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Across the Color Line: Diversity, Public Education, and the Supreme Court

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> I sit with Shakespeare and he winces not. Across the color line I move arm in arm with Balzac and Dumas, where smiling men and welcoming women glide in gilded halls…I summon Aristotle and Aurelius and what soul I will, and they come all graciously with no condescension. …Is this the life you grudge us, O knightly America?
>
> —W.E.B. DuBois, *The Souls of Black Folk,* 1903

The Stage

In 1946, Herman Sweatt, an African American, applied to the University of Texas Law School. Sweatt argued that a separate black law school, which was to be set up by the state in 1947, was not equal to the white law school at the University of Texas. Although the Supreme Court did not agree to reexamine its 1896 holding in *Plessy v. Ferguson* that separate but equal facilities for blacks and whites were constitutional, it did agree that the black school was inferior. Because no equivalent separate education was available, the Court unanimously held that Sweatt should be admitted to the University of Texas Law School.

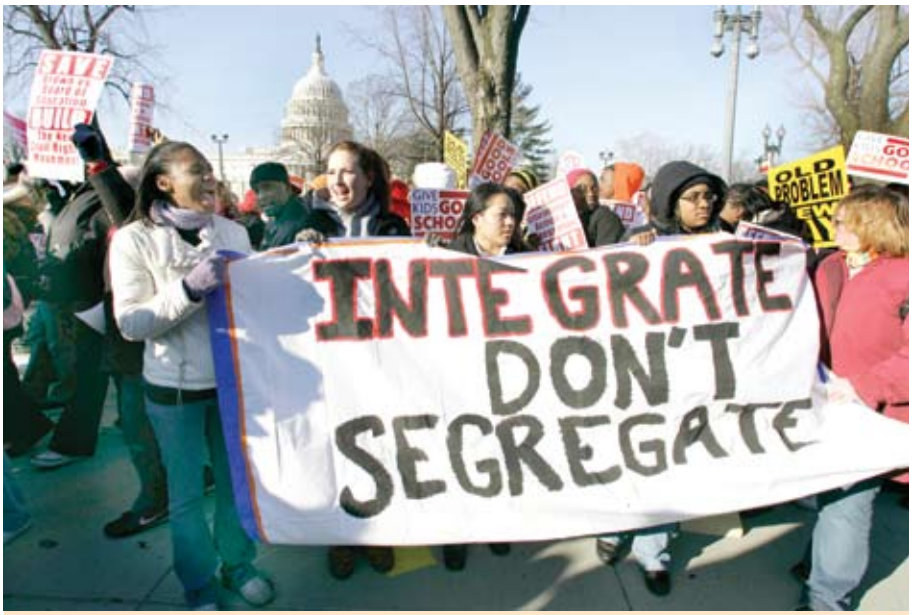
The *Sweatt* case was one of several higher education cases that laid the groundwork for the Court's well-known decision in *Brown v. Board of Education*. That decision, which explicitly struck down *Plessy v. Ferguson*'s doctrine of "separate but equal" in public schools, provided the legal basis for efforts to dismantle segregated public schools—first in the South, where segregation of schools was most rigidly enforced, and later in other parts of the country, where school districts had employed more subtle tactics to maintain segregated schools. Since its 1954 decision in *Brown*, the Court has heard a number of cases examining the use of race to achieve diversity in both primary and secondary schools and in higher education.

The Court most recently examined diversity in higher education in 2003, when it decided *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Grutter,* the Court held that the state has a compelling interest in achieving diversity in higher education, and found that the University of Michigan Law School's use of racial preferences in assigning student admission did not violate the Fourteenth Amendment's Equal Protection Clause. The Court upheld the plan because the law school's use of race was narrowly tailored and each application received a highly individualized review. No one was automatically rejected or accepted based on race. The process considered many factors when reviewing applications to achieve the compelling state interest in having a diverse student body.

On the other hand, in *Gratz,* the Court decided that the University of Michigan's use of racial preferences in undergraduate admissions did violate the Fourteenth Amendment. Although the Court again recognized the state's compelling interest in achieving student body diversity in higher education, an undergraduate admission policy that automatically awarded every underrepresented minority applicant 20 points was not sufficiently narrow and did not meet the necessary standard that each applicant receive individualized review.

Cases involving primary and secondary schools have not exactly paralleled *Grutter* and *Gratz*. Colleges and universities admit applicants based on merit; the nation's public primary and secondary schools are open to all students. Primary and secondary schools are also closely tied to local communities, and such factors as residential patterns, demographics, and school district boundaries (especially in larger metropolitan areas) have a strong impact on the diversity of a community's schools.

One of the Court's most notable rulings in the area of primary and secondary education was its 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education*. The *Swann* decision considered a variety of remedies, including the use of racial "quotas" and mandatory school busing, to achieve integration in North Carolina's Charlotte-Mecklenburg area school system. The case involved a school district that had



A group of Syracuse University students join protestors in front of the Supreme Court in Washington, D.C., December 4, 2006, as the Court heard arguments in lawsuits by Louisville and Seattle parents, challenging policies that used race to help determine where children go to school. (AP Photo/Manuel Balce Ceneta)

been subject to a state-imposed (de jure) system of segregation, and was under a court-supervised plan to desegregate the district. A unanimous Court clarified that "the objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." It upheld the power of courts to employ a wide range of strategies in achieving that objective, including policies that used a prescribed ratio of white to black students as a legitimate "starting point" to achieve integration of a segregated district.

This past June, the Court again weighed in on the question of diversity in the nation's public elementary and secondary schools in *Parents Involved in Community Schools v. Seattle School District No. 1*. The opinions in *Parents Involved*—including a plurality opinion, two concurring opinions, and two dissenting opinions—drew upon the legacy of *Brown* and the Court's precedents, both in higher education and primary and secondary schools, to reach very different answers to such questions as

- Whether voluntary state action to reduce or eliminate de facto segregation (caused by factors such residential patterns) is constitutional;
- How desegregation can be achieved and maintained in the face of changing community demographics;
- If and to what extent the government can adopt race-conscious criteria to ensure racial diversity;
- Whether a compelling state interest in diversity applies in primary and secondary school settings as well as in higher education;
- What role the courts should play in determining educational policy; and
- Whether the law can be completely "colorblind."[1]

Just over 50 years ago, the *Brown* decision determined that segregated public schools were inherently unequal and began to pave the way for desegregation in other sectors of society. The *Parents Involved* ruling also has the potential to impact millions of the estimated 49.6 million students enrolled in public schools across the country.[2] In addition to the questions highlighted above, *Parents Involved* asks whether diversity in our schools remains a compelling issue for our society. It also illustrates how the Court's composition and the judicial philosophies of its members can affect basic social premises.

The Back Story

In his book *Unfinished Business: Racial Equality in American History*, Michael J. Klarman maintains that housing segregation has increased over the past 50 years, and, because most students attend neighborhood schools, "housing segregation inevitably means school segregation."[3] Segregation in today's schools arises from such "spatial" segregation. Resegregation has not gone unnoted by local school boards. Many local boards have sought to craft school admission policies that take spatial segregation into account to mitigate the effect of neighborhood school assignments on school demographics and to achieve diverse, racially integrated primary and secondary public schools. Louisville, Kentucky, and Seattle, Washington, the two districts implicated in *Parents Involved*, were two such schools. Both schools had a history of seeking to right earlier segregation wrongs; both had experience with busing plans; both had experienced resegregation following abandonment of busing; both sought to increase student school choice; and both sought racial integration for educational and citizenship purposes.

In 1975, the Jefferson County Public School District (metropolitan Louisville), which had a history of de jure school segregation (segregation enforced by law), was ordered to desegregate. The decree was terminated in 2000, but the district continued to voluntarily integrate its schools through a plan that sought to keep black student enrollment in a range of 15-50 percent. The guidelines classified students as "black" or "other." The black student population in the district was 34 percent.[4] Parents of elementary school students in Jefferson County ranked preferred schools in residential geographic "clusters." If admitting a student to a school pushed the school outside of its racial guidelines, the student was not assigned to the school. Similarly,

transfers at all grade levels were denied due to lack of space or to maintain the racial guidelines. Race was used to make some elementary school assignments and decisions about transfer requests.

New Jefferson County resident Crystal Meredith wanted to send her son to kindergarten at a school in his geographic cluster, a mile from his home. There was no room. He was assigned to a school 10 miles away. Meredith requested a transfer to another school outside of their geographic cluster that was only one mile away. The transfer was denied because it "would have an adverse effect on desegregation compliance." (However, as noted in Justice Breyer's dissent, the transfer request was also received after the transfer deadline.) A federal district court ruled that the state had a compelling interest in achieving diverse schools and that the Jefferson County assignment plan was narrowly tailored to achieve that goal. The decision was upheld by the U.S. Court of Appeals for the Sixth Circuit.

Unlike the Jefferson County schools, Seattle's schools were never legally segregated by statute. However, the National Association for the Advancement of Colored People (NAACP), in two separate legal actions, had accused the school board of segregating the district's schools. The first action, in 1969, claimed the board established policies that maintained segregated public schools. The board established a new assignment plan in response to the suit that included mandatory busing. Then in 1977, the NAACP filed a complaint with the Department of Health, Education, and Welfare's Office for Civil Rights. As part of the settlement of this suit, a new assignment plan was introduced. By 2000, the Seattle schools were using a series of tiebreakers, including a "racial tiebreaker," to counter the effects of residential segregation on school demographics. If schools were oversubscribed, the schools first gave preference to students wishing to attend a school that a sibling already attended. A second preference was given to students who lived closest to the school; however, if the school was considered "racially imbalanced," students who would provide greater balance to the school population were given preference over those who lived closer to the school. A school was considered to be racially imbalanced if its demographics differed more than 15 percent from the racial composition of the district.

A group of parents formed a nonprofit (Parents Involved in Community Schools) to bring suit against the school district over the plan in 2000. In a summary judgment, the district court ruled in favor of the district. The U.S. Court of Appeals for the Ninth Circuit overruled the district court, holding that while achieving racial diversity was a compelling state interest, the Seattle plan was not sufficiently narrowly tailored.[5]

The Supreme Court's Decision: The Plurality

The question considered by the Court was whether a public school can voluntarily classify students by race and use racial classifications to make school assignments if the school district had never been found to have legally segregated its schools, or had been released from a court-ordered desegregation plan. A majority of five justices (Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy) ruled that the Seattle and Louisville plans violated the Constitution. But Justice Kennedy did not fully agree with the reasoning of the other four justices, and wrote a separate concurring opinion. As a result, the four justices joined in a plurality opinion written by Chief Justice Roberts (a plurality opinion does not represent a majority of the court, but represents more justices than any other concurring opinion).

Because racial classifications are potentially harmful, Court precedent has subjected plans using racial classifications to "strict scrutiny" review. Strict scrutiny requires that the government show a compelling interest in achieving the goal for which racial classifications are being used, and also that the plan has been narrowly tailored to achieve that goal.

Looking back at its prior rulings, the plurality found that the Court had recognized two compelling government interests in the educational context. The first is a compelling interest in remedying the effects of past intentional discrimination (such as was present in the 1971 *Swann* decision). The second was a compelling interest in student body diversity in a higher education setting (as in the *Grutter* decision). In the plurality's opinion, neither such interest was present in this case. The plurality noted that the Seattle schools were never legally segregated (actions brought against the Seattle schools were settled before a final decision was made) and that a court had found that the metropolitan Louisville schools had eliminated the "vestiges" of past segregation "to the extent practicable." There was thus no compelling government interest in remedying the effects of past discrimination in either district. The plurality insisted upon a distinction between de jure (enforced by law) and de facto (caused by other factors) segregation. They argued that government action to remedy societal (rather than government) actions that discriminate are not within the realm of constitutional actions. Race-conscious remedies cannot be used to right societal wrongs absent government actions that cause discrimination.

The plurality also found that the uses of racial classifications in the Seattle and Louisville plans were not sufficiently narrowly tailored, even if there were a compelling state interest in integration and school diversity. The integration plans employed a limited view of diversity based on race, which the plurality described as "racial balancing." Applying the *Grutter* and *Gratz* decisions, the plurality held that individuals must be treated as individuals, not simply members of a racial group, and that other means could be equally as effective in achieving diversity. They charged the two districts with failing to seek out and try race-neutral alternatives to achieve their goal.

Chief Justice Roberts concluded the plurality opinion by cautioning against

seemingly "benign" classifications of citizens by race. "What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?", he asked. "…The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

Justice Kennedy's Concurrence

Both Justice Thomas and Justice Kennedy wrote concurring opinions, although Thomas also joined the plurality opinion in full. Kennedy concurred for the most part with the plurality opinion (in particular, he agreed that the two school assignment plans were not narrowly tailored), but he differed with the plurality's assessment that the two districts in *Parents Involved* had not identified a compelling interest in increasing diversity. In contrast, Kennedy wrote, "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." He wrote that the plurality was "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." He criticized the plurality opinion for suggesting that the Constitution "requires school districts to ignore the problem of de facto resegregation in schooling."

Kennedy's view was that it is permissible for state and local officials to adopt policies to achieve diversity that use race-conscious measures in what he characterized as a "general way," as long as students are not treated differently based solely on their race. His recommended alternative policies for school boards to consider included strategically locating new schools, creating attendance zones looking at the demographics of residential patterns, and targeted recruiting of students and faculty.

The Dissents

Justices Breyer and Stevens each wrote a dissent. Breyer's (joined by Stevens, Souter, and Ginsburg) was lengthy and detailed, and quoted heavily from *Swann*. Of the plurality opinion, he wrote, "it is a cruel distortion of history to compare Topeka, Kansas, in the 1950s to

RESOURCES

Michael J. Klarman, *Unfinished Business: Racial Equality in American History* (Oxford University Press, 2007). Highlights the social and political factors that have influenced the path of racial progress, and looks in particular at the contributions and impact of court decisions. Klarman argues that court decisions generally reflect the racial mores of the times and that the Supreme Court has not been a defender of the rights of racial minorities.

ABA Division for Public Education, "Conversations on Racial Equality in America." This companion guide to *Unfinished Business* is designed to foster discussion of key issues raised in the book, including the role of Congress, the executive, and the courts in expanding or retarding the rights of racial minorities and the role of self advocacy, wars, and social movements in furthering racial progress. Available for free download at **www.abanet.org/publiced/features.**

ABA Division for Public Education, *Dialogue on Brown v. Board of Education.* This installment of the ABA's Dialogue series, which is designed to help lawyers, judges, and educators hold stimulating conversations about law and its role in society in high school classrooms and community settings, explores the story of, history behind, and legal legacy of *Brown v. Board of Education.* Available for free download at **www.abanet.org/publiced/features/dialogues/html.**

Louisville and Seattle in the modern day. ...To invalidate the plans under review is to threaten the promise of *Brown*." Justice Breyer reasoned that *Swann* gave school authorities broad powers to craft plans to achieve diversity, and that the Constitution permits voluntary plans to eliminate de facto as well as de jure school segregation. He argued that race-conscious criteria may be used to eliminate segregation, and that context must be taken into account when applying strict scrutiny. Dissimilar raced-based decisions cannot automatically be considered "equally objectionable," Breyer asserted. In particular, there is a significant difference between race-based policies that seek to exclude and those that seek to include.

In Justice Breyer's view, the Jefferson County and Seattle plans aimed to bring races together, and they used race in more limited ways than each district's earlier plans. Under his analysis, both plans met the strict scrutiny test. He found the state had a compelling interest in both cases: eradicating the vestiges of primary and secondary school segregation, creating good educational opportunities for all, and fostering understanding among people of different races and backgrounds. The broad ranges of each plan (in Louisville, for example, targeted black student enrollments could range from 15 to 50 percent) met the requirement that race-based plans be narrowly tailored, as did the way the plans were developed over time with community input and increasingly less reliance on racial elements.

Finally, Breyer criticized the plurality for overstepping judicial bounds in dictating solutions to social problems rather than leaving it to the people to debate and determine how best to educate our children. He predicted that the Court and the nation would regret the decision.

Justice Stevens, the longest serving justice currently on the Court, joined Breyer's dissent in its entirety. He wrote separately, however, in part to reflect on changes in the Court's composition. "It is my firm conviction," Stevens wrote in the concluding sentence of his dissent, "that no Member of the Court that I joined in 1975 would have agreed with today's decision."

The Future

Michael Klarman's basic premise is that "[l]aw has played an ambiguous role in the history of American racial equality."[6] Racial progress has resulted more from advocacy and other developments, and that progress itself has been episodic, moving backwards as often as forward.[7] Klarman argues that "*Brown* desegregated few public schools before 1964, but ... it nonetheless played a critical role in racial transformation."[8] Its role, however, was indirect. In an article on the *Parents Involved* ruling, legal scholar Jeffrey Rosen notes that Klarman has argued that it was "political commitment to integration in the 1960s, not the *Brown* decision" that brought about integration. Klarman also predicts that the *Parents Involved* decision will be "similarly inconsequential."[9] School boards will find a way around it.

Although it is more difficult for public schools to find alternatives to race-conscious criteria than for colleges and universities, other scholars also believe schools will use socio-economic factors and residential demographics to achieve the goals of diversity and integration.[10] The *Parents Involved* ruling did strike down voluntary integration plans in Seattle and Louisville, but a majority of justices (Kennedy and the four dissenters) also recognized that diversity can be a compelling educational goal that school districts are able to pursue. Only time will tell how successful alternative strategies in achieving the goal of diversity in our public schools will prove to be. The success or failure of these strategies will ultimately determine the legacy of *Parents Involved*.

Notes

1. In a concurring opinion in *Parents Involved*, Justice Thomas advocates for a color-blind constitution, under which race cannot be used to award educational opportunities (Thomas also joined the plurality opinion in *Parents Involved*).
2. "Estimated number of students enrolled in public elementary and secondary schools in 2007–08," *Back to School Facts*, Institute for Education Studies, National Center for Education Statistics (Washington, D.C.), www.nces.ed.gov/fastfacts/display.asp?id=372.
3. Michael J. Klarman, *Unfinished Business: A History of Racial Equality in America* (New York: Oxford University Press, 2007), 199.
4. "Can a School District Promote Racial Integration in Its Public Schools by Taking Race into Account in Student Assignment?" Brian Deese, *Preview of U.S. Supreme Court Cases*, Vol. 34: 3 (2006): 166.
5. Ibid., 166-167.
6. Klarman, *Unfinished Business*, 211-213.
7. Ibid., 4.
8. Ibid., 164.
9. Jeffrey Rosen, "Can a Law Change Society?", *The New York Times*, July 1, 2007.
10. Ibid.

Cases Cited

Brown v. Board of Education, 347 U.S. 483 (1954)
Gratz v. Bollinger, 539 U.S. 244 (2003)
Grutter v. Bollinger, 539 U.S. 306 (2003)
Parents Involved in Community Schools v. Seattle School District No. 1, Docket No. 05-908 (2007)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)
Sweatt v. Painter, 339 U.S. 629 (1950)

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TEACHING ACTIVITY

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ABA Division for Public Education's "Conversations on Racial Equality in America," a companion guide to Michael J. Klarman's *Unfinished Business: Racial Equality in American History*, is designed to foster discussion of key issues raised in the book. The following activity is adapted from the guide, which is available for free download at **www.abanet.org/publiced/features**.

1. Ask students to read the following excerpt from *Plessy v. Ferguson*, 163 U.S. 537 (1896).

In* Plessy v. Ferguson, *the Supreme Court ruled that a Louisiana law providing for separate railway cars for whites and blacks did not violate the Constitution.

> The object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality. …If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane....
>
> — Justice Henry Billings Brown, majority opinion, *Plessy v. Ferguson*(1896)

2. Explain that "separate but equal" was the law of the land. Ask students to come up with a list of places they think this law applied, and how long segregation was in effect. Next, have students read the following excerpts.

A. In 1936, NAACP lawyer Charles Hamilton Houston wrote the following in an article for* The Crisis, *a magazine founded in 1910 by W.E.B. DuBois.

> Law suits *[sic]* mean little unless supported by public opinion. Nobody needs to explain to a Negro the difference between the law in the books and the law in action. In theory, the cases are simple; the state cannot tax the entire population for the exclusive benefit of a single class. The really baffling problem is how to create the proper kind of public opinion. The truth is there are millions of white people who have no real knowledge of the Negro's problems and who never give the Negro a serious thought. They take him for granted and spend their time and energy on their own affairs.
>
> —Charles Hamilton Houston, "Don't Shout Too Soon," *Crisis* 43 (March 1936): 79. Quoted in Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983), p. 139

B. In 1954, the Supreme Court unanimously ruled in* Brown v. Board of Education *that separate public schools violated the Constitution.

> …Even in the North [when the Fourteenth Amendment was ratified], the conditions of public education did not approximate those existing today… .As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.
>
> …[W]here the state has undertaken to provide [a right to public education], is a right which must be made available to all on equal terms.
>
> …Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> —Chief Justice Earl Warren, *Brown v. Board of Education*, 347 U.S. 483 (1954)

C. In 2007, the Supreme Court's ruling in* Parents Involved in Community Schools v. Seattle School District No. 1 *held that voluntary public school plans cannot use racial criteria to maintain integration.

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. ...[T]he way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II*, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.
>
> —Chief Justice John Roberts, plurality opinion, *Parents Involved in Community Schools v. Seattle School District No. 1*, Docket No. 05-908 (2007)

3. Check for student understanding of the excerpts and sequence of the Supreme Court decisions discussed above by asking probing questions. In small groups, have students discuss the following questions. If possible, ask groups to come to some kind of agreement. Groups should record their answers and give their rationales.

- What is the educational value of diverse classrooms?
- Would you be willing to ride on a bus for an hour or more to attend a school with a diverse student body? Why or why not?

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TEACHING ACTIVITY *from page 45*

- How else might school diversity be achieved, besides busing?
- Who do you think should determine local school integration policies? Why?
- What role should the courts play? Why?
- Do you agree with Charles Hamilton Houston about the relative importance of public opinion v. legal decisions?

4. Have students report back to the class. Note similarities and differences between student responses and the Court's opinion and dissents in the *Parents Involved* case. Refer to the companion article. Ask students to read the final excerpt below.

> Three years after [the *Brown*] decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.
>
> The plurality is wrong to do so. …This is a decision that the Court and the Nation will come to regret.
>
> —Justice Breyer, dissenting opinion, *Parents Involved in Community Schools v. Seattle School District No. 1*, Docket No. 05-908 (2007).

5. Conclude by asking students the following questions:

- To what extent do you believe the Court's opinion in the *Parents Involved* case reflects public opinion? Why?
- Do you agree or disagree with Justice Breyer that "the Court and the Nation will come to regret" the *Parents Involved* decision? Why?