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Talking About Race and Equality

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TALKING ABOUT RACE AND EQUALITY

*Sharon E. Rush**

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INTRODUCTION

Twenty years ago, when my understanding of White privilege and unconscious racism was virtually non-existent, it was relatively easy for me to analyze and write about racism. My ease stemmed from being able to take a purely academic perspective about the problem. While I cared about eliminating racism, I was largely emotionally dissociated from the personal damage that racism causes because I, as a White person, was not racist. Racism was caused and maintained by other White people who believed in the inferiority of people of color, a belief I continue to eschew.

I have learned through my studies in the last few decades about how White privilege and unconscious racism function to maintain systemic racial inequality. While my studies have deepened my understanding of racism’s dynamics, I am not sure that they alone would have allowed me to grasp the complexities of race and race relations. Rather, my deeper understanding has largely come outside of my academic world; it has come from my experiences loving across the color line, particularly my experiences with my daughter. Although I do not feel the pain of racism in the way that she and my other loved ones do, I

* Irving Cypen Professor of Law, Levin College of Law, University of Florida. Copyright 2011. All rights reserved. I deeply appreciate the support I receive from the Cypen family and from Dean Robert Jerry. I am grateful to Kevin Rabin for his excellent research assistance.

witness it from a front row seat, a space rarely occupied by Whites. The emotions I feel from being so close to it are far deeper and more complex than I ever imagined they would be.

Like most equality-minded people, I am frustrated and discouraged that our society remains segregated and unequal in many significant ways, particularly in our public schools. If learning the complexities of racism is enhanced by meaningful—even loving—relationships across the various color lines in our society, then segregation presents a significant obstacle to gaining this deeper cross-racial understanding. Moreover, exacerbating this problem is the additional and related obstacle in the development of healthier race relations in our society: the problem of “racial silencing.”

By “racial silencing,” I mean that even as it is becoming more important for us, as a nation, to live and work together to foster cross-racial understanding and learn how to solve the problem of persistent racial inequality, it also is becoming increasingly more difficult to talk about race without stirring up hostility and resentment. Some Whites are angry and bitter when discussions about racial inequality take place because they are sick and tired of everything being about race. Among other concerns, many Whites are worried about being called racist and one sure way to dodge that stinger is to avoid discussions about race.

Whites who are tired of talking about race are not alone. Even some people of color are exasperated at what they also think is a constant focus on race because that suggests to them that White society sees people of color only as “racial others,” and not as individual Americans just like them. For example, the famous actor Morgan Freeman recently exclaimed in an interview with Mike Wallace on *60 Minutes* that the way to end racism is to “[s]top talking about it.”¹ Justice Scalia bolsters this perspective with his opinion in a racial classification case that “we are just one race here. It is American.”² As long as we are all the same, we do not need to talk about our differences, especially our racial differences.

Lots of people of different races, then, are increasingly uncomfortable talking about race. They prefer to function in a colorblind society where they insist that race is irrelevant. Not surprisingly, the concept of racial silencing is consistent with the concept of colorblindness. Logically, it is impossible to talk about race if we are not even supposed to see it. The idea seems to be that if people who believe in racial equality magically stopped seeing and talking about race they could avoid the negativity surrounding racial issues and

1. Carol Kopp, *Morgan Freeman Defies Labels*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2005/12/14/60minutes/main1127684_page3.shtml.

2. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment).

just hope that the inequality would fix itself. But we know that if we do nothing to address the problem, then little, if anything, is likely to change.

While colorblindness and silencing are concepts that serve to alleviate the discomfort that many people feel when issues of racism and inequality become the topics of conversation, it is fair to say that the healthy hostility that once was targeted at the problems of racism and inequality is growing into an unhealthy resentment toward people who simply want to talk about those problems and find ways to solve them. As a person who loves across the color line, I know all too well how challenging it is to speak out about the injustice of racial inequality. Many Whites find my comments foreign and ridiculous. On many occasions I have been accused of being “too sensitive,” or of misinterpreting situations to be about race when some people find my perceptions farfetched. Contrastingly, many people of color find my comments all too familiar—even ridiculously and embarrassingly obvious. What they cannot believe is that it took so long for me to realize how racism’s tentacles often choke the equality out of the lives of people of color on a daily basis. Not surprisingly, sometimes it is just easier for me to drop out of conversations about race in order to avoid some of the hurt and also give myself time to try to better understand racial dynamics. I have learned, however, that I cannot avoid the hurt and I certainly cannot endure the pain of the racial injustice inflicted on my loved ones or on anyone without speaking out for racial justice. Accordingly, I cannot stay silent for long. No one who truly cares whether or not we achieve racial equality can remain silent about the problem of persistent racial inequality.

This brief introduction highlights how much I admire the students on the *University of Florida Journal of Law and Public Policy* for arranging this issue that focuses on race. I deeply appreciate this opportunity to share some of my thoughts. This essay introduces a larger project that will take me a while to fully develop, but I want to share the basic outline of my current thinking about how we, as an equality-minded and caring society, can create safe spaces to talk about race.

I. THE “ANTIBALKANIZATION ZONE” OR ABZ

Equality-minded people face a challenge: find a way to talk about race without arousing resentment and hostility. Generally, the negativity among equality-minded people is felt most acutely by people who hold one of the two views alluded to above. To highlight, the first view is held by those who think we are or should be a colorblind society where

race has nothing to do with anything and we therefore should stop talking about it in order to end discrimination. People who hold this view will comprise what I call the “Nothing Group” to emphasize their view that race generally has nothing to do with a particular situation.

The second view is held by those who think we are a color conscious society where race generally has everything to do with everything and we therefore need to talk about race wherever it is a plausible explanation for a particular situation that arguably results from discrimination. I will call this group the “Everything Group” to emphasize its members’ desire to talk about race in order to explicitly expose the inequality and engage in finding solutions to end it. Naturally, there are many people in between these views, but their voices often are increasingly being drowned out by the noisy hostility generated by the Nothing/Everything dichotomy.

In a recent article, Professor Reva Siegel refers to the racial “balkanization” as a threat to our social cohesion.³ I agree with Professor Siegel, one of the most insightful scholars on issues of equality, that we must find a safe space to talk about race and avoid the threat that the current racial balkanization poses to our social cohesion. Her definitions of the balkanized zones, those who believe in anticlassification (colorblindness) versus those who believe in antistatutoryism (color consciousness), obviously are much more refined and sophisticated than mine and also are developed in an historical and modern analysis of equal protection jurisprudence as shaped by the Supreme Court and as interpreted by numerous legal scholars. My purpose in this Essay is much more modest than Professor Siegel’s and I take the liberty of couching my points in much simpler terms, but respectfully borrow from the balkanization terminology. I will call this space where it is presumptively safe to talk about race the “antibalkanization zone” or ABZ. The ABZ is not an actual physical space; those are created by discussants of race when they truly want them and voluntarily subject themselves to the associated emotional turmoil, for example, at academic symposia. Rather, the ABZ is largely a theoretical space occupying the minds of people who care about racial equality but prefer not to talk about it because of the unavoidable negativity associated with it.

Interestingly, Professor Siegel interprets Justice Kennedy’s opinion in a recent school equality case, *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴ as a significant and positive

3. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

4. 551 U.S. 701, 720 (2007) (holding that public school officials who want to achieve racial diversity in K-12 schools are only allowed to consider the race of prospective students in making *individual* school assignments *if* they can meet the strict scrutiny standard).

development toward the creation of what I am calling the ABZ. Her article inspired me to think about the ABZ and, upon reflection, I think the Court has been shaping the ABZ for decades and *Parents Involved*, particularly Justice Kennedy's opinion, highlights the limited nature of some of the current boundaries of that space. Regardless, I agree that carving out this space is necessary to ameliorate the racial hostility associated with racial inequality discussions and simultaneously keep discussions about racial equality possible.

A. *The ABZ Basic Premise: Racial Inequality is a Problem*

The Supreme Court, in an ironic twist, began to carve out the ABZ arguably to promote racial silencing, a particularly acute need of members of the Nothing Group. Two iconic 1970s cases, *Washington v. Davis*⁵ and *Regents of the University of California v. Bakke*,⁶ established guiding principles for the development of the ABZ. In *Davis*, the famous "disparate impact" case, the Court held that a facially neutral law that has a disparate impact on racial groups does not implicate constitutional issues unless the law is enacted for the purpose of discriminating on the basis of race.⁷ The Washington police department administered a test to applicants who aspired to be police officers and Blacks were four times more likely to fail the test.⁸ At the time of the suit, the police department even had an affirmative action program to hire more Black officers, consistent with racial equality. Nevertheless, because the department did not intend to discriminate against racial minorities and had made substantial progress to hire more Black officers under its affirmative action policy, and because the test was related to job qualification, the Court did not find the neutral policy a racial classification.⁹ Consequently, the law easily passed rational basis review.

Bakke is the famous "affirmative action" case, in which Justice Powell separately opined that a state university has a compelling interest in admitting a diverse class.¹⁰ His view became law in 2003 in *Grutter v. Bollinger*.¹¹ Again, the facts *as of modern times* illustrate the extant racial inequality in the medical profession. According to data

5. 426 U.S. 229 (1976) (White, J., majority opinion).

6. 438 U.S. 268 (1978) (Powell, J., majority opinion).

7. *Davis*, 426 U.S. at 241-42.

8. *Id.* at 237.

9. *Id.* at 246.

10. *Bakke*, 438 U.S. at 312-13 (Powell, J., majority opinion).

11. 539 U.S. 306, 328, 334 (2003) (holding that a law school had a compelling interest in attaining a diverse student body and that the admissions program at issue was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body).

published in 2009, about 4% of physicians self-identify as Black, about 5% self-identify as Hispanic, between 17-24% self-identify as Asian or "other," and "[t]hree out of four physicians identifi[y] themselves as white."¹² In the legal profession, minorities also remain underrepresented. For example, the 2009 demographic for the percentage of minority partners in law firms is 6% (2.2% Asian, 1.71% Black, and 1.71% Hispanic).¹³ It bears highlighting that these are *today's* statistics, reflecting the small steps we have made in the 40 years since *Davis* and *Bakke* toward racial equality in the medical and legal professions.

How did these cases begin to shape an ABZ? Importantly, they, as well as numerous other racial discrimination cases brought before the Court over the last forty years, evidence the basic premise underlying the need for the ABZ: racial inequality is a persistent and divisive problem in America. At the time of *Davis* and *Bakke*, we clearly were a racially unequal and divided society. Moreover, the current Court continues to struggle with issues of racial equality as *Grutter*, *Parents Involved* and other cases illustrate. As long as equality remains elusive, plaintiffs will bring cases alleging discrimination and discussions about race will not go away. Nor should we stop talking about race in a democracy ruled by a Constitution that values equality. Most equality-minded people understand this and even long for a way to talk about possible solutions without everyone getting hostile and resentful.

Not surprisingly, the ABZ's basic premise is agreeable with the Everything Group. In fact, it largely shapes membership in that Group. Understanding what members of the Nothing Group think about the basic premise is less clear. Undoubtedly, some members of the Nothing Group do not even acknowledge the persistent racial inequality and attribute the inequality more to economic than to racial differences. Other members probably do acknowledge the existence of racial inequality, but do not see it is a problem that the government needs to eliminate. Rather, it is just the way things are. For example, some suggest that the reason we have segregated schools is because of private choices people make to live in segregated neighborhoods. Chief Justice Roberts's opinion in *Parents Involved* comes remarkably close to expressing this sentiment.¹⁴ Either way, these views are consistent with the idea of racial silencing.

12. Ellyn R. Boukus et al., *A Snapshot of U.S. Physicians: Key Findings from the 2008 Health Tracking Physician Survey*, 35 DATA BULL. (Sept. 2009), <http://www.hschange.com/CONTENT/1078>.

13. NALP: The Association for Legal Career Professionals, *Women and Minorities in Law Firms by Race and Ethnicity*, NALP BULL., Jan. 2010, available at http://www.nalp.org/race_ethn_jan2010.

14. See *Parents Involved*, 551 U.S. at 731 ("But in Seattle the plans are defended as

B. *The ABZ Rules*

1. ABZ Participants Cannot Be Called Racist

To the extent the basic premise arouses negative emotions among members in the Nothing Group, their feelings are largely assuaged by the two rules that apply in the ABZ. These rules also stem from the *Davis* and *Bakke/Grutter* cases. Focusing on the *Davis* rule, those who want to enter the ABZ to talk about possible ways to achieve more racial equality must avoid any suggestions that the extant inequality is the result of the bad intentions of members in the Nothing Group. To link current inequality to past inequality is taboo largely because the past inequality clearly was the result of racist policies. From the perspective of many equality-minded people, except for the real racists who generally are not ashamed to admit that they believe in White superiority, no one else is racist. It follows that people who are not racist, by definition, cannot have bad intentions. They certainly do not intend the extant racial inequality. In fact, many people correctly insist that they had nothing to do with those old racist policies. Understandably, they vehemently object to being put into the same group with those who are truly racist. The *Davis* rule comports with this need to separate racists from everyone else by making a plaintiff prove racist lawmakers passed the particular law that the plaintiff alleges is discriminatory. This burden is placed on a plaintiff even though the disparate impact of the law on racial minorities can evidence overwhelming extant inequality.

2. Focus on Diversity

Similarly, the *Bakke/Grutter* cases establish another essential rule that governs the ABZ: outside of intentionally bad discrimination, cases that focus on the constitutionality of laws and policies cannot focus on racial *inequality*. Rather, they must focus on “diversity.” Briefly, both *Bakke* and *Grutter* avoided violating the *Davis* rule, not simply because the schools’ policies arguably were not facially neutral but because they allowed admissions officials to consider applicants’ race as one factor among many that could contribute to a diverse class.¹⁵ More fundamentally, the schools’ policies avoided violating the first ABZ rule because the schools’ policies were not ill-motivated. They were motivated by equality conscious policymakers who had the best

necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate . . . is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.”)

15. Professor Siegel raises this point in her article, *supra* note 3, at 1298-99.

intentions; they wanted to address the ABZ's basic premise and help solve the problem of racial inequality.

Bakke exemplified a new kind of case that started cropping up in response to affirmative action policies, which themselves were created to respond to the basic premise. This new kind of case raised the question whether a member of a racial majority group can be discriminated against on the basis of race. Phrased this way, any equality-minded person would have to answer "yes." It is not difficult to imagine such a case. Consider a police chief of color who never promotes White officers because of their race. Everyone would agree that the police chief's policy is unconstitutional racial discrimination.

Bakke helped awakened the "reverse discrimination" sleeping dog, and the Court had to fashion some kind of rule to address the possibility that laws can discriminate against racial majorities—even though *Bakke* was not even remotely about discrimination against White applicants. Stated alternatively, the reverse discrimination suit that equality-minded people can imagine (the police chief) is nothing like the situation presented in *Bakke*. The police chief case is situated in the space of intentional bad discrimination.

Still, the *Bakke* Court (and eventually the *Grutter* Court) could not ignore the reality that indeed White people can suffer racial discrimination. But neither could the Court ignore the basic premise of the ABZ. The *Bakke* and *Grutter* Courts responded to these competing realities by establishing the second ABZ rule: *Every* individual can contribute to a "diverse" environment. The concept of "diversity" allows us to talk about race as long as we talk about every other way in which each of us contributes to a diverse environment. The irony of the second rule is that it was established in the context of government action that intended to address the basic premise—racial inequality is a problem that we need to address—that characterizes the very need for the ABZ.

While the two ABZ rules—no accusations of bad intentions and focus only on diversity—calm the rough racial waters that make the Nothing Group members sick of talking about race, they are turbulent concessions for those in the Everything Group, most of whom must tread the rough racial waters every day. Nevertheless, members of the Everything Group are pressured to make the ABZ concessions in order to have the Nothing Group members address the basic premise. Making the concessions is better than being totally silenced in an otherwise colorblind world—the preference of the Nothing Group members.

The ABZ is not supposed to be an Everything Zone or a Nothing Zone; it is a public space anyone can inhabit as long as they play by the rules. Importantly, those in the ABZ do not have to worry about being called racist. The significance of this cannot be overstated. Interestingly,

the word “racism” has no synonym; it describes a unique phenomenon of protecting White privilege by failing to address inequality. Racism is more than a noun that describes a particular racist’s acts; it is an institution of systemic inequality that is allowed to persist. One might think this would auger in favor of its use, but quite the opposite is true. The synapse between the nerves touched by discussions about institutional “racism,” a systemic problem, and those touched by discussions about a “racist,” a person, is much too short for the comfort of most people of goodwill. Many of them simply will not tolerate being called upon to address the systemic racism because that is tantamount to being blamed for the racism, or being called a racist.

Realistically, the first ABZ rule is here to stay. If a person wants to engage in meaningful discussions about race, they will avoid accusing anyone of being racist. In many ways, this avoidance has become a rule of etiquette. It is bad manners to intentionally insult someone. But learning to talk about race without insulting someone also is a matter of emotional intelligence, an increasingly recognized form of intelligence.¹⁶ People with high emotional intelligence are able to interact with people in especially meaningful ways because they understand the social and psychological dynamics of a particular situation. Without a doubt, people who “manage” the color line have high emotional intelligence with respect to cross-racial understanding. This is a type of intelligence that loving parents should want their children to develop, particularly because we are becoming a more multi-racial society. Parenthetically, integrated schools would foster the development of this kind of emotional intelligence in the context of race relations.¹⁷

Thus far, the ABZ sounds like a safe place for people who truly care about equality and want to figure out how to achieve it. On reflection, however, the ABZ’s diversity rule detracts from the meaningful discussions that need to take place to find solutions to the persistent inequality. This is not to say that the ABZ itself is not necessary, but it is to say that the diversity rule narrows the space too much. *Parents Involved* highlights this point.

II. THE CONUNDRUM: *PARENTS INVOLVED*

Anyone who reads a newspaper or listens to the news is aware that segregation and inequality remain problems that plague our public

16. See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995).

17. See Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 *TEMPLE POL. & CIV. RTS. L. REV.* 73, 75 (2010).

schools.¹⁸ In light of these problems, policymakers in Seattle, Washington and Louisville, Kentucky voluntarily adopted integration plans to create more racial equality in their public schools. As a result of the plans, however, some children were denied admission to their preferred schools solely because of their race, a violation of their constitutional rights as held by the *Parents Involved* Court.

Elsewhere, I analyze *Parents Involved* and agree with the Court that there were constitutional infirmities with the integration plans.¹⁹ But my point here is much more general. I want to focus on how the Court maneuvered through the ABZ. Obviously, the simple fact that the Court heard *Parents Involved* illustrates the basic premise underlying the ABZ: racial inequality continues to be a problem in America. But how did the Court say we should talk about the problem of segregated and unequal schools, the specific situations in *Parents Involved*?

First, the Chief Justice emphasized over and over again that the segregation in the schools was not caused by the state. He quoted an earlier case in which the Court held that segregation that results from private choices does not implicate constitutional issues.²⁰ He also tied the lack of state action with the first ABZ rule that prohibits connecting past racism with current segregation and inequality. Specifically, the Chief Justice repeated that Seattle never functioned under a de jure segregated school system and, although Louisville did at one point, it had successfully achieved unitary status pursuant to a court order.²¹ De jure segregation, of course, is the most poignant evidence of a racist society. Consistent with functioning in the ABZ, a majority of the Justices emphasized settled doctrine that litigation involving school inequality should stop belaboring this point: de facto segregation is not unconstitutional and the Constitution does not require economic equality in school resources.²² In fact, the Court also quoted opinions in prior cases that rationalize our need to avoid racial hostility by harping on our past.²³

18. The link between racial and economic inequality in public schools is an area of huge concern to those involved in Harvard's Civil Rights Project. See Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, C.R. PROJECT HARVARD U. (2005).

19. See Rush, *supra* note 17, at 111.

20. *Parents Involved*, 551 U.S. at 720 (Roberts, C.J., plurality opinion) ("We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977))).

21. *Id.* at 720-21.

22. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

23. *Id.* at 730. ("Allowing racial balancing as a compelling end in itself would 'effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a

Second, and this is quite unsettling, the Chief Justice opined that *Grutter* was not controlling precedent. What this means is not entirely clear. The schools did assert that they wanted to achieve diversity in their schools, but their goals were limited only to racial diversity and that was often characterized as racial balancing. Problematically, the racial diversity the schools were trying to achieve was binary and focused only on the Black/White paradigm.²⁴ Moreover, the *Grutter* Court clearly held that each individual is entitled to a holistic review of his or her application in a public university's admissions process.²⁵ Within that context, an individual's race can be considered, but it cannot be determinative. Assuming K-12 schools, like universities, have a compelling interest in having diverse schools, the plans in *Parents Involved* would nevertheless have violated *Grutter* because each applicant did not receive individualized attention and, more significantly, race ended up being the decisive factor with respect to some students, most notably the plaintiffs.²⁶

But the plurality opinion went further, indicating that diversity can never be a compelling interest of K-12 public schools even if they use the broad-based understanding of diversity upheld in *Grutter*. Specifically, the Court emphasized that the broad-based diversity that satisfies strict scrutiny is applicable in the unique environment of higher education. Free speech and academic freedom are important considerations in the context of higher education, and are less relevant, if not irrelevant, in K-12.²⁷

Parents Involved seriously reduces the ABZ. Notwithstanding the resegregation of our public schools and the ongoing inequality throughout K-12, now equality-minded people who want to talk about how to solve these issues cannot even rely on the concept of diversity to help tone down the racial hostility that usually accompanies discussions about these pressing problems. One can almost feel a sternness in Chief Justice Roberts's admonishment that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."²⁸ One might better understand the Chief Justice's insight about how to solve the problem of persistent race discrimination if his admonishment had been directed at people who were trying to hurt racial minorities. It is

human being's race' will never be achieved.'" (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (O'Connor, J., plurality opinion)).

24. *Id.* at 723. For an excellent critique of the limitations of the Black/White paradigm, see Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

25. *Grutter*, 539 U.S. at 309, 337.

26. *Parents Involved*, 551 U.S. at 728.

27. *Id.* at 725.

28. *Id.* at 748.

much more difficult to understand his comment, however, because it was directed at school officials who, through voluntary integration plans, were trying to fulfill *Brown's* promise of integrated and equal public schools—a promise that has yet to be realized. This was the primary focus of Justice Breyer's dissent.²⁹ In fact, the very tone of the competing views of the Justices in *Parents Involved* reflects the main point of this Essay: talking about race stirs up negative emotions.

Justice Kennedy seemed to understand the dilemma presented by *Parents Involved*. Specifically, how are we, as a society, supposed to remedy the extant racial inequality and segregation in our public schools if even diversity is off the table? Phrased in the context of this essay: How can we talk about how to achieve *Brown's* promise in light of the current rules that shape the ABZ? Justice Kennedy obviously is concerned about the dilemma and suggests, for example, that it would be constitutional for school districts to factor in the racial demographics of an area in deciding where it would be best to build schools with an eye toward integration and equality—the two primary values protected in *Brown*.³⁰ Moreover, he suggests that policymakers should be able to consider the racial consequences of the impact of their policies in light of *Brown's* promise.³¹

Significantly, and this is highlighted in Professor Siegel's article, the "impact" Justice Kennedy refers to is not the same "disparate impact" that characterizes *Davis*-type suits.³² Recall that disparate impact cases under the *Davis* rule are about finding bad intentions that turn neutral laws into suspect racial classifications that must meet strict scrutiny. The impact rule Justice Kennedy seems to be introducing distinguishes the bad intention case from the good intention case. Public school policymakers should be able to rationally consider the racial consequences of the neutral policies they implement for the purpose of achieving racial equality in public schools. Naturally, Justice Kennedy agrees with the majority, as do I, that such policies cannot treat individual students unequally based on their race.³³

29. *Id.* at 803 (Breyer, J., dissenting).

30. *Id.* at 789 (Kennedy, J., concurring in part and concurring in judgment).

31. *Id.* ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.").

32. Siegel, *supra* note 3, at 1308.

33. *Parents Involved*, 551 U.S. at 790. (Kennedy, J., concurring in part and concurring in judgment).

SUMMARY

Talking about race is difficult for many people. Yet the extant inequality all around us makes it imperative that we engage in discussions about how to achieve racial equality, particularly in our schools. Toward that end, the ABZ is a necessary space. Encouragingly, Justice Kennedy, in his own words, acknowledges that we need to keep talking about race. He seems to understand the dire consequences of the *Parents Involved* plurality's reasoning, which essentially strips the ABZ of any room to talk about racial equality in public schools by its suggestion that diversity is not relevant in K-12 schools. If a topic is not in the ABZ, it is totally out of bounds for hostile-free discussions and racial silence will prevail. Justice Kennedy offers a way, not only to keep the problem of school equality in the ABZ, but to actually increase the space available to inhabitants of the ABZ who want to talk about it. He does this by reshaping the ABZ rules. First, he distinguishes between good and bad intentions in the context of race discrimination. Second, and more importantly, he shifts the focus back to equality.

Expanding the ABZ rules to enable equality-minded people to intentionally use race in the development of certain policies affecting schools—without violating an individual's equal protection—might not seem like a hugely progressive step, particularly to members in the Everything Group. But as long as we need the ABZ, which we currently do, taking Justice Kennedy's step would be a move in the right direction.

