsequent regulation. The Individuals with Disabilities Education Act (IDEA), the federal law that addressed access, opportunity, and the right to learn on behalf of children with disabilities is another example. While paving the way for six million children with disabilities to attend public school, in many ways the act legitimized sorting and categorizing, resulting in the perpetuation of lack of access and opportunity for specific groups of minoritized students.

The research suggests that three important outcomes have occurred for students from minoritized backgrounds who have been educated in racially desegregated environments. Desegregated contexts appear to support higher achievement, measured by test scores, increased educational and occupational aspirations and outcomes, and increased interaction among racially and ethnically diverse groups (Orfield & Lee, 2004). While *Brown* taught us that separate is not equal, schools, school systems, municipalities, and local courts across the

United States spent much of the last 60 years creating policy and regulation that has created a permissive atmosphere with regard to segregation which affects where and with whom students are educated. This persistent retrenchment from desegregation has been explored by a number of scholars (Frankenberg, 2013; Orfield, Frankenberg, Ee, & Kuscera, 2014; Siegal-Hawley, 2013; Thro & Russo, 2009). We argue that the resegregation of schools has an enduring relationship to the increasing tolerance for special education disproportionality as indexed in state-sanctioned disproportionality thresholds (Gibson & Kozleski, 2010). Without vigilance and attention to the mechanisms and cultural practices that promote this leaching between resegregation and disproportionality, our collective capacity to reverse the damage and find suitable remedies is threatened.

In this paper, we review the *Parents Involved in Community Schools v. Seattle School District No. 1*. Supreme Court decision, which ended cross-district admissions policies that included consideration of student racial identities as a criteria for acceptance. The implications of this 5:4 decision are indicative of a divisive political and judicial climate in which the legacy of racism is deeply embedded in how equity and social justice are conceptualized and addressed. Although the intent of *Brown* was to ensure equal educational opportunities through desegregation practices, implementation by local school districts to create racial balance has been contested repeatedly. In *Parents Involved* school board quotas may have become a proxy for racial equality; in the spirit of *Brown*, proximity and access were intended to be the means through which educational benefits and opportunities were afforded and sustained (Kelly, 2012). Attempts to achieve *Brown* have also paralleled increasing disproportionality in special education, since IDEA's inception, in referral, identification, and placement (Artiles, Kozleski, Trent, Osher, & Ortiz, 2010; Sullivan, 2011). For clarification, disproportionality in special education includes both over- and under-representation of a given racial group and the probability of their placement in a specific disability category (Artiles, Rueda, Salazar, & Higareda, 2005; Oswald, Coutinho, Best, & Singh, 1999).

In particular, the role of families in bringing the *Parents Involved* lawsuit mirrors Blanchett's (2009) analysis of the power and privilege that families from dominant cultures exercise to ensure that their children have access to the best possible educational resources and opportunities to learn. This narrative is particularly intriguing because of the central import given to families through IDEA. From the right to fair and impartial testing to participation in decisions regarding disability identification, educational program planning, and the ability to collect attorney fees for successful legal action against school districts, families appear to have a number of bargaining chips that strengthen their voice in decision-making (Shogren & Turnbull, 2014). Yet, as a number of research articles demonstrate, these bargaining advantages appear to work primarily for families from the dominant culture (Harry, 2007; Kozleski et al., 2008). In this paper, we explore the ways in which local school and housing policies, bolstered by the current Supreme Court, collude with cultural practice to maintain a social and political order that continues to disadvantage students who belong to a number of minoritized groups including race, ethnicity, immigrant status, and language, often cloaked as a response to disability.

History

A Brief History of Brown

The most commonly held facts surrounding the *Brown v. Board of Education* (1954) decision are that *de jure* segregation was "inherently unequal" and that the doctrine of "separate but equal" as established in *Plessy v. Ferguson* (1896) had no authority in public spaces, particularly in schools. Not as generally understood, however, are the tensions that underscored this unanimous Supreme Court decision and the way in which these same tensions impact today's understandings of equity and equality under the Fourteenth Amendment's Equal Protection Clause. This section outlines the main underpinnings contributing to these tensions and provides context for the *Parents Involved* (2007) decision.

The *Brown v. Board of Education* case was a consolidation of six separate segregation cases from four states. These cases were first brought to the Supreme Court in 1952 when Chief Justice

Fred Vinson presided. According to several first-hand accounts, the "mood" of the Court under Vinson was negative and several Justices, particularly Justice Felix Frankfurter, were not impressed by Vinson's leadership (Tushnet & Lezin, 1991). Court memos, letters, and transcripts offered compelling evidence that Chief Justice Vinson had little intention of overturning the *Plessy v. Ferguson* decision. Had he not died during the proceedings and been replaced by the more "friendly and unpretentious" (Tushnet & Lezin, 1991, p. 1876) Earl Warren, who was able to unite the Court through conscientious and careful interactions, the outcomes of the *Brown* decision may have been decisively different.

Chief Justice Warren understood that the "separate but equal" doctrine had taken root because of a deep-seated belief in the dominant American culture that the "Negro race [was] inferior" (Conference Notes of Justice William Douglas as cited in Tushnet & Levin, 1991, p. 1991). Warren, along with other Justices, was particularly impacted by testimonies provided by the defense in the *Brown* proceedings that focused on "inferior" public school facilities and curriculum for Black students. Thurgood Marshall and the NAACP Legal Defense and Education Fund, speaking for the plaintiffs, argued that inadequate resources violated the Equal Protection Clause under the Fourteenth Amendment to the U.S. Constitution. Equally compelling were data presented by social scientists demonstrating that segregated school systems contributed to feelings of inferiority among Black students. Under Warren, the spirit of *Brown* encapsulated the urgent cry for States not to "deprive the children of the minority group of equal educational opportunities" (*Brown I,* 347 U.S. at 493) and to acknowledge that a productive life meant having access to a quality education (*Brown I,* 347 U.S. at 493).

Equal educational opportunities had specific meaning and interpretation in the Equal Protection Clause, distinguishing between equitable and equal treatment. According to McLaughlin (2010) "equity is not the same as equality … equitable treatment in education may conflict with what constitutes equality depending on the particular interpretations as well as how we choose to measure it" (p. 266). Moreover, "Inequity always implies injustice … Persons may be treated unequally but also justly" (Green, 1983, p. 324 as cited in McLaughlin, 2010, p. 266). Chief Justice Warren, who rejected the ideology that Blacks were inferior, believed that the law was a vehicle through which former slaves could be equal (Tushnet & Lezin, 1991). Not only would desegregated schools allow Black students access to an *equal* education, but the larger hope was to create *equity* for a population who had been humiliated and "significantly disadvantaged by the laws of the states" (Bell, 1980, p. 522).

The Supreme Court Justices also deliberated about overturning *Plessy* based on whether the framers of the U.S. Constitution's Fourteenth Amendment had intended to prohibit segregation. No conclusive evidence was found, but the Justices concluded the framers had aimed to open a space through which future generations could interpret segregative practices through governmental legislation or judicial review (Tushnet & Lezin, 1991). These conversations led to detailed examination of how to desegregate public schools with "all deliberate speed" while taking into consideration states, especially in the South, that would be resistant, even defiant.

Options for the implementation of desegregation resulted in postponement of a Supreme Court ruling on the "question of relief" for how a prompt and reasonable start toward full compliance of the *Brown I* ruling was to be undertaken (*Brown II,* 349 U.S. 294, 299; 1955). A noteworthy consideration made by the Court was to provide parties and *amici curie* ("friends of the court") time to gather information about whether or not Black children should be admitted to the schools of their choice or if the Court should "permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions" (*Brown I,* 347 U.S. at 495 n. 13). As pointed out by several scholars, at this point in the deliberations of the *Brown I* ruling, the Court could have been more visionary and far-reaching in its articulation of an affirmative standard for creating and maintaining integration based on equitable and diverse measures (Pitre, 2009; Smith & Kozleski, 2005). It also could have established more explicit standards for what was meant by "all deliberate speed." Although the intention was to procure integration at a realistic and practical pace, especially

for communities who had been historically segregated, future interpretations of this language would prove problematic for district courts to implement desegregation decrees with positive outcomes for students of color in mind (Kelly, 2012). Instead of tackling these issues systematically themselves, under *Brown II* (1955), the Supreme Court justices ultimately shifted the decision-making power for integration to those who had more "proximity" to local concerns. *Brown II* authorized lower courts to generate specific solutions appropriate in each desegregation case under *Brown I* to assist in the integration of Black and White students.

Clotfelter (2004) concludes that four factors contributed to the disappointing effects of the *Brown* decision: (a) the tendency for Whites to avoid racially mixed schools, particularly when the percentage of non-Whites was large; (b) the number of avenues of avoidance available to White families, including private and suburban schools, academic tracking, and the segregation of extracurricular activities; (c) the accommodation of White flight and segregation by state and local governments, particularly local school officials; and (d) subsequent court decisions, like the *Milliken* decision in 1974 to limit the geography of integration efforts. Access to high quality education among a peer group that is also similarly aspirational accumulates as families develop social and economic capital that transfers across generations. This social capital extends to highly calibrated timing for when, how, and where to provide social and economic resources that families use to advance their children from infancy on through the neighborhoods and school networks their children access (Garcia & Yosso, 2013; Orfield, Frankenburg, Ee, & Kuscera, 2014).

A Brief History of IDEA and Its Intersection with Brown

The Equal Protection Clause of the Fourteenth Amendment was invaluable to our collective understanding of an American's fundamental rights. Under this amendment States could not deny equal protection of the laws to any person within their jurisdiction (U.S. Const. Amend. XIV, § 1). Under *Brown*, Thurgood Marshall, representing the plaintiffs, invoked the Equal Protection Clause by arguing that separate school systems for Blacks and Whites were inherently unequal. In other words, the Equal Protection Clause had been violated through the practice of segregation and, thus, was unconstitutional. Marshall's argument focused on the issue of *equality* under the Fourteenth Amendment, more so than *equity.* Even though the precedent established with the "separate is inherently unequal" doctrine had extensive implications for students of color who had been historically segregated and, later, for students with disabilities, it did not account for the right to an *equitable* education. According to Bell (1980), until Blacks' interests were willingly accepted by Whites, equality, not to mention equity, would continue to be obstructed to secure the status quo or "the superior societal status of middle and upper class whites" (p. 523). Had Blacks in *Brown* been afforded *equity* as well as *equality* under the Equal Protection Clause then the *Brown* decision would have "reckon[ed] with [America's] racism" (Kennedy, 2014, p. 3064). It would have not only accounted for the suffering Black people experienced at the hand of Whites, but also implemented formalized and systemic protections ensuring sustained equitable treatment and opportunities for disadvantaged populations.

Instead, *Brown* prohibited racial segregation in public education to guarantee *equality.* In other words, *Brown* intended for all children participating in K-12 schools to receive a quality education with the understanding that, to attain this, race would need to be considered if integration in schools was to be achieved (*Brown I,* 347 U.S. at 493). For many children with disabilities, however, *Brown* was not enough. Their ability to participate in American public schools was limited or nonexistent. The *Brown* decision paved the way for these students and their families to advocate for students' access to free and appropriate education and services in public schools. Specifically, families in the *Pennsylvania Association for Retarded Children (PARC) v. The Commonwealth of Pennsylvania* (1972) case were able to successfully argue that the provisions in Pennsylvania state law excluding children with intellectual disabilities from attending public schools violated the foundational statutes of *Brown* (Smith & Tyler, 2009).

The *PARC* case along with the *Mills v. the District of Columbia* (1973) ruling – which extended the provisions of PARC to all students with disabilities – directly led to the passage of the Education for All Handicapped Children's Act (1975), which is now the Individuals with Disabilities Education Act (IDEA) (Blanchett, 2009).

While IDEA established the right to a free and public education for children with disabilities, it also introduced a number of stipulations that have, over time, become tools of segregation through which children from minoritized populations were (a) identified as having educational disabilities as opposed to having lacked adequate opportunity to learn (Artiles et al, 2010); (b) placed in more segregated settings than their White counterparts (Harry & Klingner, 2014); and/or (c) subjected them to discipline at higher rates than their White peers (Skiba et al., 2014).

Responding to Brown in Seattle

As states and local school districts nationwide began to implement and enforce desegregation mandates with "all deliberate speed" there was great variability to how this was achieved. For states that were slow to desegregate, especially Southern states, incentives for implementation did not manifest until President Lyndon Johnson passed the Civil Rights Act of 1964, specifically Title V1. Title VI "prohibited discrimination on the basis of race, color, and national origin in programs and activities receiving federal assistance" (U.S. Department of Justice). Title VI incentivized swift and comprehensive desegregation for states that wanted to keep federal dollars and avoid a federal lawsuit for remaining segregated. By the 1970s, Southern schools were the most integrated (Orfield et al., 2014).

Seattle, Washington was no stranger to segregationist practices. Before the *Brown* decision and through the 1960s, people of color – particularly African Americans, Native Americans, Asian Americans, Pacific Islanders, Mexican and Mexican Americans, and Jewish people – were excluded from public institutions and establishments including schools and hospitals (Seattle Civil Rights & Labor History Project, n.d.). Racial restrictive covenants that enforced neighborhood segregation in Seattle through property deeds barring the sale or rental of homes and properties to non-Whites and people of Jewish descent were widespread (Silva, 2009). In spite of the Supreme Court ruling in 1948 in *Shelley v. Kramer* which, under the Fourteenth Amendment, prohibited a state from enforcing restrictive covenants that would prohibit a person from owning or occupying property based on race or color, the practice of using these covenants was generally unchecked (Seidman, 2002). Consequently, non-Whites and Jewish residents were pushed into "open neighborhoods" in Seattle including the Central District and Chinatown (Silva, 2009). Although the 1948 ruling deflated efforts to maintain strict covenant boundaries, their impact on where racially non-dominant groups resided and earned their living was long-lasting.

Discriminatory real estate practices that restricted non-White families' mobility into dominant White neighborhoods also created segregated schools *de facto.* Although community members and civil rights organizations made various attempts to desegregate neighborhoods by challenging housing restrictions, many of their efforts afforded minimal change to the overall housing infrastructure and policies. Consequently, families were generally limited to sending their children to segregated neighborhood schools. To combat segregation and to create more integrated schools, the Seattle School District (SSD) turned to a voluntary racial transfer program in 1963. At its peak in 1969-1970, approximately 2600 students participated representing 3% of all district students. Of these 2600 students, 2200 participants were Black (Seattle schools and race: A history, 2008; Shaw, 2008a). Unfortunately, the program was considered a failure because it resulted in minimal integration of students of color into North End (White-dominant) schools and even less movement of White students into South End (racially minoritized) schools (Tate, 2002).

The transfer program was eventually phased out and a district busing plan was introduced. Known as the Seattle Plan, its main undertaking was to desegregate Seattle District schools by requiring "the busing of both white and black students to new schools created by the merger of previously

distinct 'white' and 'black' neighborhood schools" (Kelly, 2012, p. 828). In 1978, SSD's mandatory busing impacted approximately 12,000 of 54,000 students. Through this busing plan, Seattle became the largest metropolitan city in the United States to voluntarily adopt mandatory busing to desegregate their district (Tate, 2002). After three years of implementation, SSD achieved "racial balance" based on a predetermined number of percentage points that considered the deviation between racial demographics of the student body and the total student population. Despite carefully planned efforts by SSD for fairness, this "balance" was mainly achieved through disproportionate numbers of non-White students riding the buses. It did not necessarily reflect actual numbers of White students who lived in the district before the Seattle plan was enacted. In fact, enrollment of White students in the SSD dropped significantly as a result of "White flight" out of the city and into outlying suburbs after integration policies were enforced. To further compound matters, "integrated" schools continued segregationist practices in the cafeteria, playground, and classrooms, further isolating students of color from their White peers (Shaw, 2008). It was not clear how segregation was produced. Possible explanations include the role of school administration and staff consciously or unconsciously separating students by race, ethnicity, or other arbitrary classifications or if students, through their own agency, segregated themselves for reasons of solidarity, familiarity, or protection (Ramiah, Schmid, Hewstone, & Floe, 2014; Tatum, 2003). Clotfelter (2004) described how local administrators in the South participated in maintaining the status quo in their responses to unhappy families; it is unclear the degree to which this explains the Seattle story.

Shortly after the Seattle Plan was in effect, backlash against the District's mandatory busing policies ensued. A statewide initiative (Initiative 350) was drafted and adopted in 1978. The Initiative placed decision-making power over busing in State control. It also dismantled mandatory busing for the purposes of racial integration and replaced it with a tepidly received busing policy that provided voluntary busing options. Initiative 350 prohibited school boards to require students to attend schools other than those in closest proximity to their homes. The initiative further outlined exceptions for mandatory busing including student assignments beyond their neighborhoods if special education services were needed (*Washington, et al., Appellants v. Seattle School District No. 1*).

In 1982, under *Washington, et al., Appellants v. Seattle School District No. 1*, the SSD along with two others challenged the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment on the ground that the Initiative permitted mandatory busing for non-racial reasons (e.g., for special education student placement, overcrowded schools) but not for racial reasons (e.g., racial integration). In essence, almost every type of busing was allowable except for busing that aimed to increase racial integration. Because mandatory busing as a means to achieve racial integration had been singled out, the Initiative had established an "impermissible racial classification" which violated the Equal Protection Clause as described in previous Supreme Court decisions (i.e., *Hunter v. Erickson,* 1969; *Lee v. Nyquist,* 1970). Layered in complexity, the case held that Initiative 350 violated the Equal Protection Clause when it apportioned decision-making power to the State government to determine what programs would appropriately meet SSD's educational needs. Because the Initiative did "not attempt to allocate governmental power on the basis of any general principle (…) but instead use[d] the racial nature of an issue to define the governmental decision-making structure (…) it impos[ed] substantial and unique burdens on racial minorities" (*Washington, et al., Appellants v. Seattle School District No. 1).* Furthermore, because the Initiative gave the State power over desegregative busing it "differentiate[d] between the treatment of problems involving racial matters and that afforded other problems in the same area" (*Washington, et al., Appellants v. Seattle School District No. 1).* In the end the Supreme Court, under Chief Justice Burger, voted 5:4, in favor of the Seattle School District.

The full implications of this court decision were unrealized because of court decisions elsewhere. In the same year a different case, *Crawford v. Board of Education of Los Angeles,* was brought to the Supreme Court that essentially overruled *Washington v. SSD No. 1* (*Washington v. Seattle*

School District – Impact). In the *Crawford* case the Court held that states had the right to amend their constitutions to prohibit mandatory busing as a means to address *de facto* racial segregation (*Crawford v. Los Angeles Board of Education,* 458 U.S. 527, 1982). While the Crawford Decision would impact policy in Seattle, already, backlash against school integration was significant. After implementation of mandatory busing under the Seattle Plan, White student enrollment plummeted by 28 percent during the first three years of its implementation leading to several school closures (Shaw, 2008b; Seattle schools and race: A history, 2008). As White students moved out of the SSD or enrolled in private schools, racial minority enrollment in the early 1980s increased by approximately 10 percent (Shaw, 2008a). Longitudinal data demonstrate similar trends. SSD's enrollment from 1970 to 2008 dropped by approximately 50 percent – from 85, 000 to 45,000 students, while the non-White racial minority population enrollment soared from approximately 20 percent to 58 percent. White flight and the choice of privileged White families to send their children to private schools within the city of Seattle were factors contributing to these enrollment trends (Judge, n.d.; Shaw, 2008a)

In the late 1980s and early 1990s, Seattle reattempted to create a successful busing plan to racially integrate its schools. The purpose was to meet the SSD's integration guidelines which stipulated that schools could not have more than a 70 percent minority or have more than 50 percent of a single minority (Dietrich, 2009). Named a "Controlled Choice" plan, the underlying premise was to lure students across town to magnet schools specializing in areas such as the performing arts or aircraft industry. This plan allowed families to rank their preferred schools. It also prioritized race as a factor in deciding which students attended specific schools as a means to racially integrate the student body population ("How the racial-tiebreaker case began," 2007). Initially, there were logistical challenges impeding smooth facilitation of the plan such as registration complications and considerably lengthy bus routes. Overall, however, Seattle's community was satisfied that mandatory busing assignments had been reduced from 50 percent under the Seattle Plan to 13 percent under the Controlled Choice plan.

In the 1997-1998 academic year the SSD ended busing for the purpose of desegregation and, instead, adopted racial-tiebreakers or "integration tiebreakers." Referred to as a "universal assignment rule" the purpose was to allow more students to attend neighborhood schools with less cross-town busing by providing busing to students' home cluster – known as "cluster zones" consisting of a contiguous group of schools inclusive of a student's neighborhood school (Holly-Walker, 2010; Lilly, 1997) At first, tiebreakers were used in elementary, middle, and high schools among nine cluster zones established. Then, they became used solely at the high school level as a means to assign students to schools when schools had more applicants than available seats. Priority was given first to students with siblings in the same school, then to students whose racial background would contribute to the school's overall racial balance, and finally to students whose residence was in closest proximity to the school (Kelly, 2012). The use of racial-tiebreakers as a determinant for school enrollment was contested in 2000 when a Seattle parent sued the SSD for placing her White daughter in her fourth-ranked high school. This parent, Kathleen Brose, and her daughter had ranked Ballard first. It was a newly rebuilt school with 13 acres of land that overlooked the city. Instead, her daughter was assigned to Franklin, a high school Brose described as a "heavily black school with lower test scores" ("Supreme Court Revisits Race in Public Schools," 2008). Soon afterwards, Brose formed *Parents Involved in Community Schools* (*PICS*), the nonprofit corporation that successfully challenged SSD at the Supreme Court.

A Major Setback

Advocates of desegregationist practices and policies believed *Parents Involved in Community Schools v. The Seattle School District No. 1* was a significant setback for racially non-dominant students. In this section we examine the thinking behind legal precedents that have progressively marginalized students from non-dominant backgrounds and prevented many students the opportunity for a quality educational experience. The heart of the issue, according to Justice Steven Breyer in

his dissenting opinion in *Parents Involved*, involves both the interpretation of the Fourteenth Amendment, the *Equal Protection Clause* as applied to desegregation, and how the Supreme Court understood principles of Federalism as related to who should be afforded power to make public school decisions (Breyer, 2010). Key legal decisions impacting desegregation decrees leading up to and including *Parents Involved* and an integrated analysis of Breyer's viewpoints as well as Chief Justice Robert's,representing the plurality, are presented.

The previous section that discussed Seattle's busing and other solutions for racial integration concluded with a sketch of circumstances that led to the 2007 court case *Parents Involved v. Seattle School District No. 1.* To continue this narrative, it is important to reiterate the main tensions of this case, which were a consolidation of two desegregation cases – one involving public schools of all grade levels in Louisville, Kentucky and the other involving secondary schools in Seattle. Underlying both cases was the fundamental question of whether or not it was constitutional, under the Equal Protection Clause, to "allocate[e] children to different public schools based solely on their race" (*Parents Involved,* 551 U.S. 701).

McFarland v. Jefferson County Public Schools

The Louisville case, *McFarland v. Jefferson County Public Schools* (2004), involved parents who contested Jefferson County's Board of Education's race-conscious student assignment plans in which students were classified as Black or "other" "in order to make certain elementary school assignments and to rule on transfer requests" (*Parents Involved,* 551 U.S. 701). These assignment plans were instituted voluntarily by the Jefferson County School District (JCSD) after 2000 when the District Court had found JCSD in compliance with desegregation decrees that had successfully eliminated segregation "to the greatest extent possible."

Noteworthy was the fact that Jefferson County had an unconstitutional *de jure* segregated school system and had been under a desegregation order for decades before reaching unitary status. Unitary status was given to school districts that had taken all necessary steps to achieve desegregation under a legal standard comprised of several court decisions in which they demonstrated a "good-faith commitment" *(Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237, 248-50 – 1991) to "disestablish (…) the dual system and its effects" (*Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 537-38 – 1979). Furthermore, unitary status was generally granted if a school district had met six compliance factors delineated by *Green v. County School Board of Education of New Kent County* (1968) including school assignment, faculty, staff, transportation, extracurricular activities and facilities (Holley-Walker, 2010). So when JCSD voluntarily issued a school assignment plan for the purpose of desegregation, the Sixth Circuit,on appeal of upholding this plan, validated its constitutionality in *McFarland ex rel. McFarland v. Jefferson County Public Schools* (2005). The court had stated the school assignment plan was constitutionally-sound because of its narrowly tailored racial guidelines that ensured successful racial integration through the compelling governmental interest of maintaining a minority presence in schools (Thro & Russo, 2009).

PICS v. SSD (2007)

In contrast to the JCSD, the Seattle School District had never "operated legally segregated schools or been subject to court-ordered desegregation" (*Parents Involved,* 551 U.S. 701 at 511). Justice Breyer (2010) recognized that the SSD took on the challenge of integrating their schools voluntarily by devising complex school choice plans designed to create attractive options for White students and their families who had fled to suburbs and private schools within the city. However, regardless of the intent behind their school assignment plans the SSD also had to contend with other constraints that undermined the success of their integration efforts, including zoning policies that led to segregated neighborhoods and parents whose individualized interests were antithetical to the achievement of racial balance such as the families that comprised *PICS*.

In *Parents Involved* the use of racial tiebreakers as one determinant of high school admission at oversubscribed schools was challenged. *PICS*

and their advocates alleged that the SSD's open choice assignment plan violated the Equal Protection Clause by allowing the criterion of race to be a screening tool used to determine student placement. In the initial round of litigation the District Court found, and the Ninth Circuit later affirmed, the SSD's school assignments constitutional because they were "narrowly tailored to serve a compelling government interest" (*Parents Involved,* 551 U.S. 701 at 512). However, when the case reached the Supreme Court, the Justices,who were divided almost equally on the constitutionality of using race-conscious criteria to determine students' school placements, questioned one another's positions heatedly.

Principles of federalism. At the core of *Parents Involved* was compelling debate over the application of the Equal Protection Clause and principles of federalism. As conceptualized by Justice Steven Breyer (2010) in a chapter titled *The States and Federalism,* he explained his understanding of constitutional federalism as the power "the people" control that is not delegated by the Constitution. By this argument, he contended that more power should be placed in the hands of local communities who have a vested interest in and understanding of local issues. With this mindset, dissenters –including Breyer –of *Parents Involved* consistently argued for the Court to give deference to the local school boards in Seattle and Louisville because of their comprehensive understanding of the complexities involved in racially integrating their schools. Assenters of *Parents Involved* believed that delegation of how schools should promote racial integration should be decided at the State level placing the burden on States to "demonstrate that their race-based policies are justified" (*Parents Involved,* 551 U.S. 701 at 539).

During the Court proceedings Chief Justice Roberts distinguished between *de jure* State segregation practices under Jim Crow and racial imbalance as a result of other factors, namely an individual's private choice to live in a segregated community. One legal precedent Roberts invoked as presented through *Freeman v. Pitts* (1992) was that once a school system achieved unitary status as defined in *Green v. New Kent County School Board* (1968) they were not accountable for any subsequent racial imbalance created by independent demographic changes connected through residential housing choices (*Parents Involved,* 551 U.S. 701 at 543). This legal precedent, applied to the SSD, meant that even though the SSD never was assigned unitary status because of their historically pro-active approaches to racial integration, they were also not responsible for an imbalanced racial composition in their schools due to changing patterns in demographics.

This argument presented by Chief Justice Roberts directly opposed Justice Breyer's fundamental beliefs about the power that local school districts should exert if a compelling governmental interest, such as racial integration and diversity, were threatened. Breyer asserted that underlying this compelling governmental interest was another – "maintaining hard-won gains" to further prevent resegregation by *de facto* and to right past intentional discrimination wrongs *(Parents Involved,* 551 U.S. at 838 Breyer, J. dissenting). Breyer further cautioned the Court that if local school districts did not have "a significant degree of leeway where the inclusive use of race-conscious criteria" was applied and if State action did not enforce desegregative practices, residential and school resegregation was an eminent possibility *(Parents Involved,* 551 U.S. at 2836 Breyer, J. dissenting).

Equal Protection Clause. The Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution, Amendment XIV, Section 1 states: "nor shall any state … deny to any person within its jurisdiction the equal protection of laws" (U.S. Const. amend. XIV, § 2). In its intent, the Equal Protection Clause provides "equal application" of the laws to individuals. It is critical to the protection of civil rights, for, under this Amendment, States cannot discriminate and the laws of a state must provide equal treatment of individuals under similar conditions and circumstances (Seidman, 2002). Over time, however, how the Equal Protection Clause has been applied to legal decisions involving racially non-dominant groups, specifically Blacks, has fluctuated between "a group-based antisubordination model to an individual-based anticlassifcation model" (Ross II, 2013, p. 1619). For example, under *Brown I* the Equal Protection Clause protected groups of people who had

been historically discriminated against through "separate but equal" legislation but, under *Parents Involved,* it protected individuals' personal rights without taking into account any membership or affiliation they had with a particular group.

To determine the constitutionality of certain laws, "strict scrutiny" is used as a form of judicial review and is passed only if "a compelling governmental interest" that has been narrowly tailored to achieve that interest has been argued successfully (Seidman, 2002). There is a three-tiered approach to determine levels of scrutiny. For "strict scrutiny" the government must demonstrate that the "challenged classification serves a *compelling* state interest and that the classification is necessary to serve that interest" (Levels of scrutiny under the equal protection clause, n.d.). For middle-tier or intermediate scrutiny the challenged classification serves an important state interest and the classification is "at least substantially related to serve that interest." In minimum or rational basis scrutiny, the government "need only show that the challenged classification is rationally related to serving a legitimate state interest." Although there are many classifications that fall under each of these three tiers, for the purposes of this paper, it is important to understand that *race* is a "suspect classification" that receives strict scrutiny under the Equal Protection Clause and *disability* is a classification that generally requires minimum scrutiny.

In *Parents Involved*, Supreme Court dissenters, including Breyer, argued that the Seattle School District survived strict scrutiny to determine the constitutionality of using race-based criteria to achieve integration, a compelling governmental interest, because the SSD's school assignment plan was narrowly tailored to serve that interest *(Parents Involved,* 551 U.S. at 2762 Breyer, J. dissenting). He also argued that the cases being heard under *Parents Involved* should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word" and be replaced by a more "lenient," but carefully examined process through which the use of race-conscious criteria could be considered in proportion to the end it served (*Parents Involved,* 551 U.S.701 at 744). For Breyer, "lenient" meant that race – as a classification – should be analyzed with less strict scrutiny since, in his view, the racial classification system used in school assignments would consciously address racial integration, thus addressing the state interest of increasing racial diversity in schools. Breyer (2010) explained,

> We argued that the Fourteenth Amendment applies more strictly when a race-based distinction thwarts its basic purpose – when it puts racial minorities at a disadvantage – than when a race-based distinction seeks to further that basic purpose by, for example, seeking increased racial diversity (p. 135).

In response the assenters argued that,

> Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny (*Parents Involved*, 551 U.S. 701).

Chief Justice Roberts further argued that the school districts in *Parents Involved* failed to demonstrate that their "narrowly tailored" school assignment programs achieved the "compelling interest" of "racial balance." In his view, there was insufficient evidence of the school districts' "operation of plans," of the number of students impacted by school assignments, and of "race-neutral alternatives"(*Parents Involved,* 551 U.S. 701 at 2766). Additionally, Roberts did not believe that "race-conscious remedies" applied in this case since the SSD had never been segregated by law and the JCSD had achieved unitary status. Ultimately, the assenter majority saw no basis for the continuation of using racial classifications for the purpose of racial integration (*Parents Involved,* 551 U.S. 701 at 737, 534).

Implications for Students of Color. As a result of the *Parents Involved* decision*,* race-conscious criteria could not be used to assign students to schools for integration purposes. Consequently, school districts, nationwide, began seeking race-neutral alternatives including socioeconomic approaches that considered parents' education, occupation, and family income; percentage rank plans,such as Florida's Talented 20 program that guaranteed state university admission to public high school seniors who graduated within the top 20 percent of their class; and lottery methods, such as the Ford Academy in Dearborn, Michigan that randomly

selected their students (U.S. Department of Education, 2004). One intention of these alternative approaches was to decrease the achievement gap by ensuring all students received a quality education. Holding schools accountable to high standards and student performance outcomes was the response to the achievement gap, although, as the research suggests, the accountability agenda has done little to decrease the achievement gap (Artiles & Kozleski, in review; Lipman 2011; Nation's Report Card, 2012). The theory was that schools would be incentivized to provide excellence by creating high-quality neighborhood schools through which students could attain a rigorous educational experience regardless of where the school was located or who attended.

The current predicament for many school districts nationwide, with or without unitary status, is how to create and maintain racially integrated schools when the law favors individuals' rights under the Equal Protection Clause and does not account for the extent to which White flight and segregated housing practices contribute to resegregated communities and schools even though those possibilities were acknowledged by the original crafters of the *Brown* decision.

Disproportionality in the Seattle Public Schools

One of the purposes of analyzing the impact of the *Parents Involved* decision is to examine the consequences that this decision has had on local educational culture and practice. Of particular interest is the significance this decision has had on students of color, particularly those receiving special education services. The concern is that this student population will be marginalized to an even greater extent since local school districts and state governmental agencies are no longer required to enforce racial integration through classification systems that target race. This concern is bolstered by data that demonstrate that certain geographical regions nationwide, particularly large metropolitan areas, are incrementally becoming more segregated leading to increased school resegregation (Frankenberg, 2013; Reardon & Yun, 2005; Siegal-Hawley, 2013). One of the major concerns for students of color and for students of color with disabilities is that segregated schools that have high concentrations of minority students often "suffer from inadequate facilities, a general lack of resources, and an underdeveloped instruction" (Pitre, 2009, p. 550). Part of the analysis in this section is to examine data available on the enrollment and distribution of students of color before and after the *Parents Involved* decision from the period between 2005 and 2012.

Disproportionality Flourishes

After the *Parents Involved* decision, the Seattle School District shifted its focus from achieving racial balance to focusing on creating high-quality neighborhood schools in the hope that all students attending these schools would receive an excellent educational experience. In 2008, the district implemented a new assignment plan based on where students lived, not on their race. Each school was structured to have "at least 15 percent and no more than 50 percent of its students from neighborhoods with lower-than-average income and educational attainment, and a higher-than-average minority population" (Shaw, 2008b, June 3). In 2013, SSD redrew its attendance boundaries to accommodate the approximately 10,000 additional students they anticipated would be enrolling in the next decade (Higgins, 2013, September 17). SSD currently maintains an open enrollment system through which they provide students a list of several choice schools, including attendance area schools and/or option schools (e.g., Montessori) in order of preference (Seattle Schools Community Forum, 2014, February 24).

The hope of these open enrollment plans continues to be to provide students with quality options and to maintain an enrollment status that would be racially integrated in spite of indicators demonstrating residential segregation patterns occurring in certain Seattle residential areas mostly due to high- and low-income disparity (Florida, 2014; Fry & Taylor, 2012). As data collected for the purposes of this paper indicated, however, enrollment trends and distribution of race portray a picture of racial imbalance and a continuation of disproportionality that detrimentally impacts students of color. *Brown* offered the opportunity to redress racial segregation through educational access and opportunity but as data from Seattle in 2014 show, 8.2% of the White population

lives below the poverty rate while 27% of African Americans living in the city (along with 22.7% of American Indians and Alaska Natives, 17.6% of Hawaiian and Pacific Islanders, and 11.6% of people reported two or more races) exist below the poverty threshold (United Way of King County, 2014). Almost a quarter of all Latinos in the city report living below the poverty threshold as well.

Graduation rates across the city explain some of the poverty, since between 14 and 34 % of nonwhite groups graduate from high school as compared to a 94% graduation rate for the White population (United Way of King County, 2014). Further, about half of all Asians and White report at least a bachelor's degree while only a fifth of the Black. Hispanic, and American Indian populations report attaining that level of education. For Pacific Islanders, the number are even more dismal: 6.8% report a bachelor's degree or higher. Hunger, school readiness, and low birth rate are all parts of this cycle (United Way of King County, 2014). But, what happens to students in school is also telling. Most of the population of color lives in the south and eastern portions of Seattle and the suspension data show that the highest proportion of suspensions occur in the SE corridor. African-American students are twice as likely to be suspended as their peers. Across the city, students who are African American are more than twice as likely to be identified for special education services (Reduce exclusionary discipline in SE schools, 2014). Access to high quality schools where students from diverse backgrounds can learn from one another, engaged in rigorous curricula from the time that they enter school, is clearly an essential part of the equation. But, lacking policies that allow for this kind of organization of schools, Seattle will continue to struggle with these cycles.

Seattle's disproportionality data make a compelling case that the *Parents Involved* case shifted the proportion of students who identify as African-American (AA), Hispanic (H), and American Indian/ Alaska Native (AIAN) who receive special education services in the district. We examined the risk ratio for four categories of students, comparing data from 2007-08 and the 2011-12 academic years. We used a risk ratio comparison which computes the ratio of a subgroup, African-Americans, for example, with the majority population, which is White in Seattle. A risk ratio for special education disproportionality compares two ratios. The top ratio is the comparison of the percentage of students with disabilities of a particular subgroup with the entire population of that subgroup attending school in the district. The bottom ratio is that of the entire subgroup population (with and without disability status) compared to the entire school district population. This calculation produces a risk ratio that helps us understand to what degree a particular subgroup may be likely to be identified for special education (Skibaet al., 2008).

Our analysis revealed that students who were AA and AIAN were more than twice as likely to be identified for special education services in 2011-12 while in 2007-08 they were more likely than White students to be identified but the ratio was smaller, in the range of about 1.5 times as likely. Further, students who were AA were about 1.5 times as likely to be placed in the most restrictive educational environments as their White peers. This was true both before and after *PICs.*

Issues of seepage

As the original *Brown* decision becomes more narrowly construed, it constricts the possibilities for altering business as usual in our nation's schools. The legacy of real estate markets that restrict migratory patterns across a city, limit access to health care, promote specific areas of the city as "safe", and, as a result, cluster social and intellectual capital in particular zones, have serious effects on creating an equal and equitable school system. The data are clear: Schools in the southeastern corridor of Seattle are under resourced, experience more routine violence, have higher rates of suspension, lower rates of graduation, lower average student performance on accountability measures, and higher proportions of students entering special education and attending segregated classes (Reduce exclusionary discipline in SE schools, 2014). The seepage between the race-neutral finding of the *PICS* decision and the SSD disproportionality rate is evident. Since *PICS,* disproportionality in graduation, advanced placement, and special education grows. In contrast, students of color and their families who have been historically minoritized continue be restricted by the structural and socio-cultural determinants of

the context they access– such as inadequate housing, lack of transportation, low-paying jobs, and lack of health care – that are barriers to their ability to connect their own funds of knowledge to the educational experiences prized in mainstream culture (Fanning-Madden, 2014; Orfield, Frankenberg, & Siegal-Hawley, 2010). By devolving *Brown* II to local contexts, the protections promised in the original *Brown* decision became dependent on the political and social will of the communities in which racism was endemic: systematic, differential resourcing of housing, education, transportation, health care, and jobs.

Notes on Calcifying and Segregating

To summarize, the *Parents Involved* decision and its aftermath suggest that deeply engrained cultural practice resists case law and policy efforts designed to redress and reproportion designs for school integration and inclusion. The Seattle story is also a reminder of the thick braid that strangles efforts to reapportion housing, transportation, and access to high paying jobs and careers. Most of Jean Anyon's career was spent reminding us of the power of local authority to determine access and opportunity in education through the management of neighborhoods and the redistribution of wealth from individuals to corporations and financial institutions (Anyon, 2005). Two powerful forces converge in our education system as a result of these local policies and practices. The first is a deterministic view of families and children that places responsibility for hope and thirst for education within individuals rather than understanding the communal nature of social networks and cultural practices. Without access to multiple experiences and opportunities, communities, segregated by virtue of infrastructure and investment, struggle to create the context for success. As Losen and Lee (2004) remind us, it is in the crossroads between great cultures that our children create their futures through constituting new ways of understanding, communicating, and solving problems.

Policy makers at the local level need to accomplish two kinds of work. The first is to develop programs that reward multiuse, multifunction, integrated public spaces for libraries, museums, schools, and playgrounds. These spaces need be created in multiple parts of the city to attract people from around the city to explore other neighborhoods. Restaurateurs and other businesses that locate and relocate in these multi-ethnic hubs need to benefit fiscally from their decisions in terms of progressive tax reforms. Neighborhoods that seek multiracial families through specific real estate marketing should be recognized for their efforts and be granted special status in grant competitions for their track records. Policy makers can create incentives for schools to offer moving educational labs like food carts that make educational opportunities available across the city. Thus, a school that traditionally serves an exclusive area of the city can be encouraged to offer outreach and specific curriculum through their educational labs. Social services can incentivize comprehensive social capital plans that support access to transportation and multi-ethnic neighborhoods. Further, by drawing on the work of researchers that have demonstrated the use of cell phone technologies to link communities educationally (Carta, Lefever, Bigelow, Borkowski, & Warren, 2013) and improve family outcomes, policy makers can work with digital access companies to incentivize their connections with minoritized families. These policies shift the locus of intervention to connecting neighborhoods, transportation, housing, and education.

A second, simultaneous efforts needs to be expended to identify the most troubling policies that maintain the status quo. These are likely real estate and business policies that segment and balkanize urban spaces. Creating alternative opportunities opens up innovation and change. Equally important is closing the loopholes that maintain stasis. Both are necessary. Schools are a representation of the way that communities are organized. Asking schools to change without changing the forces that created the current conditions is a recipe for reproduction of the past and further calcification of the categories and systems that divide and sort us.

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