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Disintegration

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DISINTEGRATION

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INTRODUCTION

The silver lining behind the Supreme Court's decision to disintegrate the Seattle and Louisville public schools is that the decision also runs the risk of disintegrating judicial review. *Parents Involved in Community Schools v. Seattle School District No. 1*[1] holds that the Constitution bars voluntary, race-conscious efforts by two local school boards to retain the racial integration that they worked so hard to achieve after *Brown*.[2] In so holding, the Court curiously reads the Equal Protection Clause as preventing the use of race to pursue *actual* equality, and instead insists on a type of *formal* "equality" that has historically been associated with thinly veiled efforts to disguise racial oppression—the type of oppression that the Court authorized in upholding the separate-but-equal regime of *Plessy*.[3] By using the Constitution to protect passive resegregation from active integration, the current Court ends up *constitutionalizing* the culture's regression to the days of greater racial separation—a separation that *Brown* found to be "inherently unequal."[4] As a result, the new *Resegregation* decision has not only realigned the current Court with its own racially oppres-

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[1] 127 S. Ct. 2738 (2007) (invalidating race-conscious efforts to prevent resegregation of public schools in consolidated cases involving Seattle, Washington and Louisville/Jefferson County, Kentucky) [hereinafter referred to as "*Parents Involved*" or the "*Resegregation*" case].

[2] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*) (invalidating maintenance of racially segregated public schools); *see also* Brown v. Bd. of Educ., 349 U.S. 294, 757 (1955) (*Brown II*) (requiring desegregation of public schools "with all deliberate speed"). Even the use of facially neutral criteria might well be viewed as racially discriminatory if the intent of the school board in using those criteria were to promote racial integration. *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (adopting intent requirement to establish equal protection violation); *cf.* Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) (holding that pursuit of racial balance would be a "patently unconstitutional" effort to impose racial quotas (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.))).

[3] *See* Plessy v. Ferguson, 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause). *Plessy* was formally overruled in *Brown*. *See Brown I*, 347 U.S. at 493–95 (holding that "separate educational facilities are inherently unequal."). Unlike *Plessy*, which presumed equal treatment of all races, *Parents Involved* did invalidate the use of express racial classifications—although it did not impose any sort of equality requirement, which was presumed to exist even in *Plessy*. The two cases are analogous, however, in their focus on the formal "equality" of treating all races the same, while ignoring the actual harm that both decisions would foreseeably inflict on the racial minorities who were disadvantaged by the decisions. This point is discussed in greater detail in Part II.A *infra*.

[4] *Brown I*, 347 U.S. at 493–95 (holding that "separate educational facilities are inherently unequal.").

sive past, but it has also distanced the Court from the nation's hope for a racially progressive future. Once the decision is understood in this way, the question becomes whether the case will begin to undermine the legitimacy needed for the Court to continue its activist conception of judicial review. Because the views of the Justices seem so transparently political, the threat to judicial legitimacy that emanates from the *Resegregation* case may end up exceeding the nation's patience for continued Supreme Court interference in the nation's racial policymaking process. There can be no assurance that the case will prompt such a reconsideration of judicial review. But one can at least hope that it will.

Part I of this Article describes the manner in which the *Resegregation* decision has marginalized the importance of racial integration. Part I.A. describes the Seattle and Louisville integration plans under consideration in the case. Part I.B. describes the various Supreme Court opinions issued in the decision invalidating those plans. Part II discusses the impact that the *Resegregation* decision is likely to have on the nation's ever-evolving conception of equality. Part II.A. explains how the decision effectively overrules *Brown*—by protecting the interests of disappointed white parents at the cost of advancing racial resegregation—despite the fact that it is doctrinally difficult to support such a result. Part II.B. argues that the plurality opinion of Chief Justice Roberts now gives official recognition to an updated form of racism, in which supposed "equality" is used as a tool of racial oppression. Part III discusses the effect that the decision is likely to have on the future of judicial review. Part III.A. illustrates that the decision to invalidate the integration plans at issue can best be understood as political rather than doctrinal in nature. Part III.B. expresses the hope that such transparent judicial politics will cause the Supreme Court to lose the perceived legitimacy that it needs to continue supplanting the racial policy preferences adopted by the representative branches of government. The Conclusion suggests that, while one may hope for the disintegration of undemocratically activist judicial review, the long persistence of racial oppression in the United States does not afford much basis for optimism in achieving that end.

I. DISINTEGRATING THE SCHOOLS

The likely effect of the Supreme Court's *Parents Involved* decision will be to promote racial resegregation of the nation's schools, thereby undermining the strenuous efforts that some school boards have made to achieve integration in

the aftermath of *Brown*. Although the Court suggests that race-neutral strategies can still be used to maintain integration,[5] experience suggests that those strategies will not work.[6] The prevalence of residential segregation in the United States,[7] combined with the frequent failures of race-neutral efforts to secure integration in the past,[8] suggests that the effectiveness of race-neutral remedies for resegregation is more likely to be theoretical than real. Moreover, the prominence of this belief at the time the case was decided suggests that the Supreme Court majority in *Parents Involved* was intentionally subordinating actual integration to an abstract conception of colorblindness when it chose to tolerate the foreseeable resegregation of public schools.[9] Stated more succinctly, when white parents were disappointed by the failure of their children to receive the school assignments that the parents desired, the Supreme Court was willing to elevate the interests of those disappointed white parents above the more general societal interest in promoting racial integration of the schools. As a result, the message conveyed to racial minorities by the *Resegregation* decision—and fortified by the political leanings of the Justices who joined it—is a message of hostility to the idea of racial inclusion.[10] As a rap music aficionado might put it, the Supreme Court majority in the *Resegregation* case chose simply to disregard the policies of local school boards concerning racial diversity, in order to dis integration.[11]

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[5] *See Parents Involved*, 127 S. Ct. at 2760–61 (Roberts, C.J., majority opinion) (favoring use of race-neutral alternatives); *id.* at 2792–93 (Kennedy, J., concurring) (same) .

[6] *See, e.g.*, *id.* at 2828–30, 2831–34, 2836 (Breyer, J., dissenting); *cf. id.* at 2768–70 (Thomas, J., concurring) (conceding that *de facto* segregation is likely to result, but calling it lack of "racial balance" rather than "segregation").

[7] *See id.* at 2747, 2755, 2758 (Roberts, C.J., majority opinion) (discussing effects of residential segregation); *id.* at 2769, 2775 (Thomas, J. concurring) (same); *id.* at 2791 (Kennedy J., concurring in part and concurring in the judgment) (same); *id.* at 2802–05, 2820–22, 2829 (Breyer, J., dissenting) (same); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 480, 488 (5th ed. 2005) (discussing residential and school segregation).

[8] *See Parents Involved*, 127 S. Ct. at 2828–30, 2831–34, 2836 (Breyer, J., dissenting) (discussing race-neutral failures).

[9] *See id.* at 2751–52; (Roberts, C.J., majority opinion) (subordinating importance of racial balance to interest in race neutrality); *id.* at 2758–59 (Roberts, C.J., plurality opinion) (same); *id.* at 2768–70 (Thomas, J., concurring) (same).

[10] *See id.* at 2798–2800 (Stevens, J., dissenting) (criticizing majority for its failure to distinguish between inclusion and exclusion of racial minorities); *id.* at 2815–17 (Breyer, J., dissenting) (same).

[11] In the vernacular of black English, that has crossed over into more mainstream culture through the popularity of rap music, the term "dis" or "diss" is commonly used to convey the notion of disrespect. *See* Wikipedia, *Dissing*,

A. *The Cases*

Schools in the United States have historically been segregated. Although *Brown v. Board of Education* invalidated the *de jure* segregation that used to be common in many parts of the nation, most schools in the United States have failed to achieve any meaningful level of actual integration in the fifty-three years that have elapsed since *Brown* was decided.[12] That is due largely to widespread *de facto* segregation, which is primarily traceable to residential housing patterns. Moreover, as a result of current resegregation trends, schools are now becoming more segregated rather than more integrated.[13] It is, therefore, noteworthy when a local school board has both the inclination and the ability to produce a degree of racial balance that reflects the racial composition of the overall district in which the school board governs. After years of effort, both the Jefferson County, Kentucky, and Seattle, Washington, school boards were able to achieve an unusual degree of racial balance for the cities of Louisville and Seattle respectively—even though the schools in both cities had been highly segregated in the past. The school boards did this by voluntarily adopting integration plans that both paid attention to race, and imposed restrictions on student assignments that would exacerbate racial imbalance. When disappointed white parents challenged the explicit use of race in those integration plans, the Courts of Appeals for the Sixth and Ninth Circuits rejected the challenge and upheld the plans. However, a 5–4 majority of the Supreme Court reversed and invalidated the plans, holding that their explicit use of race violated the Equal Protection Clause of the United States Constitution.[14]

1. Louisville

Louisville had historically maintained a *de jure* segregated school system, and from 1975 to 2000, the school district operated under a federal court desegregation decree that required the district to pursue in its schools specified racial percentage ranges that reflected the student racial makeup of the district as a whole. The decree was dissolved in 2000, when the District Court held that Louisville had achieved unitary status. Nevertheless, from 2001 to the

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http://en.wikipedia.org/wiki/Dissing (last visited Dec. 5, 2007).

[12] *See* STONE ET AL., *supra* note 7, at 488–500 (discussing successes and failures of desegregation efforts in the North and the South).

[13] *See Parents Involved*, 127 S. Ct. at 2801–02, 2833 (Breyer, J., dissenting) (citing statistics about present racial segregation in public schools); Gratz v. Bollinger, 539 U.S. 244, 299 n.4 (2003) (Ginsburg, J., dissenting) (same); Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 277–78 (2007) (same); STONE ET AL., *supra* note 7, at 488–500 (same).

[14] *See Parents Involved*, 127 S. Ct. at 2746 (Roberts, C.J., majority opinion).

present, Louisville operated under a voluntarily adopted integration plan that was designed to maintain the level of integration achieved under the previous desegregation decree. Virtually all students in the Louisville school system are either black or white, with blacks comprising 34% of the student body, and whites and others comprising the remaining 66%. Accordingly, the Louisville plan classified students as either "black" or "other," and sought to maintain a black student population in each affected school of at least 15%, and not more than 50%. That established a range in which the level of integration at each school was within plus or minus 20% of the actual racial balance in the overall school district. When students first entered the school system, or sought to transfer to another school within the system, they were permitted to attend the schools of their choice. However, student choices were subject to space limitations, and to the percentage limitations imposed by the racial integration guidelines.[15]

When Crystal Meredith moved to the Louisville school district in August 2002, space limitations precluded the assignment of her white son to the school that was nearest his home, and he was assigned instead to a school that was 10 miles away. When Meredith requested that her son be transferred to another school that was nearer her home, that request was denied on the ground that her son's assignment to that school would cause the school to fall outside the integration range established by the racial guidelines. Meredith then sued the school board, challenging the constitutionality of the racial guidelines. The United States District Court for the Western District of Kentucky found that the school board's use of race was constitutional, because it was narrowly tailored to advance the board's compelling interest in maintaining racially diverse schools. The Court of Appeals for the Sixth Circuit affirmed, but the United States Supreme Court then granted *certiorari*.[16]

2. *Seattle*

Like the Louisville schools, the Seattle public schools also had a history of alleged *de jure* segregation, which was challenged before both a federal court and a federal administrative agency. Before the allegations of *de jure* segregation were adjudicated, however, the *de jure* segregation claims were set-

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[15] *See id.* at 2749–50 (Roberts, C.J., majority opinion); *id.* at 2806–09 (Breyer, J., dissenting). The racial guideline restrictions did not apply to magnet schools. *See id.* at 2749–50 (Roberts, C.J., majority opinion); *id.* at 2809 (Breyer, J., dissenting).

[16] *Id.* at 2750 (Roberts, C.J., majority opinion); *id.* at 2809 (Breyer, J., dissenting).

tled when the Seattle school board promised voluntarily to adopt an integration plan. Initial versions of the plan included race-conscious student assignments, as well as busing, in order to increase the integration of Seattle's racially imbalanced schools. Although those versions of the Seattle plan eventually succeeded in achieving a significant degree of racial balance, opposition to busing, white flight, and the influx of Asian students led the board to substitute the plan at issue in the *Parents Involved* case. That plan, which was in effect from 1999 to 2002, abandoned busing as a technique for promoting integration, and substituted a system of constrained student choice. Students were permitted to attend the schools of their choice, subject to four "tiebreaker" restrictions that resolved competing claims for assignment to oversubscribed schools. The tiebreaker first gave a preference to students with siblings in the desired school; second to students who were not in a race that was overrepresented in the desired school; third to students residing in the neighborhood of the desired school; and fourth to students who received child care in the neighborhood of the desired school. The plan also sought to reduce the emphasis that race had played in earlier versions of the integration plan.[17]

For purposes of deciding whether a race was overrepresented in a racially imbalanced school, the school board classified students as being either "white" or "nonwhite."[18] It considered a school to be "racially imbalanced" if the nonwhite student population of the school deviated by more than plus or minus 15% from the student racial composition of the school district as a whole.[19] While the Seattle integration plan at issue was in use, the student population of the Seattle school district was 41% white, and 59% nonwhite (including student populations that were 23.8% Asian, 23.1% black, 10.3% Latino, and 2.8% indigenous Indian).[20] The current version of the Seattle plan was in effect for only the three school years ranging from 1999–2002, because the board ceased using the plan when the plan was challenged in court.[21] During the time that

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[17] *See id.* at 2746–48 (Roberts, C.J., majority opinion); *id.* at 2801–06 (Breyer, J., dissenting).

[18] *See id.* at 2747 (Roberts, C.J., majority opinion).

[19] *See id.* at 2747 n.3 (noting that the target percentage increased from 10% to 15% for the 2001–2002 school year). *See also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1169–71 (9th Cir. 2005) (Court of Appeals decision describing Seattle plan in more detail).

[20] *See Parents Involved*, 127 S. Ct. at 2747, 2747 n.3 (Roberts, C.J., majority opinion).

[21] *See id.* at 2746 n.1, 2751 (Roberts, C.J., majority opinion); *id.* at 2805–06 (Breyer, J., dissenting). Because the District Court record was closed before the start of the 2001–2002 school year, the record contained no student assignment data for that year. *See id.* at 2746 n.1 (Roberts, C.J., majority opinion).

the tiebreaker applied, it affected only about 300 of the district's approximately 50,000 students per year, and 97% of all students in the school system received their first or second choices in school assignments. Students who did not receive their first or second choices, were permitted to transfer to the school of their choice the following year without regard to the racial guidelines. As a result, no student was required to spend more than one year in a school that was not the student's first or second choice.[22]

A nonprofit corporation called Parents Involved In Community Schools—comprised of parents who objected to Seattle's use of a racial tiebreaker in making school assignments—sued the Seattle school board alleging constitutional and statutory violations, including a violation of the Equal Protection Clause. In a series of lower court decisions, the challenges were ultimately rejected by the Washington Supreme Court, the United States District Court for the Western District of Washington, and the United States Court of Appeals for the Ninth Circuit after rehearing *en banc*. Like the Sixth Circuit in the Louisville case, the Ninth Circuit found that the integration plan was narrowly tailored to advance the school board's compelling interest in promoting racial diversity. However, the United States Supreme Court then granted *certiorari*.[23]

Both the Louisville and Seattle integration plans evolved over decades of experimentation and accumulated school board expertise. Although initial versions of the plans were largely ineffective, subsequent versions became increasingly more effective, and the plans eventually produced meaningful levels of integration in the Louisville and Seattle schools. The versions of the plans that were considered by the Supreme Court sought to minimize the role that race had played in earlier incarnations of the plans, while simultaneously increasing student choice and protecting the levels of racial balance that had finally been achieved. Both the Louisville and Seattle cases, therefore, presented clearly the issue of whether race-conscious efforts to promote integration and prevent resegregation could be used for student assignments in a marginal number of cases where other integration strategies had failed to work in the past.[24] The Louisville and Seattle cases were argued separately before the Supreme Court,[25] but were consolidated for disposition in the *Parents Involved* decision.[26]

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[22] *See id.* at 2805–06 (Breyer, J., dissenting).

[23] *See id.* at 2748–49 (Roberts, C.J., majority opinion).

[24] *See id.* at 2809–11 (Breyer, J., dissenting).

[25] *See* Meredith v. Jefferson County Public Schools, 126 S. Ct. 2351 (2006) (granting *certiorari*) (oral argument at http://www.oyez.org/cases/2000-2009/2006/2006_05_915/);

B. *The Opinions*

In *Parents Involved*, Chief Justice Roberts wrote a 5–4 majority opinion for the Supreme Court invalidating the Louisville and Seattle integration plans. He relied heavily on *Brown* in holding that the use of race to promote integration violated the Equal Protection Clause because it was not narrowly tailored to advance a compelling interest in student diversity.[27] Justices Scalia, Kennedy, Thomas and Alito joined that opinion. However, Justice Kennedy declined to join the four-Justice plurality portions of the opinion,[28] which seemed categorically to preclude any use of race to promote integration in *de facto* segregated schools.[29] Justice Thomas wrote a concurring opinion, emphasizing his belief that the Constitution required prospective colorblindness, even in the face of *de facto* resegregation.[30] Justice Kennedy wrote a concurring opinion, arguing that the explicit use of race might be permissible in some instances to promote the integration of *de facto* segregated schools, if race-neutral efforts were first shown to be unavailing.[31] As the Justice casting the "swing vote" on this issue, Justice Kennedy's position will likely be dispositive in future cases. Justice Stevens wrote a dissenting opinion, denouncing the "cruel irony" entailed in the invocation of *Brown* by Chief Justice Roberts to justify the resegregation of public schools.[32] Justice Breyer wrote the primary dissent, arguing that the Roberts majority had misapplied *Brown*—as well as the Court's post-*Brown* desegregation precedents—in a way that undermined the promise of integrated education.[33] Justice Breyer's dissent was joined by Justices Stevens, Souter and Ginsburg.[34]

1. *Invalidating the Plans*

Three Justices wrote opinions supporting invalidation of the Louisville and Seattle integration plans. Chief Justice Roberts wrote an opinion, parts of which were joined by a majority of the Court, and parts of which were joined

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Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 126 S. Ct. 2351 (2006) (granting *certiorari*) (oral argument at http://www.oyez.org/cases/2000-2009/2006/2006_05_908/).

[26] *See Parents Involved*, 127 S. Ct. 2738 (2007).

[27] *See id.* at 2746, 2751–54, 2759–61 (Roberts, C.J., majority opinion).

[28] *See id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

[29] *See id.* at 2746, 2755–59, 2761–68 (Roberts, C.J., plurality opinion).

[30] *See id.* at 2768 (Thomas, J., concurring).

[31] *See id.* at 2791–93 (Kennedy, J., concurring in part and concurring in the judgment).

[32] *See id.* at 2797–98 (Stevens, J., dissenting).

[33] *See id.* at 2800–01 (Breyer, J., dissenting).

[34] *See id.* at 2800.

by a plurality. Justice Thomas wrote a concurring opinion, and Justice Kennedy wrote an opinion concurring in part, and concurring in the judgment.

a. Chief Justice Roberts

The majority opinion written by Chief Justice Roberts rested squarely on the proposition that all racial classifications, whether benign or invidious, are subject to strict scrutiny under the Equal Protection Clause. Because the Louisville and Seattle integration plans sometimes made explicit use of race in assigning students to racially oversubscribed schools, those plans were subject to strict scrutiny.[35] As a result, the plans could be upheld only if they were shown to constitute narrowly tailored efforts to advance a compelling governmental interest. In the educational context, only two governmental interests had ever been recognized as compelling: the interest in remedying the effects of past intentional discrimination; and the interest in promoting diversity in higher education. The interest in remedying the effects of past intentional discrimination did not apply under the facts of *Parents Involved*, because both the Louisville and Seattle school districts were unitary at the time that the integration plans were adopted. Accordingly, there was at that time no past intentional discrimination to remedy, and the Constitution did not permit the use of racial classifications to remedy mere *de facto* segregation or racial imbalance.[36] Although the Supreme Court had held four years earlier, in *Grutter v. Bollinger*,[37] that the pursuit of student diversity in higher education could constitute a compelling governmental interest, the integration plans at issue in *Parents Involved* concerned primary and secondary education rather than higher education. Moreover, the Louisville and Seattle plans were not narrowly tailored efforts to advance *Grutter* diversity, because the binary focus of those plans on only "black" and "white" racial balance—without the holistic, individualized consideration of other factors that can contribute to student diversity—made the integration plans impermissibly overbroad.[38] Because the racial guidelines affected only a small percentage of students—3% in Louisville, and fifty-two students in Seattle—the use of race had not been shown to be necessary for student diversity. In addition, the Louisville and Seattle school

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[35] *See id.* at 2751–54 (Roberts, C.J., majority opinion).

[36] *See id.* at 2751–52.

[37] 539 U.S. 306, 328 (2003).

[38] *See Parents Involved*, 127 S. Ct. at 2753–54 (Roberts, C.J., majority opinion).

boards had not adequately demonstrated that they engaged in a serious, good-faith consideration of race-neutral alternatives.[39]

In the plurality portions of his opinion—which were joined by Justices Scalia, Thomas and Alito—Chief Justice Roberts distinguished more forcefully between the holistic diversity found to be compelling in *Grutter*, and the binary racial diversity that was pursued in Louisville and Seattle. Roberts asserted that it was not necessary to determine whether an interest in mere racial diversity could be compelling, because the integration plans at issue were not narrowly tailored to the "educational and social benefits asserted to flow from racial diversity." There is no evidence that replicating the racial demographics of a school district "has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits." Therefore, the integration plans at issue were "directed only to racial balance pure and simple, an objective that this Court has repeatedly condemned as illegitimate."[40] In fact, the pertinent definitions of diversity were so binary that, in Seattle, a student body that was 50% white and 50% Asian would be considered diverse, while a student body that was 30% Asian, 25% black, 25% Latino, and 20% white would be considered racially concentrated.[41] Unlike the diversity plan upheld in *Grutter*, the Louisville and Seattle integration plans set their diversity targets simply by counting back from the goal of "outright racial balancing"—a goal that has repeatedly been held to be "patently unconstitutional"—because it fails to treat citizens as individuals, and instead treats them as mere members of racial groups.[42] Chief Justice Roberts then found that the two plans suffered from defects present in other invalid affirmative action programs, including the absence of a "logical stopping point," and the desire to remedy mere "societal discrimination."[43] The plans were simply using the semantic concepts of "racial integration" and "racial diversity" to camouflage a constitutionally impermissible effort to achieve racial balance.[44]

Chief Justice Roberts stressed that the Court's post-*Brown* desegregation precedents—including *McDaniel v. Barresi*,[45] *Swann v. Charlotte-Mecklenburg Board of Education*,[46] *Crawford v. Board of Education*,[47] *School Committee of*

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[39] *See id.* at 2759–61.
[40] *See id.* at 2755 (Roberts, C.J., plurality opinion).
[41] *See id.* at 2756.
[42] *See id.* at 2757–58 (quoting *Grutter*, 539 U.S. at 330).
[43] *Id.* at 2758.
[44] *See id.* at 2758–59.
[45] 402 U.S. 39, 41 (1971).
[46] 402 U.S. 1, 16 (1971).

Boston v. Board of Education,[48] and *Grutter v. Bollinger*[49]—were not controlling under the doctrine of *stare decisis*, because those cases involved remedies for *de jure* segregation, rather than efforts to prevent the *de facto* resegregation that Louisville and Seattle sought to address.[50] As a result, *Brown* itself compelled the conclusion that the Louisville and Seattle plans were unconstitutional in their assignment of students to particular schools on the basis of race. The fact that the school boards may have had benign integrationist motives was irrelevant, because strict scrutiny applies to all racial classifications—regardless of whether their motivations are benignly inclusive or invidiously exclusive. Although developing student school assignment plans can be a complex process, no deference is owed to local school boards in determining the constitutionality of those plans.[51] Chief Justice Roberts expressly reserved the question of whether race could be used to promote diversity through other means—such as school sitings, or the establishment of magnet school—stating that those questions implicated different constitutional considerations.[52] Finally, Chief Justice Roberts reiterated his belief that *Brown* compelled the result in *Parents Involved*, because *Brown* established the proposition that racial classification and separation denoted inferiority in a way that was "odious to a free people whose institutions are founded upon the doctrine of equality."[53] Chief Justice Roberts ended the plurality opinion with his own version of an oft-quoted sentiment, asserting that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[54]

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[47] 458 U.S. 527, 535 (1962).

[48] 352 Mass. 693, 695, 700 (1967); *appeal dismissed for want of substantial federal question*, 389 U.S. 572 (1968) (per curiam) (a disposition of the merits and a Supreme Court precedent).

[49] 539 U.S. at 324–25, 330, 337.

[50] *See Parents Involved*, 127 S. Ct. at 2761–64 (Roberts, C.J., plurality opinion).

[51] *See id.* at 2764–68.

[52] *See id.* at 2766.

[53] *See id.* at 2767–68 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214 (1995)).

[54] *See id.* at 2768 (Roberts, C.J., plurality opinion). In his Ninth Circuit dissent, Judge Bea had stated that "[t]he way to end racial discrimination is to stop discriminating by race." *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1222 (9th Cir. 2005) (Bea, J., dissenting). Judge Bea also quoted Professor Van Alstyne's assertion that "one gets beyond racism by getting beyond it now." *See id.* at 1221 (quoting California Supreme Court Justice Stanley Mosk in Price v. Civil Serv. Comm., 26 Cal.3d 257, 299 (1980) (Mosk, J., dissenting), who was himself quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979)).

b. Justice Thomas

Justice Thomas, while fully joining the opinion of Chief Justice Roberts, wrote his own concurring opinion to address several contentions made in Justice Breyer's dissent. Justice Thomas rejected the dissent's assertion that resegregation was occurring in Louisville and Seattle; that the school boards had a present interest in remedying past segregation; and that the two race-based assignment plans served a compelling state interest. As a result, the plans were not only unconstitutional, but they gave the local school boards a free hand to make decisions based on race in a way that was reminiscent of the segregationist arguments made in *Brown*.[55]

Justice Thomas rejected the dissent's claim that the Louisville and Seattle school districts were threatened with resegregation, because for Thomas, mere racial imbalance did not amount to segregation. Segregation had to be *de jure* in nature, and the asserted resegregation at issue in *Parents Involved* was simply *de facto* racial imbalance, produced primarily by private residential choices. Accordingly, the dissent's reverential embrace of "integration" amounted to nothing more than a preference for unconstitutional racial balancing.[56] Moreover, the Louisville and Seattle plans were not necessary for the schools to preserve their "hard-won gains," because the only pertinent gain at issue was the prevention of a *de jure* segregated dual school system—something that did not presently exist in either Louisville or Seattle.[57] The two school boards also lacked any interest in using race-based remedies for past segregation. Such remedies are constitutionally available only to redress the effects of formal segregation by law, or the effects of past discrimination for which the school board itself is responsible—neither of which was at issue in *Parents Involved*.[58] As a result, post-*Brown* precedents allowing race-based desegregation remedies—such as *Swann*,[59] *McDaniel*,[60] and *Green v. County School Board*[61]—are exceptional cases responding to massive resistance, which are simply inapplicable in a *de facto* context.[62] Contrary to the dissent's suggestion, it is not difficult to distinguish *de facto* from *de jure* segregation,

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[55] *See Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).
[56] *See id.* at 2768–70.
[57] *See id.* at 2770 n.3.
[58] *See id.* at 2770–73.
[59] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5–6 (1971).
[60] McDaniel v. Barresi, 402 U.S. 39, 41 (1971).
[61] 391 U.S. 430, 437–38 (1968).
[62] *See Parents Involved*, 127 S. Ct. at 2771 nn.5–6 (Thomas, J., concurring).

and only the threat of *de facto* resegregation was present in Louisville and Seattle.[63] In the absence of formal findings that establish school board involvement in uncured past discrimination, the school boards were simply trying to remedy "general societal discrimination."[64] The dissent is, therefore, incorrect when it challenges the coherence of holding that a remedy could be constitutionally compelled one day but constitutionally impermissible the next. There is nothing incoherent in concluding that race-based remedies are permissible only as long as there is some prior discrimination to remedy.[65] Remedies for segregation are discrete, one-time remedies, but remedies for mere racial imbalance would have to be indefinite in order to keep pace with constantly changing demographics.[66]

Justice Thomas accused the dissent of applying a watered-down version of strict scrutiny, which sought to distinguish between benign and invidious discrimination. Although Court of Appeals Judges Kozinski and Boudin had agued in favor of applying a relaxed standard of review to integration efforts that were benign rather than oppressive in nature, Supreme Court precedents—including *Adarand Constructors, Inc. v. Peña*,[67] *Grutter v. Bollinger*,[68] and *Johnson v. California*[69]—squarely rejected that view. Strict scrutiny applied to all racial classifications, whether benign or invidious. Moreover, there was nothing benign about racial paternalism that excluded students from schools based on their race.[70] Contrary to the dissent's assertion, the integration plans at issue in *Parents Involved* could not survive genuine strict scrutiny for three reasons.

First, the dissent had not identified any compelling interest in remedying prior segregation that did not ultimately amount to a mere interest in counteracting the effects of societal or residential segregation—an interest that would have no logical stopping point.[71]

Second, the school boards also lacked any educational justification for promoting integration, because the existing social science evidence was too contested to establish reliably that integration was beneficial for black students.

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[63] *See id.* at 2771 n.4.
[64] *See id.* at 2772.
[65] *See id.* at 2772 n.8.
[66] *See id.* at 2773.
[67] 515 U.S. 200, 227, 241 (1995).
[68] 539 U.S. 306, 326 (2003).
[69] 543 U.S. 499, 505 (2005).
[70] *See Parents Involved*, 127 S. Ct. at 2774–75 (Thomas, J., concurring).
[71] *See id.* at 2775–76.

Moreover, strict scrutiny precluded mere judicial deference to local school boards with respect to the presence of such educational benefits.[72] In such an inconclusive context, Supreme Court Justices should not play the role of activist social engineers seeking to solve society's racial problems.[73]

Third, no "democratic element" in producing an educational environment reflective of our "pluralistic society" constituted a compelling interest. That interest was too abstract to have any meaning distinct from mere racial balancing. Moreover, school tracking and self-segregation might well prevent any such racial-interaction benefits from occurring even in nominally "integrated" schools.[74] Not only was the social science again too contested to support such an interest, but if the Supreme Court were to take sides in such an educational policy debate, it would imprudently be replicating the error of *Lochner*.[75] Justice Thomas distinguished the compelling diversity interest recognized in *Grutter* by asserting that *Grutter* was limited to the context of higher education—a context in which special emphasis was placed on freedoms of speech and thought, and where schools made educational judgments in selecting their student bodies.[76] The interests of the Louisville and Seattle school boards could not be compelling because, in the past, the only government interests that had been recognized as compelling were government interests in preventing anarchy or violence, and in remedying past discrimination for which the government was itself responsible.[77]

Justice Thomas ended his concurrence by endorsing the conception of colorblindness articulated by Justice Harlan's dissent in *Plessy v. Ferguson*.[78] He accused the dissent of being pragmatic and instrumental in its constitutional interpretation—just as the Court had been in *Plessy*[79]—and then asserted that the dissent was arguing for the same sort of deference to local practice and expertise that the segregationists had argued for in *Brown*. Like Justice Breyer's dissent, the segregationists in *Brown* had also argued that the decision

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[72] *See id.* at 2776–79.

[73] *See id.* at 2779 n.14.

[74] *See id.* at 2779–81.

[75] *See id.* at 2779 n.15 (quoting "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Science." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

[76] *See id.* at 2775–79; 2781–82.

[77] *See id.* at 2782.

[78] *See id.* at 2782 (quoting "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[79] *See id.* at 2782–83.

would be disruptive and productive of litigation; that it failed to follow precedent; that it failed to recognize the benign racial consequences that were intended to flow from the racial classification at issue; and that the Court should not undo the racial progress that had already been achieved.[80] Justice Thomas labeled the dissent's preference for racial inclusion over racial separation a "faddish" theory and cautioned that our history has taught us to "beware of elites bearing social theories."[81]

c. Justice Kennedy

Justice Kennedy's concurring opinion sought to stake out a middle ground between the positions taken by Chief Justice Roberts in his plurality opinion and Justice Breyer in dissent. Justice Kennedy agreed with the Roberts majority that the Louisville and Seattle integration programs were unconstitutional, because they were not narrowly tailored efforts to advance the government's compelling interest in diversity. However, he did not agree with the Roberts plurality that the school boards had failed to identify a compelling interest in diversity.[82]

Because the Louisville and Seattle integration plans made express use of race in allocating educational benefits and burdens, the plans were subject to strict scrutiny. The school boards, therefore, bore the burden of showing that their plans were narrowly tailored to advance a compelling governmental interest. In order to apply that constitutional standard, the plans had to be thoroughly understood to determine whether they were genuinely benign or remedial on the one hand, or motivated by illegitimate notions of racial inferiority or racial politics on the other. They also had to be thoroughly understood to determine whether less restrictive alternatives existed for advancing any compelling interest that might exist. However, the Louisville and Seattle school boards did not meet their burden of showing that strict scrutiny was satisfied, because the application of their racial guidelines was too confused and self-contradictory to be narrowly tailored. For example, the Louisville plan was applied to deny a desired kindergarten transfer to Crystal Meredith's son, but the plan sometimes stated that it did not apply to kindergartens, while at other times stating that it did. In addition, there were several other unexplained

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[80] *See id.* at 2783–86 (citing claims that racial segregation under *Plessy* was racially beneficial, and that the Supreme Court should not undo the progress that had already been made).

[81] *See id.* at 2787–88.

[82] *See id.* at 2788–89 (Kennedy, J., concurring in part and concurring in the judgment).

ambiguities and inconsistencies in the way that the Louisville plan operated. The Seattle plan was similarly confusing, because the school board had not explained why its interest in diversifying schools in a multiracial school system could be satisfied by classifying students merely as "white" or "nonwhite." Accordingly, neither the Louisville nor the Seattle school boards had demonstrated that their plans were narrowly tailored to advance the asserted interest in diversity.[83]

Justice Kennedy believed that the aspirational goal of the Constitution was that race should not matter, but he also believed that in reality race often *did* matter. Accordingly, Justice Kennedy disagreed with the Chief Justice's "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."[84] Fifty years of experience since *Brown* indicated that the Roberts plurality's belief that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" was overly simplistic. To the extent that the Roberts plurality could be read as requiring school districts to ignore *de facto* resegregation, Justice Kennedy could not agree. Similarly, the colorblindness advocated by Justice Harlan in his *Plessy* dissent, made sense in the context of *Plessy*, but could not be universally applied in other contexts.[85] When student body composition interferes with equal educational opportunity, school boards are free to devise race-conscious measures to address the problem, as long as those measures do not systematically type students by race. Accordingly, measures including race-conscious school site selection, gerrymandered attendance zones, and the establishment of magnet schools might be permissible. Because such measures would not tell students that they were defined by race, they would not be subject to strict scrutiny. Rather, they would be analogous to the manner in which race is used in drawing facially neutral election district lines—a process in which race consciousness has been constitutionally permitted for generations.[86] In the present case, however, the number of students affected by the Louisville and Seattle integration plans is so small that the school boards did not negate the existence of less restrictive alternatives to the use of race-conscious student assignment. Such alternatives might include the race-conscious

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[83] *See id.* at 2788–91.

[84] *See id.* at 2791.

[85] *See id.* at 2791–92.

[86] *See id.* at 2792. Although Justice Kennedy does not cite his work, Professor Goodwin Liu has argued that the Louisville and Seattle integration plans should be controlled by the Supreme Court's redistricting cases, rather than by the Court's affirmative action cases. *See* Liu, *supra* note 13, at 301–09.

but facially neutral measures mentioned above, or other more nuanced measures that the school boards might devise in accordance with *Grutter*.[87]

Justice Kennedy appears to agree with the Roberts majority that the diversity interest invoked in *Parents Involved* is not the same as the more holistic and individualized diversity interest found to be compelling in *Grutter*. However, the interests in remedying past intentional discrimination, or in promoting *Grutter*-type diversity, might still inform the constitutional analysis in *Parents Involved*.[88] Nevertheless, the dissent's application of strict scrutiny was so permissive that it approximated rational basis review, and would authorize widespread governmental use of racial classifications. Although the dissent claimed to be applying *Grutter*[89] and *Gratz v. Bollinger*,[90] those cases are not controlling. The undergraduate affirmative action plan at issue in *Gratz* involved *less* consideration of race than the *Parents Involved* plans, but was still held unconstitutional—thereby establishing *a fortiori* the unconstitutionality of the Louisville and Seattle plans. And the law school affirmative action plan upheld in *Grutter* gave much more individualized consideration to a range of diversity factors than the mechanical plans at issue in *Parents Involved*.[91] The dissent sought to minimize the distinction between *de facto* and *de jure* segregation in assessing the constitutionality of racial classifications, but the Court's post-*Brown* precedents—including *Swann*[92] and *Green*[93]—were limited to *de jure* segregation in their authorization of extraordinary race-based remedies. Such remedies are not available for mere *de facto* societal discrimination. It is true that the victims of discrimination can be harmed just as much by *de facto* as *de jure* discrimination; that it can sometimes be difficult to distinguish *de facto* from *de jure* discrimination; and that the primary function of the distinction has historically been to limit the reach of judicial—as opposed to political—remedies for discrimination. Nevertheless, the distinction is still an important one. Racial classifications are among the most pernicious actions

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[87] *See Parents Involved*, 127 S. Ct. at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment).

[88] *See id.* at 2793–94.

[89] *Grutter*, 539 U.S. at 340–41.

[90] 539 U.S. 244, 251 (2003) (invalidating affirmative action plan for undergraduate student admissions at the University of Michigan).

[91] *See Parents Involved*, 127 S. Ct. at 2794 (Kennedy, J., concurring in part and concurring in the judgment).

[92] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 8–10 (1971).

[93] Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968).

that a government can take, and the *de jure* limitation serves to cabin the government's use of race.[94]

Justice Kennedy noted that, when considering the resegregation issue in Court of Appeals cases, Judges Kozinski and Boudin expressed the view that direct racial remedies should be available to cure the problem of racial isolation in schools. However, the inefficiency that results from limiting the direct use of racial classifications is warranted, because indirect uses of race are less dangerous. Racial categorizations are difficult to apply; they can be divisive; and race can be used as a political bargaining chip. But race-conscious measures that are facially neutral are less harmful. Moreover, the duality resulting from recognizing that race has caused a problem, while resisting the use of race to solve that problem, is simply a duality that is built into the Equal Protection Clause.[95] The nation has a moral obligation to promote racial integration, but it must fulfill that obligation in ways that treat race as one of many factors. The crude and stigmatizing reduction of school children to racial chits cannot be tolerated—at least not until all other measures have been exhausted. Therefore, school districts are free to continue pursuing racial integration, but they must do so without the widespread use of racial classifications to allocate benefits and burdens.[96]

2. *Supporting the Plans*

Two Justices wrote dissenting opinions supporting the Louisville and Seattle integration plans. Justice Stevens wrote a brief dissenting opinion, and Justice Breyer wrote a long opinion that served as the primary dissent.

a. *Justice Stevens*

Justice Stevens wrote a brief dissenting opinion in *Parents Involved*, in which he joined what he termed the "eloquent and unanswerable" dissent of Justice Breyer. He wrote separately to denounce the "cruel irony" of the Chief Justice's reliance on *Brown* to support his decision.[97] Justice Stevens emphasized that *Brown* involved discrimination against black schoolchildren, noting that there were no reports of white children wishing to attend black segregated

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[94] *See Parents Involved*, 127 S. Ct. at 2794–96 (Kennedy, J., concurring in part and concurring in the judgment).

[95] *See id.* at 2796–97.

[96] *See id.* at 2797.

[97] *Id.* at 2797 (Stevens, J., dissenting).

schools. Nevertheless, Chief Justice Roberts ignored this important contextual fact and rewrote *Brown* in a way that equated racial discrimination against blacks with race-conscious efforts to promote the very integration that *Brown* sought to achieve.[98] Chief Justice Roberts disregarded the distinction between using race for inclusionary purposes and using it for exclusionary purposes, relying on only a series of split decisions—such as *Adarand*[99]—that applied strict scrutiny to both benign and invidious uses of race. The cases decided between *Brown* and *Adarand*—including *School Committee of Boston*,[100] *Swann*,[101] and *Bustop, Inc. v. Los Angeles Board of Education*[102]—demonstrate that rigid Supreme Court adherence to the three tiers of equal protection scrutiny have obscured the meaning of *Brown*. Although those cases made it clear that the Fourteenth Amendment did not prohibit race-based student assignments that were designed to promote integration, the Roberts majority failed to follow those precedents. Justice Stevens then noted that the Court had changed since those cases were decided, stating "[i]t is my firm conviction that no member of the Court that I joined in 1975 would have agreed with today's decision."[103]

b. Justice Breyer

Justice Breyer wrote the primary dissent in *Parents Involved*, which was joined by Justices Stevens, Souter and Ginsburg.[104] He argued that the Louisville and Seattle integration plans were similar to many other primary and secondary school plans developed throughout the nation in the fifty years since *Brown* was decided, in that they all sought to fulfill the integration promise of *Brown* by adopting techniques that the Supreme Court had previously required, permitted, and encouraged local school boards to take. Accordingly, the governmental interest at stake was "compelling," and the plans at issue were as "narrowly tailored" as other plans that the Court had previously approved. Moreover, the Court had in the past recognized that the Constitution *permits* local communities to adopt desegregation plans even when it does not *require*

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[98] *See id.* at 2797–2800.

[99] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

[100] Sch. Comm. of Boston v. Bd. of Educ., 352 Mass. 693 (1967); *appeal dismissed for want of substantial federal question*, 389 U.S. 572 (1968) (per curiam) (a disposition of the merits and a Supreme Court precedent).

[101] 402 U.S. 1, 16 (1971).

[102] 439 U.S. 1380, 1383 (1978).

[103] *Parents Involved*, 127 S. Ct. at 2798–2800 (Stevens, J., dissenting).

[104] *See id.* at 2800 (Breyer, J., dissenting).

them to do so. Because the Roberts plurality paid inadequate attention to prior law, context, and constitutional principle, it had reversed course and misapplied precedent in a way that undermined the ability of local school boards to deal with the problem of resegregation. As a result, the *Parents Involved* decision threatened a disruptive round of race-related litigation that undermined *Brown*'s promise of primary and secondary school integration in a way that could not be justified under the Equal Protection Clause.[105]

Justice Breyer asserted that dozens of post-*Brown* Supreme Court cases viewed the Constitution as *requiring* the use of race-conscious measures to achieve school desegregation. In addition to what the Constitution required, a unanimous Court in *Swann* also *permitted* local school boards to use race conscious integration measures, giving the local boards broad discretion to achieve the levels of racial balance that they deemed appropriate to prepare students to live in a pluralistic society.[106] A decade of experimentation followed, in which various coerced and voluntary techniques ultimately resulted in a significant degree of racial integration. Since 1968, however, integration progress had stalled, and resegregation had emerged as a problem. Now, many students attend racially isolated schools, and many school districts—including Louisville and Seattle—have implemented race-conscious plans to remedy the problem of resegregation. Three important lessons emerge from this history. First, such integration efforts must reasonably be understood as narrowly tailored efforts to advance a compelling governmental interest in promoting integration. Second, the distinction between *de facto* and *de jure* discrimination is meaningless in the context of school segregation. Third, integration efforts are realistically so complex that the Constitution cannot plausibly be read to rule out categorically all race-conscious integration efforts.[107]

Justice Breyer stressed that the Louisville and Seattle school districts had both been segregated in ways that were alleged to be *de jure*. The *de jure* segregation claims were adjudicated in Louisville, resulting in a desegregation decree, but were settled prior to adjudication in Seattle. Nevertheless, both school districts went through similar evolutionary cycles. The schools were initially segregated; then desegregated with extensive use of busing; then resegregated as a result of population shifts; then subject to voluntary efforts to combat resegregation through integration plans that deemphasized busing in

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[105] *See id.* at 2800–01.

[106] *See id.* at 2801 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1,16 (1971)).

[107] *See id.* at 2801–02.

favor of racially constrained student choice. Both plans also experimented with race-neutral alternatives, and sought to combat the problem of white flight. For Justice Breyer, those histories illustrated the futility trying to distinguish between *de facto* and *de jure* segregation as the basis for determining whether race-conscious integration efforts were permissible. The mere presence or absence of a court order could not be dispositive, because many southern school districts that were segregated by law were later desegregated through voluntary race-conscious measures without any court order. Moreover, a district like Louisville that was initially subject to a desegregation decree, might adopt an integration plan the day before the decree was dissolved, but fully intend to continue using that plan the day after the dissolution of the decree. It would be untenable to think that the plan was valid on the first day, but invalid the next day. That was particularly true, because the *McDaniel* Court permitted the use of a race-conscious remedy without any prior judicial decree.[108] The complexity of achieving greater integration explains why the law often defers to local officials in formulating integration plans.[109]

Justice Breyer cited "[a] longstanding and unbroken line of legal authority" that he claimed permitted the use of "race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[110] He then, for the second time in his opinion, quoted the following language from *Swann*:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.[111]

Justice Breyer noted that, although this language was technically dicta, it asserted "a basic principle of constitutional law—a principle that has found 'wide acceptance in the legal culture.'"[112] Justice Breyer then cited other cases—including *North Carolina Board of Education v. Swann*,[113] *Bustop*,[114]

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[108] *See id.* at 2809–11 (citing McDaniel v. Barresi, 402 U.S. 39, 41 (1971)).

[109] *See id.* at 2811.

[110] *See id.*

[111] *See id.* at 2811–12 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

[112] *See id.* at 2812 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

[113] 402 U.S. 43, 35 (1971).

[114] Bustop, Inc. v. L.A. Bd. of Educ., 439 U.S. 1380, 1383 (1978).

McDaniel,[115] *Board of Education v. Harris*,[116] *Crawford*,[117] and *School Committee of Boston*[118]—that he claimed supported the *Swann* proposition.[119] The fact that numerous other federal and state courts reached the same conclusion, both before and after *Swann*, illustrated that the principle permitting race-conscious integration efforts had been adopted as the prevailing view.[120] Congress and the President had also taken numerous actions reflecting their adherence to the principle.[121]

Justice Breyer argued that such widespread adherence to the *Swann* principle was not surprising, because the principle was consistent with the intent of the fourteenth amendment drafters to end racial exclusion and give former slaves full membership in American society. Accordingly, the Constitution was almost always read to prohibit invidious discrimination, but it was significantly more lenient in permitting benign race-conscious efforts—such as the efforts of the Freedman's Bureau to fund race-conscious school integration programs.[122] Although there has been contemporary debate about the advisability of distinguishing between invidious and benign uses of race, the Supreme Court has never followed the "colorblind" approach of Justice Thomas, and it has never repudiated the constitutional asymmetry between actions that seek to *exclude* and actions that seek to *include* racial minorities. The racially inclusive Louisville and Seattle plans were not meaningfully different from the voluntary race-conscious plan that the Court upheld in *McDaniel*, in accordance with the principle of *Swann*.[123]

It was no answer to dismiss the unanimous legal principle of *Swann* as mere dicta. The plurality would have to offer some reason *why* the *Swann* principle did not control the Louisville and Seattle plans. The plurality claimed only that later cases—*Adarand*,[124] *Johnson*[125] and *Grutter*[126]—have now

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[115] McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

[116] 444 U.S. 130, 148–49 (1979).

[117] Crawford v. Bd. of Educ. of L.A., 458 U.S. 527, 535–36 (1962).

[118] Sch. Comm. of Boston v. Bd. of Educ., 352 Mass. 693 (1967); *appeal dismissed for want of substantial federal question*, 389 U.S. 572 (1968) (per curiam) (a disposition of the merits and a Supreme Court precedent).

[119] *See Parents Involved*, 127 S. Ct. at 2811–14 (Breyer, J., dissenting).

[120] *See id.* at 2813–14.

[121] *See id.* at 2814–15.

[122] *See id.* at 2815.

[123] *See id.* at 2815–16.

[124] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

[125] Johnson v. California, 543 U.S. 499, 505 (2005).

[126] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

supplanted *Swann*.[127] However, those more recent cases did not overrule *Swann*, or hold that the distinction between racially inclusive and racially exclusive programs was irrelevant. Indeed, they emphasized that the very purpose of strict scrutiny was to take account of relevant differences. Moreover, those cases explicitly sought to "dispel the notion that strict scrutiny" was "strict in theory, but fatal in fact."[128] *Grutter* reinforced the distinction between inclusive and exclusive programs, by emphasizing the importance of context in ruling on the constitutionality of race-conscious plans, and by upholding the race-conscious affirmative action plan that was there at issue.[129] Justice Breyer believed that the Roberts plurality ignored both context and those prior decisions in order to assert that strict scrutiny was always fatal, whether the program at issue was inclusive or exclusive.[130]

According to Justice Breyer, another important contextual factor that the plurality ignored was the fact that the Louisville and Seattle programs did not seek to allocate goods or services on the basis of merit, or in any other way to stigmatize or pit races against each other. Because the case did not involve magnet schools, but rather involved schools whose popularity varied without regard to race, no race-based harm could be said to result from application of the programs. Indeed, it was this insight that caused lower court judges, such as Judge Kozinski in the Court of Appeals, to argue for a more lenient standard of review than strict scrutiny. A more lenient standard would not preclude careful scrutiny of important contextual factors, but it would permit race-conscious integration plans in situations where their need was adequate to overcome the dangers of their use—situations like the need to end racial isolation in schools. Justice Breyer stated that he favored the application of a more lenient standard of review, and noted that Justice Kennedy also agreed that strict scrutiny need not be applied to all cases involving race-conscious integration efforts. Nevertheless, he believed that the *Parents Involved* plans also satisfied traditional strict scrutiny.[131]

Justice Breyer believed that the Louisville and Seattle plans served a compelling governmental interest. Whether that interest was termed an interest in diversity, racial balancing or integration, it had three important elements. First, there was an "historical and remedial element" that sought not only to

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[127] *See Parents Involved*, 127 S. Ct. at 2816 (Breyer, J., dissenting).

[128] *See id.* at 2816–17 (quoting *Adarand*, 515 U.S. at 237, which in turn quoted Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

[129] *See id.* at 2817–18.

[130] *See id.*

[131] See id. at 2818–20.

prevent resegregation, but to remedy the lingering effects of prior segregation that was often *de jure* in nature—segregation that affected "not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes."[132] Second, there was an educational element that sought to overcome the adverse educational effects of segregated schools, that was supported by social science evidence suggesting that black students performed better when moved from segregated to integrated educational environments. Although the social science was contested, there is enough support for the educational benefits of integration to conclude that local school boards have a compelling interest in pursuing integrated education.[133] Third, there was a democratic element in creating an educational environment that reflected the "pluralistic society" in which students would have to live.[134] Social science evidence also supported the conclusion that a diverse environment in which children learned to work and play together promoted future racial cooperation. Once again, even though the evidence was not uncontested, it provided sufficient support to deem the interest compelling. Moreover, such beneficial civic effects correspond to the types of interests that *Grutter* found to be compelling in the context of higher education. Those effects are *a fortiori* even more compelling in the formative years of primary and secondary education, where children begin to absorb the values that they will carry with them for the rest of their lives. Justice Breyer emphasized that *Brown* focused on primary and secondary education, and not on higher education.[135] The government interest at issue in *Parents Involved*, therefore was not a mere interest in addressing general "societal discrimination," but rather was an interest in "eradicating" primary and secondary school segregation.[136] The plurality's suggestion that remedial and diversity interests could only be compelling in the context of *de jure* segregation is inapposite, because the *de facto*/*de jure* distinction is relevant only to what the Constitution requires—not to what the Constitution permits. Indeed, the whole point of achieving school district "unitary" status is to restore the very type of local control that was exercise in Louisville and Seattle.[137]

Justice Breyer believed that the Louisville and Seattle integration plans were narrowly tailored for a variety of reasons. First, they used broad racial

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[132] *Id.* at 2820.
[133] *See id.* at 2820–21.
[134] *Id.* at 2821.
[135] *See id.* at 2821–23.
[136] *See id.* at 2823.
[137] *Id.* at 2823–24.

ranges—rather than racial quotas—as integration targets. Because the plans placed the most emphasis on student choice, it was choice rather than race that was the "predominant factor" driving the plans. Second, the broad racial limits were less burdensome, and therefore more narrowly tailored, than other uses of race that the Court had previously approved. They were even more narrowly tailored than the use of race in *Grutter*, because the Louisville and Seattle plans used race in only a small fraction of student assignment cases, and only in a context that had nothing to do with merit. Third, the plans were developed and refined over years of consultation and experimentation, in which no less restrictive alternative had proved adequate. Deference to local school board expertise and experience in this matter was not inconsistent with strict scrutiny, but merely recognized the greater institutional competence of local school boards to resolve such complex issues.

Deference to local school board expertise and experience was also consistent with the Court's long stand preference for local control.[138] The hypothetical race-conscious but facially-neutral alternatives that Justice Kennedy identified—including school site selection, gerrymandered attendance zones, and magnet schools—were either inapplicable under the Louisville and Seattle circumstances, or had been tried and found to be inadequate. Although the plurality and Justice Kennedy faulted Louisville and Seattle for their binary use of only black and white racial categories, a more precise breakdown of racial groups would have entailed even *more* use of race, and therefore *more* danger of racial divisiveness.[139] Because federal courts found earlier versions of the Louisville and Seattle integration plans to be constitutional, Justice Breyer found it difficult to see how the present versions, which gave *less* weight to race, could be unconstitutional.[140]

Justice Breyer believed that the Framers intended the Constitution to be a practical document, but he feared that the Roberts plurality opinion would force Louisville and Seattle to go back to using race neutral plans that had proved ineffective in the past. In addition, hundreds of other school districts had tried similar race-conscious techniques for promoting integration and preventing re-segregation, and all of those plans were also put in jeopardy by the plurality opinion. Justice Breyer thought that, at the very least, the Roberts plurality would spur a surge of race-based litigation.[141] The problem of racial segre-

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[138] *See id.* at 2824–26.
[139] *See id.* at 2828–29.
[140] *See id.* at 2830–31.
[141] *See id.* at 2831–33.

gation was a hard problem to solve, and resegregation was now on the rise. Justice Breyer believed that race-conscious measures would often be a necessary resegregation remedy, but thought that Chief Justice Roberts had deprived local school boards of a vital tool needed to solve the problem.

The plurality—and particularly Justice Thomas, with his commitment to strict colorblindness—believed that race neutrality was the best way to address the problem. However, the Constitution does not authorize Supreme Court Justices to dictate solutions to complex social problems. Rather, it allocates that power to the democratic process. As such, the Constitution bars only invidious racial discrimination, and not all uses of race-conscious criteria.[142] Justice Breyer noted that, although the plurality would apparently bar all uses of race, there remained five Justices who would permit at least some race-conscious efforts to "avoid racial isolation" and "achieve a diverse student population."[143] Justice Breyer argued that the plurality set back the work of local school boards, ignored *stare decisis*, and showed a lack of respect for local democratic decisionmaking. Further, it did so in a way that risked the aggravation of racial conflict. The plurality ignored the fact that *Brown* was not about eliminating all race-consciousness, but was about dismantling a racial caste system. Therefore, the plurality's decision threatened the promise of *Brown*, and was "a decision that the Court and the Nation will come to regret."[144]

II. DISINTEGRATING EQUALITY

The concept of equality in the United States has been an ever-evolving one. Although the Declaration of Independence asserted as a self-evident truth "that all men are created equal," the drafters of that document were comfortable with a concept of equality that tolerated slavery, the genocide of indigenous Indians, and the disenfranchisement of women.[145] Accordingly, the Constitution addressed none of those deficiencies—even after the Bill of Rights was added.[146] When the Reconstruction Amendments finally abolished slavery and added the Equal Protection Clause to the Constitution,[147] the *Plessy* Supreme

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[142] *See id.* at 2833–34.

[143] *Id.* at 2835.

[144] *Id.* at 2834–37.

[145] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

[146] *See generally* U.S. CONST.

[147] *See id.* amends. XIII, XIV.

Court still understood the concept of equality to permit racial segregation.[148] When *Brown* eventually overruled *Plessy*,[149] constitutional toleration of *de jure* segregation was simply replaced by constitutional toleration of *de facto* segregation.[150]

That very same *de facto* segregation is what the Supreme Court chose to address in the *Resegregation* case. The Court's willingness to tolerate the foreseeable school resegregation that will result from its decision demonstrates that the constitutional concept of equality remains as elastic as ever. At any point in time, "equality" means whatever the Supreme Court says it means, and the current Court has reverted to an earlier, more oppressive understanding of equality. It has reinvigorated a pre-*Brown* interpretation of the relationship between segregation and racial equality—and it has strikingly invoked *Brown* as its justification for doing so. In the process, Chief Justice Roberts has also legitimized a contemporary form of racism, in which the concept of equality itself can be used to sacrifice the interests of racial minorities for the benefit of disgruntled whites.

A. *Overruling* Brown

The Louisville and Seattle school districts tried to integrate their public schools in the belief that doing so was permitted—if not *required*—by the reasoning of *Brown*. Accordingly, it is hard not to wonder whether the *Resegregation* case that invalidated the Louisville and Seattle integration plans should be understood as overruling *Brown* as well. Legal precedents are sufficiently imprecise that the point is necessarily more rhetorical than substantive, but rhetoric often matters most. The *Resegregation* case can be viewed as overruling *Brown* in at least two distinct ways. First, it ignores the inescapable interest in *racial* diversity on which *Brown* and its progeny seem to

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[148] *See* Plessy v. Ferguson 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

[149] *See Brown I*, 347 U.S. at 493–95 (overruling *Plessy* and holding that "separate educational facilities are inherently unequal.").

[150] *See, e.g.*, Milliken v. Bradley I, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for *de facto* school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

rest. Second, it protects a form of racial oppression that *Brown* sought specifically to bring to an end.

1. Diversity

All five Justices in the *Resegregation* case majority agreed that the Louisville and Seattle integration plans were not narrowly tailored to advance the interest in educational diversity that the Supreme Court had held to be compelling in *Grutter*.[151] The four dissenters vigorously disagreed,[152] but even if the majority were correct, any failure to achieve *Grutter* diversity would not be particularly relevant to a claim of constitutionality based on *Brown*. *Grutter* upheld the pursuit of holistic diversity, which Chief Justice Roberts stressed had encompassed a range of individualized factors deemed educationally beneficial.[153] And *Gratz* reinforced that view by invalidating a diversity plan that the Court believed had paid too much attention to the significance of race relative to other diversity factors.[154] *Brown*, however, had nothing to do with multi-factor holistic diversity. Instead, *Brown* was limited to single-factor *racial* diversity.

Chief Justice Roberts understood the distinction between holistic and racial diversity. Characterizing the school boards' argument, he stated:

> Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.[155]

But then, with a puzzling doctrinal sleight of hand, Chief Justice Roberts simply sidestepped the school board argument, stating:

> The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation the plans are directed only to racial

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[151] *See Parents Involved*, 127 S. Ct. at 2753–54 (Roberts, C.J., majority opinion).

[152] *See id.* at 2800–01; 2824–30 (Breyer, J., dissenting).

[153] *See id.* at 2753–54 (Roberts, C.J., plurality opinion) (citing *Grutter*, 539 U.S. at 324–25, 330, 337–38).

[154] *See id.* at 2753–54 (citing *Gratz*, 539 U.S. at 275–76).

[155] *See id.* at 2755.

> balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.[156]

The problem is that *Brown* too was about "racial balance, pure and simple," in its effort to secure "the educational and social benefits asserted to flow from racial diversity."

Although Chief Justice Roberts concluded that the Louisville and Seattle integration plans were not narrowly tailored to advance an interest in *Grutter* diversity, he refused even to consider whether the plans were narrowly tailored to advance an interest in *Brown* diversity. He acted as if *Brown*'s interest in racial diversity had somehow been preempted by *Grutter*, so that *Grutter* diversity was now all that remained constitutionally permissible. In that sense, the Roberts opinion "overruled" *Brown* by denying its relevance to the very integration interest on which *Brown* had rested.

There is a reason for this. As Justice Breyer demonstrated in his dissent, the Louisville and Seattle plans were *very* narrowly tailored to minimize the use of race in preventing resegregation.[157] Indeed, it is difficult to imagine how a realistic integration plan could have been any more narrowly tailored. Prior integration strategies had been tried on multiple occasions in both school districts, and race neutral efforts had failed to produce meaningful integration. Moreover, when the two districts finally succeeded in achieving a degree of integration, they relaxed the extent to which they use race as a factor, ultimately utilizing race even less than the diversity plan upheld in *Grutter*.[158] Chief Justice Roberts, therefore, had to find some way of making *that* narrow tailoring irrelevant to the constitutional inquiry he wished to conduct. He accomplished this by labeling the educational interest in integration an interest in mere "racial balancing," thereby deeming it "patently unconstitutional."[159] But such efforts to promote racial integration lie at the core of *Brown*.

At the time that *Brown* was decided, *Brown* could arguably have been interpreted as requiring only the repeal of official segregation laws, coupled with prospective race neutrality in student assignments.[160] Such a reading of *Brown* would have been similar to the reading that Chief Justice Roberts now

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[156] *See id.*

[157] *See id.* at 2824–30 (Breyer, J., dissenting).

[158] *See id.* at 2825–26.

[159] *See id.* at 2753 (Roberts, C.J., majority opinion); *id.* 2755–58; 2763 (Roberts, C.J., plurality opinion).

[160] *See* STONE ET AL., *supra* note 7, at 480 (noting that possible reading of *Brown* requires only prospective race neutrality).

wishes to give it.[161] But there are several problems with such a limited reading of *Brown*.

First, the Roberts reading is difficult to square with *Brown*'s insistence that "separate [is] inherently unequal"[162]—a holding that seems to call for *actual* integration as opposed to the mere symbolic repeal of segregation laws. If racial separation educationally disadvantages minority children and stigmatizes them as inferior to whites, that disadvantage and stigmatization is unlikely to dissipate simply because whites have found a way to perpetuate racial segregation in the absence of laws that make such segregation official.

Second, subsequent cases have read *Brown* as being concerned with actual integration. *Green v. County School Board*[163] invalidated a race-neutral "freedom of choice" plan that failed to produce any meaningful integration, demanding "whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[164] And as Justice Breyer points out, unanimous Supreme Court dicta in *Swann v. Charlotte-Mecklenburg* expressly stated that a school board "might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."[165] Chief Justice Roberts treats the *Swann* dicta as if it occurred in isolation, but it did not. The *Swann* dicta was reduced to holding in the companion cases of *North Carolina State Board of Education v. Swann* (where the Court invalidated a prohibition on busing for the purpose of achieving racial balance),[166] and *McDaniel v. Barresi* (where the Court upheld a voluntary school assignment plan that was designed to reflect the racial balance of the school district).[167]

Third, the effort by Chief Justice Roberts to limit *Brown* and its progeny to cases of *de jure* segregation[168] is logically nonresponsive because it simply

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[161] *See Parents Involved*, 127 S. Ct. at 2764–68 (Roberts, C.J., plurality opinion) (favoring prospective race neutrality).

[162] *Brown I*, 347 U.S. at 493–95 (holding that "separate educational facilities are inherently unequal.").

[163] 391 U.S. 430, 437–38 (1968).

[164] *Id.* at 437–38.

[165] *See Parents Involved*, 127 S. Ct. at 2811–12 (Breyer, J., dissenting) (quoting Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

[166] *See id.* at 2812 (citing N.C. Bd. of Educ. v. Swann, 402 U.S. 43, 45(1971)).

[167] *See id.* (citing McDaniel v. Barresi, 402 U.S. 39, 41 (1971)).

[168] *See id.* at 2761–64 (Roberts, C.J., plurality opinion) (emphasizing distinction between *de facto* and *de jure* segregation).

assumes the conclusion whose validity is at issue. *Brown* and the race-conscious integration cases implementing it arose in the context of *de jure* segregation, but that does not limit the precedential value of those cases to the *de jure* segregation context. Indeed, the precise question at issue in the *Resegregation* case is *whether* the racial balancing efforts that *Brown* and its progeny authorized should, for some reason, be limited to the context of *de jure* segregation. Rather than address that question, however, Chief Justice Roberts simply announced his predetermined conclusion.

Customary legal analysis requires some explanation of *why* an issue was resolved in a particular manner—not simply an assertion *that* the issue has been so resolved. Accordingly, Justice Breyer seems justified in criticizing the plurality for never explaining "why it would abandon the guidance set forth" in *Swann* and the other cases that implemented *Brown*.[169] Once again, however, there is a reason why Chief Justice Roberts chose to engage in formalist legal assertion rather than instrumental legal analysis. He chose to do so because it is hard to find any instrumental justification for limiting *Brown* to *de jure* segregation. All of the reasons for promoting integration in a *de jure* context continue to apply in a *de facto* context as well. And even if one agrees with cases such as *Milliken v. Bradley I*,[170] which refuse to *impose* race-conscious integration obligations on school districts in the absence of *de jure* segregation, there is no reason to deny school districts the ability *voluntarily* to adopt integration plans that seek to prevent *de facto* resegregation. Accordingly, Justice Breyer stressed:

> [t]he opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake....No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do.[171]

The only serious instrumental justification offered for limiting voluntary integration efforts to *de jure* rather than *de facto* segregation comes from Justice Kennedy's concurrence. Justice Kennedy argues that the potential divisiveness of race-conscious integration is too high a price to pay for the benefits of racial

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[169] *Id.* at 2816 (Breyer, J., dissenting).

[170] *See* Milliken v. Bradley I, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for *de facto* school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

[171] *See Parents Involved*, 127 S. Ct. at 2823 (Breyer, J., dissenting).

diversity.[172] Rational people could agree or disagree with that value judgment, but one thing seems reasonably clear: There is no platonically *correct* answer to the question of whether the benefits of racial diversity outweigh the costs of potential white resentment. As a result, it is hard for the Supreme Court to claim that it has greater institutional competence than the politically accountable school boards have in striking the proper balance between the competing interests. Justice Breyer points out that the issues surrounding the formulation of educational diversity plans are extremely complex and subtle, calling for a considerable amount of expertise and experience. It is, therefore, understandable that he criticizes the Court for dictating its own preferred solution to a complex social problem in a way that supplants the operation of the democratic process.[173] It would be one thing if the Constitution spoke directly to the issue, but all the Constitution does is demand "equal protection."[174] There is no reason to think that the Supreme Court is in a better position than a local school board to determine whether non-invidious efforts to prevent resegregation are required to secure "equal protection." There is, however, a good reason to fear that the Supreme Court is likely to strike the balance in a way that simply elevates the interest of whites over the interests of racial minorities. That is what the Supreme Court has traditionally done in the context of race relations.

2. *Oppression*

If *Brown* stands for anything, it stands for the proposition that the interests of racial minorities cannot simply be sacrificed in order to advance the interests of whites. That form of oppression is rooted in the supposed inferiority of racial minorities, and the supposed superiority of whites. It persisted explicitly in the United States from the era of slavery, which the Supreme Court upheld in *Dred Scott*,[175] through the era of official segregation, which the Court upheld in *Plessy*.[176] But it was precisely that notion of white-supremacist racial oppres-

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[172] *See id.* at 2795–96 (Kennedy, J., concurring in part and concurring in the judgment).

[173] *See id.* at 2833–34 (Breyer, J., dissenting).

[174] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[175] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners).

[176] *See* Plessy v. Ferguson, 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that

sion that the Supreme Court sought to invalidate in *Brown*, by holding that even "equal" segregated schools were unconstitutional because of the message of racial caste inferiority that they conveyed.[177]

It is important to remember that the *Brown* decision was not issued out of the blue, but rather was a response to the Court's own equality failings. *Brown* overruled *Plessy*—a prior Supreme Court decision in which the Court had sided with white segregationists against the integration interests of racial minorities.[178] And *Plessy* was simply the latest in a line of earlier Supreme Court cases that had systematically favored the interests of whites over the interests of racial minorities. Prior to *Plessy*, the Court had upheld the institution of slavery in *Dred Scott*;[179] it had limited the scope of Reconstruction legislation enacted by Congress to protect former black slaves in *United States v. Cruikshank*;[180] and it had invalidated other Reconstruction legislation in the *Civil Rights Cases*.[181] And, of course, the Court's hostility to minority rights did not end with *Plessy*. The Court later went on to uphold the now-infamous exclusion order that led to the World War II internment of Japanese-American citizens in *Korematsu*.[182]

Even *Brown* itself turned out to be a major disappointment. It was hoped that *Brown* would both desegregate the schools, and end the government's use of racial classifications. But it did neither. The "all deliberate speed" limitation that the Court imposed on its desegregation order in *Brown II*,

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segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

[177] *See Brown I*, 347 U.S. at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

[178] *See id.* at 493–95 (overruling *Plessy*, and holding that "separate educational facilities are inherently unequal.").

[179] *See Dred Scott*, 60 U.S. (19 How.) at 407, 452 (invalidating congressional limitation on spread of slavery).

[180] *See* United States v. Cruikshank, 92 U.S. 542, 551–59 (1875) (refusing to apply criminal provisions of Enforcement Act of 1870 to Ku Klux Klan lynching of black freedmen); *see also*, STONE ET AL., *supra* note 7, at 460–64 (describing Supreme Court restrictions on Reconstruction legislation).

[181] *See* United States v. Stanley (*Civil Rights Cases*), 109 U.S. 3, 8–19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875, and imposing "state action" restriction on congressional antidiscrimination legislation); *see also*, STONE ET AL., *supra* note 7, at 460–64 (describing Supreme Court restrictions on Reconstruction legislation).

[182] *See* Korematsu v. United States, 323 U.S. 214, 215–20 (1944) (upholding World War II exclusion order that led to Japanese-American internment).

delayed any meaningful Southern desegregation for a decade.[183] And the Court's refusal in *Naim v. Naim* to invalidate miscegenation laws permitted government racial classifications to persist, even though the Court's actions in *Naim* were taken the year *after* it issued its decision in *Brown I*.[184] When "all deliberate speed" finally permitted actual desegregation in the South, the Supreme Court then refused to integrate Northern schools. It chose instead to adopt its current distinction between *de jure* and *de facto* segregation, which placed Northern schools out of remedial reach because their segregation had resulted primarily from residential housing patterns.[185] More recently, the Court has used a colorblind conception of *Brown* to invalidate racial affirmative action programs and remedial redistricting plans.[186] It is important to remember

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[183] *See Brown II*, 349 U.S. at 301 (limiting desegregation obligation of public schools to that which could be accomplished "with all deliberate speed"); *see also* STONE ET AL., *supra* note 7, at 483–88 (describing Supreme Court inaction in face of massive Southern resistance that followed *Brown*).

[184] *See* Naim v. Naim, 350 U.S. 985 (1956) (per curiam), and 350 U.S. 891 (1955) (per curiam). In *Naim*, the United States Supreme Court was asked to hold unconstitutional a Virginia miscegenation statute that had been upheld by the Virginia Supreme Court of Appeals. The United States Supreme Court vacated the Virginia decision and remanded for clarification of the record. 350 U.S. at 891. The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier decision and refused to clarify the record. Naim v. Naim, 90 S.E.2d 849, 850 (1956) (per curiam). Nevertheless, the United States Supreme Court declined to recall or amend the mandate, finding that the constitutional question had not been "properly presented." This allowed the Virginia court's decision to remain in effect. 350 U.S. at 985. Because the neutrality principle that had been announced in *Brown I* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court's failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court's actions in *Naim v. Naim* have been vigorously criticized. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) (noting that "there are very few dismissals similarly indefensible in law."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (noting that dismissal of the miscegenation case was "wholly without basis in the law."). The Supreme Court ultimately invalidated the Virginia miscegenation statute as a manifestation of white supremacy eleven years later in *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967), when only sixteen states still had miscegenation statutes on the books. *See id.* at 6.

[185] *See* Milliken v. Bradley I, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for *de facto* school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

[186] *See* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 156–89 (2000) (discussing Supreme Court affirmative action and redistricting cases).

that *this* is the pedigree of the Supreme Court that confronted the Louisville and Seattle integration plans in the *Resegregation* case. And now the *Resegregation* case shows that the Court is willing to undo even the degree of school integration that was achieved after so much effort in the fifty-plus years that have elapsed since *Brown*.

In the *Resegregation* case, the Supreme Court chose to give a seat in an oversubscribed school to a white student rather than a minority student, knowing that the likely result would be to promote segregation over integration. The *Resegregation* case therefore "overruled" *Brown's* prohibition on racial oppression, by sacrificing the integration interest of minority school children in order to advance what turns out to be simply the segregationist interest of white parents. I am at best a cautious proponent of school integration.[187] But many racial minorities understandably believe that the only way of ensuring quality educational opportunities for minority students is by having them attend the same schools that white students attend. That is because those are the schools to which the culture has historically allocated the bulk of its quality educational resources.[188] Since it is often said that "green follows white,"[189] integration is commonly seen as offering the most realistic hope of a better education for racial minorities. Integration is also said to reduce the stigma that is frequently imposed on minority students who attend racially isolated schools. In addition, many believe that integration provides diversity benefits to white and minority

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[187] Some commentators have argued that the racial integrationist strategy that culminated in *Brown* did not best serve the educational interests of racial minority children, because racially identifiable schools with genuinely equal resources might have provided better educational opportunities for minority students. *See, e.g.*, DERRICK BELL, SILENT COVENANTS: *BROWN v. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 20–28 (2004) (favoring separate but genuinely equal schools for black children); ROY L. BROOKS, INTEGRATION OR SEPARATION: A STRATEGY FOR RACIAL EQUALITY 185–243 (1996) (favoring "limited separation" in education of black students); *cf.* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN v. BOARD OF EDUCATION* 294–303 (2004) (posing question whether separate but genuinely equal education would benefit minority children more than failed integration efforts); Louis M. Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 717 (1992) (arguing that *Brown* simply precluded need to provide equal educational opportunities for minorities); *see also Parents Involved*, 127 S. Ct. at 2777 (Thomas, J., concurring) (disputing claim that quality education for black students has to be integrated education).

[188] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 11–17 (1973) (describing dramatic funding discrepancies between minority and white schools).

[189] *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 104 (1979) (using phrase to convey common belief that white schools will typically be better funded than minority schools).

students alike, as school boards try to prepare those students to live in an increasingly multicultural society.[190] Notwithstanding those potential benefits, the *Resegregation* decision sacrifices the interests of racial minorities in integrated education for the benefit of white interests that appear to be either marginal or invidious.

It is important to pinpoint precisely why the plaintiffs in the *Resegregation* case might have objected to the race-conscious integration efforts adopted by the Louisville and Seattle school boards. The most immediate reason appears to have been the disappointment and inconvenience felt by white parents whose children were not assigned to the schools that the parents wished their children to attend. However, it is difficult to see how that injury could amount to a legally cognizable claim—let alone a claim with sufficient magnitude to outweigh a school board's interest in integration. The injury is at best marginal.

The Louisville and Seattle integration plans did not involve magnet schools, and the school assignments made under those plans had nothing to do with merit. Accordingly, the integration plans at issue were in no sense "affirmative action" plans that allocated scarce educational recourses on the basis of race. As a result, they were not controlled by *Grutter*, *Gratz*, or any of the other restrictive affirmative action cases that the Supreme Court has handed down in the past two decades.[191] Instead, the Louisville and Seattle plans entailed what Professor Liu has referred to as a student "sorting" process rather than a student "selection" process. Students were not selected for particular schools because of their individual abilities or educational qualifications. They were given their school assignments simply because students had to be distributed in some way across the district's many schools.[192] That means that there is nothing special about the disappointment or inconvenience that a student's parents experienced as a result of the failure to receive a desired school assignment. The very same disappointment and inconvenience would result from an assignment based on sibling attendance, geographic location, or even

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[190] *See Parents Involved*, 127 S. Ct. at 2820–24 (Breyer, J. dissenting) (describing benefits of integrated education); *see also Grutter*, 539 U.S. at 328–30 (same).

[191] *See Parents Involved*, 127 S. Ct. at 2818–20 (Breyer, J., dissenting) (distinguishing Louisville and Seattle plans from affirmative action programs); *see also* SPANN, *supra* note 186, at 156–63 (discussing historical evolution of Supreme Court affirmative action cases).

[192] *See* Liu, *supra* note 13, at 281. These considerations caused Court of Appeals Judges Kozinski and Boudin to favor a more relaxed standard of review for such benign sorting plans. *See Parents Involved*, 127 S. Ct. at 2774 (Thomas, J., concurring) (describing views of Judges Kozinski and Boudin).

random lottery allocation. Certainly, the disappointment and inconvenience produced by one of those other sorting criteria would not rise to the level of a constitutional violation. Therefore, if there is some constitutional injury produced by the sorting processes used in the Louisville and Seattle plans, it must stem solely from the use of race—independent of any attendant dissatisfaction that would have also accompanied the use of nonracial sorting criteria. But once one tries to ascertain the nature of a harm that could result from the use of race *simpliciter*, one is forced to conclude that more invidious considerations are at play.

There seems to be no doubt that the Court's decision to invalidate the Louisville and Seattle integration plans will produce significant school resegregation.[193] Even the Justices who voted to invalidate the plans seem to concede that resegregation will occur. They simply believe that the danger of resegregation does not call for the use of race-conscious remedies, because the resulting resegregation will be *de facto* rather than *de jure* in nature.[194] Even if one were to accept that view, however, it remains true that the only way white parents can secure the school assignments they desire is by forcing resegregation on minority students—by placing the white-parent marginal interest in avoiding disappointment and inconvenience above the interest of minority children in securing an integrated education. Although each individual parent might view his or her own contribution to school resegregation as insignificant, the aggregate effect of those individual decisions will, of course, be to erode the integration gains that Louisville and Seattle have been able to achieve since *Brown*. Moreover, the danger of resegregation is not a hidden cost. It is a cost that has been made quite explicit by the history and prominence of the various Louisville and Seattle integration efforts that have been tried over the years.[195]

The white parents who opposed the Louisville and Seattle racial integration plans were, therefore, confronted with a clear choice. They could have chosen to acquiesce in those plans and send their children to racially integrated schools, or they could have chosen to resist those plans and send their children to racially resegregated schools. When they elected the latter, and chose to send

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[193] *See Parents Involved*, 127 S. Ct. at 280–02, 2833 (Breyer, J., dissenting) (highlighting danger of *de facto* resegregation).

[194] *See id.* at 2751–52, 2761–64 (Roberts, C.J., majority opinion) (emphasizing *de facto* nature of any resegregation in Louisville and Seattle); *id.* at 2768–70 (Thomas, J., concurring) (arguing that renewed racial imbalance would not constitute resegregation, because "resegregation" has to be *de jure* rather than *de facto* in nature).

[195] *See id.* at 2800–11 (Breyer, J., dissenting) (discussing history of Louisville and Seattle integration efforts in context of more general integration efforts).

their children to resegregated white schools, they were forcing minority children to attend resegregated minority schools as well. A school system cannot maintain integrated schools for minority students if white parents decline to let their children attend those schools. Disappointed white parents, therefore, were sacrificing the inclusionary educational interests of minority school children in order to advance exclusionary educational interests of their own. White parents might be tempted to argue that they have as much right to send their children to a resegregated school as minority children have to attend an integrated school.[196] But that is precisely the segregationist argument that the Supreme Court rejected in *Brown*. The racially oppressive elevation of anti-integration white interests over the pro-integration interests of racial minorities—and all of the "inherently unequal" racial stigmatization that such an elevation conveys—violates the core anti-subordination principle of *Brown*.[197] It allows white parents to send their children to schools that are attended by other white students, rather than to schools that are attended by racial minorities. And it allows white parents of today to pursue the same degree of racial separation that white parents of the separate-but-equal generation were able to pursue before the Supreme Court overruled *Plessy* in *Brown*.

Some white parents probably oppose the Louisville and Seattle integration plans because they consciously do not want their children going to school with racial minority children. It is difficult to forget that many schools in the United States have remained starkly segregated even after *Brown*, and it is unlikely that the *de facto* segregation of those schools is the product of mere happenstance.[198] Other white opponents of the Louisville and Seattle integration plans may be motivated by mere convenience concerns, but they are nevertheless willing to tolerate school resegregation in order to advance those convenience concerns. Either way, I suspect that the white parents who oppose the Louisville and Seattle plans do not view themselves as proponents of invidious racial discrimination. But neither did proponents of the *de jure* racial segregation that

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[196] *Cf.* Wechsler, *supra* note 185 (asking whether neutral principles permit state to choose between denying associational preferences of those who desire integration and imposing association on those who wish to avoid it).

[197] *See Brown I*, 347 U.S. at 493–95 (holding that "separate educational facilities are inherently unequal.").

[198] *See Parents Involved*, 127 S. Ct. at 2801–02, 2833 (Breyer, J., dissenting) (citing statistics about present racial segregation in public schools); *Gratz*, 539 U.S. at 299 n.4 (Ginsburg, J., dissenting) (same); Liu, *supra* note 13, at 277–78 (same); STONE ET AL., *supra* note 7, at 498–99 (same).

was practiced under the separate-but-equal regime of *Plessy*.[199] Contemporary white parents—like their *Plessy* predecessors—have probably convinced themselves that they are pursuing a race relations policy that will, in the long run, reduce racial resentment and promote racial harmony. As dubious or slanted as such a claim might sound, it is understandable that the disappointed white parents in Louisville and Seattle would regard their racial preferences as abstractly benign and constitutionally principled. They are motivated by a self-interested concern for the welfare of their own children, which gives them a strong incentive to view their position in as favorable a light as possible. If not forgivable, the motivation of those objecting parents is at least understandable. However, it is more difficult to understand why the United States Supreme Court would take the view that deference to such parental desires is constitutionally compelled. The Court is expected to be more detached than self-interested parents, and to do a more sophisticated job of parsing pertinent doctrinal principles when it engages in legal analysis. But that appears not to be the case.

In the *Resegregation* case, the Supreme Court went out of its way to recognize a cause of action allowing disappointed white parents to trump the integration interests of minority school children. And it did so even though the Court's jurisdiction to entertain the claims of those white parents was questionable. Although Chief Justice Roberts concluded that the parents presented a justiciable controversy,[200] he did so using doctrinal reasoning that is difficult to accept. The Constitution requires a plaintiff to demonstrate a present, redressible injury in order to establish the Article III standing necessary to have a claim adjudicated in federal court.[201] However, it is not clear that the claims presented by the Louisville and Seattle parents satisfied this jurisdictional requirement.

The white parent plaintiff in Louisville claimed that her son was denied assignment to the kindergarten that she wished him to attend, but by its terms, the Louisville racial assignment plan did not apply to kindergarten assignments.[202] It appears that the plan was applied in her son's case simply because

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[199] *See Parents Involved*, 127 S. Ct. at 2783–86 (Thomas, J., concurring) (citing claims that segregation under *Plessy* was racially beneficial).

[200] *See id.* at 2750–51 (Roberts, C.J., majority opinion) (finding jurisdiction).

[201] *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426–31 (1985) (describing law of standing).

[202] *See Parents Involved*, 127 S. Ct. at 2749–50 (Roberts, C.J., majority opinion) (stating facts); *id* at 2789–90 (Kennedy, J., concurring in part and concurring in the judgment)

of a bureaucratic mix up—something that is not typically viewed as sufficient to establish the standing needed to challenge the constitutionality of an improperly applied policy.[203] Moreover, the plaintiff's son has now been transferred to the desired school, and it is entirely speculative whether he will ever again be affected by the racial component of the Louisville plan.[204] Accordingly, the plaintiff not only appeared to lack standing, but her claim appeared to be moot as well—thereby providing yet a second reason why the Supreme Court lacked jurisdiction.[205]

Similarly, the members of the plaintiff organization in the Seattle case either lacked standing, or their injuries were moot. The members who feared that their children might be denied desired school assignments sometime in the future did not assert a ripe injury that was adequate for standing. Because student assignments are determined by many contextual factors that vary from year to year, those parents could not know whether their desired assignments would be granted or denied in the future. And even if some future assignments were denied, the parents could not know if they would have received their desired assignments in the absence of the racial plan that they opposed.[206] As a result, those parents could not establish the degree of redressibility that the Supreme Court has required for Article III jurisdiction.[207] The members of the plaintiff organization who claimed that they had been denied their desired assignments in the past, had either now received the school transfers that they desired, or no longer desired the assignments that they had initially requested.[208]

(emphasizing confusion about application of Louisville integration plan to kindergarten assignments).

[203] *See id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment) (noting that school board failed to apply its stated policy); Spann, *supra* note 201, at 1426–31 (discussing lack of Article III case-or-controversy jurisdiction to resolve speculative or hypothetical cases).

[204] *See Parents Involved*, 127 S. Ct. at 2751 (Roberts, C.J., majority opinion) (noting that plaintiff's son has now been transferred to desired school).

[205] *See* Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 628–29 n.190 (1983) (discussing law of mootness). The strongest claim that Chief Justice Roberts offers for jurisdiction is that the plaintiff in the Louisville case had also sought damages. *See Parents Involved*, 127 S. Ct. at 2751 (Roberts, C.J., majority opinion). Although a damage claim would not be mooted by the transfer of the plaintiff's son to the desired school, it is hard to imagine the Court recognizing a damage claim that was more than merely nominal.

[206] *See Parents Involved*, 127 S. Ct. at 2750–51 (Roberts, C.J., majority opinion) (stating facts).

[207] *See* Spann, *supra* note 201, at 1426–31 (discussing redressibility requirement); *but see Parents Involved*, 127 S. Ct. at 2750–51 (Roberts, C.J., majority opinion) (upholding standing).

[208] *See Parents Involved*, 127 S. Ct. at 2750–51 (Roberts, C.J., majority opinion) (stating facts).

With respect to those parents, therefore, the mootness of their claims again precluded jurisdiction.[209]

The law of justiciability is notoriously incoherent.[210] Accordingly, the fact that the Supreme Court chose to find jurisdiction in a debatable case is not, in itself, particularly interesting. What is interesting, however, is that the Supreme Court appears to apply the law of justiciability in ways that are racially correlated.[211] The Supreme Court has been very demanding in terms of the injuries that it will view as sufficient to satisfy the Article III standing, mootness, and ripeness requirements. That has been particularly true of the stringent redressibility showing that the Court has demanded for standing. When minority plaintiffs have sued to challenge alleged racial discrimination in things like housing, school admissions, or police misconduct, the contemporary Court has typically found that those minority plaintiffs lacked standing to maintain their suits, because it was not certain that a favorable ruling would eliminate their alleged injury.[212] However, when white plaintiffs have sued to challenge racial affirmative action programs, the Court has typically upheld their standing to sue, even if it was not certain that a favorable ruling would eliminate their alleged injury. For white plaintiffs, the Court has simply relaxed the stringent redressibility standard that it applies to minority plaintiffs.[213]

In a very real sense, the law of standing is different for white and minority plaintiffs. The Court has recognized justiciable injuries for white victims of alleged discrimination but not for minority victims of alleged discrimination. And that, of course, is just another form of the white supremacist racial oppression that *Brown* sought to prevent. It reflects the Court's belief that white antidiscrimination interests are simply more important than the antidiscrimination interests of racial minorities. Such a view is unfortunately consistent with the Supreme Court's prior oppressive history of favoring white interests over minority interests.[214] But it is even more unfortunate that the Court has insisted on reconfiguring the very concept of equality in a way that

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[209] *See* Spann, *supra* note 205, at 628–29 n.190 (discussing law of mootness); *but see Parents Involved*, 127 S. Ct. at 2750–51 (Roberts, C.J., majority opinion) (upholding standing without discussing mootness).

[210] *See* Spann, *supra* note 201, at 1426 (noting disarray in law of standing).

[211] *See id.* at 1422–25 (describing color-coded standing thesis).

[212] *See id.* at 1454–58 (describing denial of standing in minority plaintiff cases).

[213] *See id.* at 1459–61 (describing grant of standing in white plaintiff cases).

[214] *See supra* text accompanying notes 178–186 (discussing cases in which Supreme Court has favored white interests over minority interests).

makes its participation in racial oppression appear to flow from high principle and lofty constitutional ideals.

B. *Roberts's Racism*

I view racism as the practice of exploiting the interests of one race in order to advance the interests of another. Defined in that way, racism has permeated United States culture since the beginning. In some of its earliest incarnations, racism took the form of slavery and then *de jure* segregation—both of which rested on an explicit white supremacist belief in the inferiority of racial minorities.[215] When United States culture evolved to a point where the express exploitation of minority interests was no longer constitutionally comfortable, more subtle ways had to be found to reconcile the continuation of white racial privilege with the Equal Protection Clause of the Constitution. New Supreme Court doctrinal devices—such as the invention of a state action requirement,[216] the disregard of *de facto* segregation,[217] and the limitation of constitutional protections to cases of intentional discrimination[218]—came to serve the function of protecting white privilege from incursions by racial minorities.

In recent years, however, the Supreme Court has taken it upon itself to protect the white majority from minority advances even when the white majority *itself* has authorized those advances in the form of affirmative action or integration plans.[219] The Court has done this by concluding that such programs deny the equal protection rights of the white majority, despite the fact that it is the white majority who has chosen to adopt those plans.[220] Stated differently, the white majority decided that it was in its own best interest to reduce the

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[215] *See supra* text accompanying notes 175–76 (discussing Supreme Court involvement in slavery and segregation).

[216] *See Civil Rights Cases*, 109 U.S. 3, 8–19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875 and imposing "state action" restriction on congressional antidiscrimination legislation).

[217] *See, e.g.*, Milliken v. Bradley I, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for *de facto* school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

[218] *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (adopting intent requirement to establish equal protection violation).

[219] *See* SPANN, *supra* note 186, at 156–89 (discussing Supreme Court affirmative action and redistricting cases).

[220] *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224–26 (1995) (discussing Supreme Court protection of whites under Equal Protection Clause).

continuing effects of white privilege in our racially pluralist culture.[221] But the Supreme Court, nevertheless, told the white majority that the Constitution *required* white privilege to persist. Therefore, the Supreme Court is now using the constitutional concept of equality to perpetuate racial discrimination. It does this by denying the legal relevance of all the advantages that whites were able to accumulate during their long history as practitioners of racial exploitation. This new form of racism is captured succinctly in the assertion by Chief Justice Roberts that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[222] That blithe exercise in wordplay reduces to a linguistic adage a social problem so complex that we have been unable to solve it throughout the whole of United States history. This modern form of Roberts's racism, therefore, *constitutionalizes* the existing levels of discrimination in United States culture. It incorporates ongoing white privilege into a doctrinal baseline to which Chief Justice Roberts is willing to accord constitutional protection indefinitely into the future.

1. Baseline Discrimination

I have argued in the past that the Supreme Court's invalidation of affirmative action plans has had the effect of freezing the advantages that whites have impermissibly secured over racial minorities in the distribution of societal resources. When the Court permits whites to acquire resources through race-conscious discrimination, but then prohibits minorities from reclaiming a share of those resources through race-conscious remedies, it is like enacting a law that prohibits a runner from ever overtaking another runner who has received an illegal head start in a race. The current distribution of societal resources is simply built into the existing baseline, and the Court reads the Constitution as prohibiting race-conscious efforts to upset that baseline by redistributing those resources.[223]

What Chief Justice Roberts now adds to this constitutional anomaly is an insistence that this form of baseline discrimination applies even where there is

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[221] Professor Bell has argued that whites will only take actions that benefit racial minorities when it is also in the interest of whites to do so. *See* Derrick Bell, Brown *and the Interest-Convergence Dilemma, in* SHADES OF *BROWN:* NEW PERSPECTIVES ON SCHOOL DESEGREGATION 91–106 (Derrick Bell ed., Teachers College Press 1980).

[222] *Parents Involved*, 127 S. Ct. at 2768 (Roberts, C.J., majority opinion).

[223] *See* Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 243–56 (1997) (using footrace metaphor to illustrate how preexisting inequalities can hide beneath an analytical baseline).

no tangible resource being allocated—where the *only* thing at stake is integration versus resegregation. As has been discussed, the Louisville and Seattle plans were not affirmative action programs. They were not enacted to override the allocation of scarce educational resources that would otherwise be distributed to students on the basis of merit. Rather, the sole purpose of the plans was to promote integration rather than segregation.[224] Nevertheless, Chief Justice Roberts chose to find not only that objecting white parents had a legitimate interest in sending their children to resegregated schools, but that this interest in resegregation should be built into the baseline of existing rights that the Constitution protects from redistribution to racial minorities.

Chief Justice Roberts would seemingly bar *all* forms of race consciousness from a school board's efforts to prevent resegregation. He addressed the facially neutral alternatives that were endorsed by Justice Kennedy—including race-conscious school siting, gerrymandered attendance zones, and the establishment of magnet schools—but he did so only to assert that they were not before the Court.[225] Indeed, it is that very danger of precluding all race-conscious remedies that caused Justice Kennedy to part company with the Roberts plurality, and to write his own concurring opinion.[226] If Justice Breyer is correct that history has shown race-neutral strategies to be inadequate for achieving integration,[227] Chief Justice Roberts has simply read the Constitution to *require* resegregation. Moreover, his plurality opinion creates a strong incentive for school districts to stop even *trying* to integrate their student bodies. If they try, their efforts are likely to be either ineffective or unconstitutional. But if they simply stop trying, their actions will be perfectly constitutional. The likelihood that incurable resegregation will result from the Roberts plurality opinion is sufficiently foreseeable that the four Justices who signed the opinion either intended resegregation, or were not troubled by its presence.

Schools might respond to the Roberts prohibition on race consciousness by using socioeconomic status as a proxy for race. But if schools try using socioeconomic proxies to promote diversity, they will be acting as if

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[224] *See supra* text accompanying notes 191–90 (discussing distinction between affirmative action and sorting plans).

[225] *See Parents Involved*, 127 S. Ct. at 2766 (Roberts, C.J., plurality opinion) (discussing facially neutral alternatives).

[226] *See id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment) (declining to join portions of Roberts's plurality opinion that could be read as precluding all consideration of race).

[227] *See id.* at 2824–30 (Breyer, J., dissenting) (arguing that history has show need for race-conscious integration strategies).

socioeconomic factors are all that matter. Notwithstanding the dramatic racial isolation that continues to exist in many of the nation's schools,[228] relegating school boards to the use of socioeconomic proxies conveys the message that *racial* segregation no longer poses a distinct social problem. Moreover, the resegregated schools that racial minorities will be forced to attend are almost certain to be inferior to the resegregated schools that white students will attend. White schools traditionally receive better funding and resources than minority schools, and the Supreme Court has held that such discriminatory funding does not offend the Constitution.[229] As Professor Seidman has pointed out, *Brown* overruled any separate-but-equal requirement that had previously been imposed by *Plessy*. Therefore, as long as racially isolated schools are only *de facto* segregated, there is no requirement that the white and minority schools be in any sense equal.[230]

Even if school boards do attempt to use socioeconomic status as a diversity proxy for race, there is still a danger that Chief Justice Roberts will view those efforts as unconstitutional. In *Washington v. Davis*,[231] the Supreme Court held that the Equal Protection Clause prohibited intentional discrimination. Therefore, if a school board's primary motive in using a socioeconomic proxy for race is to promote *de facto* racial integration, the Court might well view the board's actions as entailing the precise type of intentional discrimination that *Washington v. Davis* prohibits. Although the Court held in *Personnel Administrator v. Feeney*[232] that mere knowledge of a policy's disparate impact was not enough to establish an equal protection violation, the distinction between *Washington v. Davis* impermissible actuating intent, and *Feeney* permissible in-spite-of intent can be quite elusive.[233] Because Chief Justice Roberts seems hostile to the very idea of school integration itself, he might well conclude that socioeconomic factors serve simply as an impermissible proxy for race in the resegregation context. In this regard, it is noteworthy that the Su-

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[228] *See supra* note 13 (documenting present school segregation).

[229] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 11–17 (1973) (upholding dramatic funding discrepancies between minority and white schools).

[230] *See* Seidman, *supra* note 187, at 717 (arguing that *Brown* simply precluded need to provide equal educational opportunities for minorities).

[231] *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (adopting intent requirement to establish equal protection violation).

[232] *See* Personnel Administrator v. Feeney, 442 U.S. 256, 278–79 (1979) (holding in a gender discrimination case that mere awareness of known discriminatory effects was not sufficient to satisfy the intent requirement of the Equal Protection Clause).

[233] *See, e.g.*, *Davis*, 426 U.S. at 253 (Stevens, J., concurring) (suggesting that knowledge of natural consequences can be most probative evidence of subjective intent).

preme Court in *Missouri v. Jenkins II*[234] prohibited the use of facially neutral magnet schools in an effort to attract white suburban students to the racially segregated Kansas City schools. The Court viewed the use of magnet schools as an indirect racially motivated remedy for the type of *de facto* segregation that the Court in *Milliken I*[235] had previously held a school district could not constitutionally pursue directly.

In his *Resegregation* concurrence, Justice Thomas cites *Lochner* for the proposition that the Constitution does not enact any theory of democratic education that the Supreme Court, acting as a social engineer, is free to inflict on the rest of the nation.[236] But that is precisely what the Justices who joined the Roberts plurality opinion appear to be doing. For whatever reason, they have adopted the view that the *Brown*-based harms of racial segregation are outweighed by the need to pursue an abstract interest in colorblind race neutrality that will prevent many of the nation's schools from ever becoming integrated. It is difficult to understand why a politically unaccountable Supreme Court would think it had the institutional competence to inflict that view on the members of a democratically selected school board that had reached the opposite conclusion. It is clear, however, that the Supreme Court Justices who adopted such a view had an understanding of equality that is racially discriminatory.

2. *Discriminating Equality*

Almost everyone claims to be in favor of racial equality, but the concept of equality can be quite tricky to pin down. Things are alike and different in many ways. One cannot settle on which similarities and differences "count" in making a particular equality determination without first supplying some normative objective against which the equality assessment can be measured.[237]

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[234] *See* Missouri v. Jenkins II, 515 U.S. 70, 85– 96 (1995) (prohibiting use of magnet schools to attract white students from Kansas City suburbs in order to remedy inner-city *de facto* segregation).

[235] *See* Milliken v. Bradley I, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for *de facto* school segregation in Detroit, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

[236] *See Parents Involved*, 127 S. Ct. at 2779 nn.14–15 (Thomas, J., concurring) (citing Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

[237] Professor Westen has argued that the concept of equality is at bottom an empty vessel, frequently filled with external meanings that are generally mistaken for the meaning of the vessel itself. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982)

This can cause serious problems in zero-sum situations, where the interests of whites and racial minorities are perceived to diverge in ways that are mutually exclusive.[238] In such situations, it is difficult to determine whether the concept of equality requires the sacrifice of white interests to advance the interests of racial minorities, or the sacrifice of racial minority interests to advance the interests of whites. This determination cannot be made simply by consulting the principle of "equality" itself. No "plain meaning" of equality can hope to resolve the underlying conflict in normative preferences that simmers beneath the surface of a zero-sum dispute. When someone claims that such a dispute *can* be resolved through recourse to the plain meaning of equality, he or she is simply seeking to camouflage a predetermined value judgment that favors one interest over the other.

The Roberts plurality attributes a plain-meaning, "colorblind" conception of equality to *Brown*, and treats that conception as dispositive in resolving the underlying value conflict that is at issue in the *Resegregation* case.[239] Justice Thomas places even more emphasis on the dispositive force of "colorblindness" in his concurrence, and he does so in a way that appears to be a caricature of doctrinal formalism.[240] However, the suggestion that colorblind race neutrality could ensure equality simply ignores the centuries of baseline inequalities that preceded the Court's new commitment to colorblindness.[241] The Justices in the

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(equality has no substantive content of its own and derives substance entirely from claims of rights). The Westen thesis generated spirited responses. *See, e.g.*, Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 576 (1983) (the equality concept is necessary morally, analytically, and rhetorically); Anthony D'Amato, *Is Equality A Totally Empty Idea?*, 81 MICH. L. REV. 600, 603 (1983) (equality has a substantive content of its own); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1168 (1983) (identifying both formal and substantive principles of equality). For Professor Westen's reply, see Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 663 (1983).

[238] As stated above, I do not think that the Louisville and Seattle integration plans concern zero-sum situations, because they are merely sorting programs, rather than merit-based affirmative action programs. *See supra* text accompanying notes 191–90. Nevertheless, Chief Justice Roberts treats the plans as if they inflict some injury on white parents in order to benefit minority students. *See Parents Involved*, 127 S. Ct. at 2750–51 (finding justiciable injury to disappointed white parents); *but cf. supra* text accompanying notes 202–15 (arguing that parents did not suffer any justiciable injury).

[239] *See Parents Involved*, 127 S. Ct. at 2767–68 (Roberts, C.J., plurality opinion) (asserting that racial classifications are "odious" to concept of equality).

[240] *See id.* at 2782, 2787–88 (Thomas, J., concurring) (applying rigid colorblindness standard).

[241] *See supra* Part II.B.1 (discussing baseline discrimination); *see also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 70–82 (1993) (deconstructing concept of discrimination).

Roberts plurality are simply using the concept of equality to perpetuate the sacrifice of minority interests for the apparent benefit of whites.

It is very difficult to imagine a non-invidious motive for the Roberts plurality's resolution of the *Resegregation* case. It would have been easy for the Supreme Court to have affirmed the lower court decisions, and to have invoked the *Brown* and *Swann* line of cases to authorize the integration plans that Louisville and Seattle had voluntarily chosen to adopt. Indeed, it required a considerable amount of doctrinal maneuvering for the Supreme Court to suppress those precedents, and reject the reasoning of the lower courts that followed them.[242] I can think of only two reasons why the Roberts plurality might have strained so hard to decide that the Louisville and Seattle integration plans undermined rather than promoted the concept of equality. The first seems undemocratic, and the second reeks of racism.

The first reason why the Roberts plurality Justices might have wanted to invalidate the integration plans at issue in the *Resegregation* case is that they viewed the use of any express racial classification as posing a danger of racial divisiveness so severe that it could not be tolerated, even if it offered the only realistic hope of preventing resegregation. Although neither the Roberts plurality nor the Thomas concurrence explicitly invoked the divisiveness argument, Justice Kennedy did articulate such a justification to support his distaste for the express classification of individuals based on race.[243] As I argued above, however, the politically unaccountable Supreme Court lacks the institutional competence to substitute its personal value preferences for the judgments of the politically accountable branches in striking such a delicate balance between the competing interests.[244] Moreover, given the Supreme Court's long history of hostility to racial minority interests[245]—and the difficulty of finding any meaningful doctrinal constraint on the exercise of the Court's judicial discretion[246]—one should be extremely hesitant to cede such racial policymaking power to the Supreme Court.

The second reason why the Roberts plurality might have wanted to invalidate the Louisville and Seattle integration plans is that the plurality was

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[242] *See supra* Part II.A (discussing ways in which *Resegregation* case "overruled" *Brown*).

[243] *See Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J, concurring in part and concurring in the judgment) (discussing divisiveness).

[244] *See supra* text accompanying notes 173–74 (analyzing divisiveness justification).

[245] *See supra* text accompanying notes 178–86 (discussing Supreme Court history of hostility to racial minority interests).

[246] *See supra* Part II.A (discussing ways in which *Resegregation* case "overruled" *Brown*).

simply opposed to the idea of racial integration itself. It is as if the Court were going out of its way to invalidate the Louisville and Seattle plans simply because those plans would actually produce integration. History has shown that *actual* integration is not something to which the Supreme Court has traditionally aspired: the all-deliberate-speed qualification of *Brown II* produced a decade of post-*Brown I* southern segregation;[247] the Court's decision to distinguish between *de facto* and *de jure* segregation precluded any meaningful northern integration;[248] and the *Jenkins II* prohibition on efforts to entice white suburban students back to inner-city schools precluded indirect means of achieving integration.[249] In addition, the Court now allows segregated schools to become unitary after a period of good faith efforts to comply with *Brown*, even though the racially identifiable character of those schools has not changed.[250] Moreover, the Court refuses to view the resegregation of formerly segregated schools as something that requires the continued use of desegregation remedies.[251] Although rampant residential segregation is responsible for most contemporary school segregation,[252] it is also noteworthy that the Court has refused to view the subtle forms of state action that contribute to residential segregation as sufficient to trigger the integration remedies that the Court makes available for *de jure* discrimination.[253] And, of course, the

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[247] *See Brown II*, 349 U.S. at 301 (limiting desegregation obligation of public schools to that which could be accomplished "with all deliberate speed"); *see also* STONE ET AL., *supra* note 7, at 483–88 (describing Supreme Court inaction in face of massive Southern resistance that followed *Brown*).

[248] *See* Milliken v. Bradley I, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for *de facto* school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

[249] *See* Missouri v. Jenkins II, 515 U.S. 70, 91–96 (1995) (prohibiting use of magnet schools to attract white students from Kansas City suburbs in order to remedy inner-city *de facto* segregation).

[250] *See* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 246–51 (1991) (even racially identifiable schools become unitary after period of good faith compliance with desegregation decree).

[251] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 431–40 (1976) (no need to take account of resegregation through population shifts).

[252] *See supra* note 7 and accompanying text.

[253] *See* Spangler, 427 U.S. at 431–37 (state involvement in "white flight" exacerbating residential segregation not a basis for integration remedies); *see also Parents Involved*, 127 S. Ct. at 2775–76 (Thomas, J., concurring) (rejecting claim that past school segregation affected housing segregation); *cf.* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 224–36 (1973) (Powell, J., concurring in part and dissenting in part) (offering argument rejected by majority that state involvement in *de facto* segregation make *de facto*/*de jure* distinction untenable).

Resegregation case itself prohibits voluntary race-conscious efforts to promote integration, even when those efforts seem necessary to prevent resegregation.[254] For some reason, the Supreme Court simply seems averse to the idea of actual integration, and the concept of equality to which the Court subscribes is expansive enough to embrace that aversion.[255] The *Plessy* Supreme Court had an understanding of equality that permitted the maintenance of racial segregation, and the Roberts Supreme Court seems intent on reviving that understanding.

I cannot help but feel that the Roberts Court went out of its way in the *Resegregation* case to solve a problem that did not exist—much as the Rehnquist Court did in *Shaw v. Reno*,[256] when it recognized a cause of action enabling disgruntled whites to challenge race-conscious redistricting. In both cases, the white plaintiffs suffered no concrete injury other than minor disappointment or inconvenience, and in both cases the *real* motive for the plaintiff's legal challenge seems to have been an objection to association with racial minorities. In the *Resegregation* case, the stated injury was the inability to go to the school of one's choice, and in the *Redistricting* case, the stated injury was the inability to vote in the district of one's choice. But all of the pertinent schools were formally "equal" in the *Resegregation* case, just as all of the voting districts were formally "equal" in the *Redistricting* case. As a result, the disappointment suffered from the failure to secure the desired voting- or school-district assignment was legally no more cognizable than the disappointment suffered from a geographic- or lottery-based assignment.[257] Both the *Resegregation* and *Redistricting* cases, however, involved a real injury that remained tacit, because it was too inconsistent with the culture's stated values to be made explicit. In the *Resegregation* case, the real injury was that a student would have to go to school with racial minority students in an integrated school; in the *Redistricting* case, the real injury was that a voter would have to vote in a majority-minority district with racial minority voters. In both cases, the white interest in avoiding unwanted association with racial minorities is

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[254] *See Parents Involved*, 127 S. Ct. at 2833 (Breyer, J., dissenting) (arguing that race-conscious remedies invalidated by Court may be necessary to prevent resegregation).

[255] For a more extensive discussion of the Supreme Court's school desegregation cases, and how they illustrate the Court's conception of equality, see SPANN, *supra* note 241, at 70–82.

[256] Shaw v. Reno, 509 U.S. 630, 649 (1993) (recognizing cause of action to challenge race-conscious redistricting).

[257] *See supra* text accompanying notes 191–92 (discussing lack of legally cognizable injury).

what was at stake, and in both cases, there was no way to recognize that injury without giving deference to white racial preferences.

In the line of *Redistricting* cases that was spawned by *Shaw v. Reno*, the Supreme Court was ultimately unable to sustain a coherent cause of action for disappointed white voters, and the Court seems now to have withdrawn from the business of policing race-conscious redistricting. It has done so through the expedient of permitting the use of race as a proxy for political affiliation, because the task of distinguishing coherently between acceptable and unacceptable uses of race apparently proved too daunting.[258] One might hope that the Court would have learned a lesson from its redistricting experience, but the *Resegregation* Supreme Court chose instead to replicate its *Shaw v. Reno* mistake by permitting disappointed white parents to challenge school board efforts to promote integration. In both the *Resegregation* and *Redistricting* contexts, the Supreme Court was confronted with the same insoluble problem. The Court was trying to advance a race-neutral agenda, that was rooted in the claim that race does not matter. However, it was trying to do so in a culture that has always been based on the core conviction—whether stated or unstated—that race really *does* matter a lot. The Supreme Court's continuing mission, therefore, has been to permit the culture's racial dynamics to play out as it seems they inevitably must, but to make their operation appear consistent with the *idea* of racial equality.

In 1948, the southern Dixiecrats opposed federal civil rights laws, for the stated reason that federal intervention was inconsistent with states rights. No one, of course, believed them, and now the "states rights" movement of the period has become code for the Southern segregationist policies that were rooted in invidious discrimination against blacks.[259] The Roberts Supreme Court's use of "equality" to promote segregation is similarly invidious. In retrospect, I suspect that it too will come to be recognized as mere code for the contemporary segregationist policies favored by current social conservatives. I can only hope that this recognition will occur sooner rather than later, so the

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[258] *See* Easley v. Cromartie, 532 U.S. 234, 258 (2001) (permitting use of race in redistricting as proxy for political affiliation). Note that Professor Liu has invited the Court to apply its redistricting jurisprudence in the school resegregation context. *See* Liu, *supra* note 13, at 306–07 (arguing that integration plans should be upheld unless race has been the "predominant factor" in formulating the plan).

[259] *See* Wikipedia, *Dixiecrat*, http://en.wikipedia.org/wiki/Dixiecrat (last visited Dec. 5, 2007); Scott Buchanan, Dixiecrats, http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h=1366 (last visited Dec. 5, 2007).

Supreme Court will stop practicing racial discrimination through the technique of judicial review.

III. DISINTEGRATING JUDICIAL REVIEW

Martin Luther King, Jr. once said, "The American people are infected with racism—that is the peril. . . . Paradoxically, they are also infected with democratic ideals—that is the hope."[260] A primary function of the Supreme Court has been to utilize the power of judicial review to mediate the tension that exists between that racism and those democratic ideals. The Court's job has often been to mask the symptoms of American racism, so that they appear to flow from the democratic ideal of racial equality. I have argued in the past that this "veiled majoritarian" form of judicial review serves the function of promoting majoritarian interests at the expense of racial minority interests.[261] That is not a good thing. But it is something that is likely to persist as long as the dominant culture continues to desire the sacrifice of racial minority interests for white majoritarian gain. What cases like the *Resegregation* case reveal, however, is that the Court sometimes oppresses racial minorities even when the white majority would prefer not to—even when protecting minority interests in our racially pluralist culture coincides with the interest of the white majority.[262] And that is a form of judicial review that the white majority might refuse to tolerate, once it realizes what is going on. When majoritarian preferences are denied because the Constitution compels such denials, the majority is likely to acquiesce in Supreme Court invalidations. But if majoritarian preferences are being denied in the *name* of constitutional compulsion, but are really being overridden by the Supreme Court's own racial policy preferences, the majority may cease to acquiesce. Hopefully the political—as opposed to doctrinal—nature of the Supreme Court's *Resegregation* decision is sufficiently transparent that it will help to prompt such a majoritarian realization, and will thereby undermine popular support for racially oppressive judicial review.

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[260] *See* TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–1968 746 (2006) (quoting Martin Luther King, Jr.).

[261] *See* SPANN, *supra* note 241, at 1–6 (describing "veiled majoritarian" judicial review).

[262] Professor Bell's interest-convergence model predicts that this is the only time that the white majority will protect the interests of racial minorities. *See* Bell, *supra* note 221, at 91–106 (describing interest-convergence model).

A. Racial Politics

The *Resegregation* decision seems political rather than doctrinal in nature. The Justices who joined the majority are, of course, politically conservative on the issue of race. Chief Justice Roberts, who authored the majority and plurality opinions,[263] was recently appointed by President George W. Bush to replace the late Chief Justice Rehnquist. He was appointed largely because of his politically conservative views, including his views on race.[264] The *Resegregation* case was the first major race case on which Roberts sat as a Supreme Court Justice, but he did vote against racial minority interests in a prior Supreme Court redistricting case.[265] The remaining four Justices in the *Resegregation* majority were Justices Scalia, Kennedy, Thomas and Alito.[266] Like Chief Justice Roberts, Justice Alito is a new member of the Court, appointed by George W. Bush largely because of his conservative political views.[267] The *Resegregation* case was also his first major race case as a Supreme Court Justice, but he too voted against racial minority interests in a prior Supreme Court redistricting case.[268] Justices Scalia, Kennedy, and Thomas all have long and consistent histories of opposition to racial minority interests, and none of the three has ever voted in favor of racial minority interests in any Supreme Court affirmative action or majority-minority

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[263] *See Parents Involved*, 127 S. Ct. at 2746 (Roberts, C.J., majority and plurality opinions).

[264] *See* Joan Biskupic, *Few Big Rulings as Justices Felt Out New Roles: Addition of Two Members, Rising Influence of a Third Left Court in Caution Mode*, USA TODAY, June 30, 2006, at 9A (discussing political leanings of new Supreme Court Justices).

[265] Chief Justice Roberts and Justice Alito previously voted to reject black and Latino vote dilution claims in a recent Texas redistricting case. After *Grutter* was decided, the Supreme Court invalidated 5–4, under the Voting Rights Act, a mid-decade Texas redistricting plan that eliminated a majority-Latino voting district. *See* League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2612–23 (2006) (upholding Latino vote dilution claim). Chief Justice Roberts, joined by Justice Alito voted to reject this claim. *See id.* at 2652–63 (Roberts, C.J., dissenting in part, with Alito, J.). Justices Scalia and Thomas also voted to reject this claim. *See id.* at 2663 (Scalia, J., dissenting in part, with Thomas, J.). In addition, a majority of the Court rejected a Voting Rights Act claim asserting dilution of black voting strength). *See id.* at 2624–26 (plurality opinion of Kennedy, J., with Roberts, C.J., and Alito, J.); *id.* at 2652 (Roberts, C.J., concurring in part, with Alito, J.); *id.* at 2663–68 (Scalia, J., concurring in judgment in part, with Roberts, C.J., Thomas, and Alito, JJ.).

[266] *See Parents Involved*, 127 S. Ct. at 2746 (Roberts, C.J., majority opinion) (listing Justices who joined majority).

[267] *See* Biskupic, *supra* note 264, at 9A (discussing political leanings of new Supreme Court Justices).

[268] *See supra* note 265.

redistricting case.[269] Because Roberts and Alito joined those three Justices in voting to invalidate the integration plans at issue in the *Resegregation* case, it remains true that no Justice in the *Resegregation* majority has ever voted in favor of a racial minority interest in an affirmative action, redistricting, or integration case.[270] One can never be certain, but it is hard not to imagine that the Justices in the Resegregation majority would also have voted with the majorities in cases like *Dred Scott*,[271] *Plessy*[272] and *Korematsu*.[273] The apparently political nature of the Court's *Resegregation* decision is also supported by the circumstances under which the Court granted *certiorari*, and by the Court's disregard of *stare decisis* in refusing to follow *Brown*.

1. Certiorari

It is surprising that the Supreme Court decided to grant *certiorari* in the *Resegregation* case. After decades of contentious doctrinal turmoil,[274] the law of affirmative action had finally reached a state of equilibrium under the companion cases of *Grutter*[275] and *Gratz*[276]—where racial affirmative action was disfavored, but permitted in certain narrowly tailored circumstances to promote student diversity. Similarly, after nearly a decade of equally contentious doctrinal turmoil, the law of majority-minority redistricting reached a state

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[269] *See* SPANN, *supra* note 186, at 159–63 (discussing Supreme Court voting blocs and voting records on affirmative action and redistricting). Since the statistics in that book were published, Justices Scalia, Kennedy and Thomas have also voted against racial minority interests in the *Grutter*, 539 U.S. at 310, and *Gratz*, 539 U.S. at 247, affirmative action cases, as well as in the *Perry*, 126 S. Ct. at 2602–04, redistricting case. *See supra* note 265.

[270] *See supra* note 265.

[271] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction & invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners).

[272] *See* Plessy v. Ferguson, 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

[273] *See* Korematsu v. United States, 323 U.S. 214, 215–20 (1944) (upholding World War II exclusion order that led to Japanese-American internment).

[274] *See* SPANN, *supra* note 186, at 10–84 (describing contentious history of Supreme Court affirmative action cases).

[275] *See Grutter*, 539 U.S. at 328 (holding that the race conscious pursuit of educational diversity constituted a compelling governmental interest).

[276] *See Gratz*, 539 U.S. at 251 (invalidating an affirmative action diversity plan as not narrowly tailored).

of equilibrium in *Easley v. Cromartie*[277]—where the "predominant" use of race in redistricting was prohibited, but race could be used as a proxy for political affiliation. Because it had proved so difficult for the Court to reach such a state of equilibrium in the affirmative action and redistricting contexts, and because the cases establishing the new equilibrium were so recent, it is not clear why the Court would want to destabilize matters in the comparatively innocuous context of voluntary race-conscious efforts to prevent resegregation. Indeed, six months prior to granting certiorari in the *Resegregation* case, the Supreme Court had denied *certiorari* in *Comfort v. Lynn School Committee*[278]—a strikingly similar case, raising the same race-conscious *de facto* integration issue. In *Comfort*, the District Court and the *en banc* Court of Appeals had upheld the integration plan at issue on the basis of the diversity rationale of *Grutter*—just as the lower courts had done in the two consolidated *Resegregation* case decisions.[279]

The change that occurred between the time that the Court denied *certiorari* in *Comfort*, and the time that the Court granted *certiorari* in the *Resegregation* case, was not a change in controlling constitutional doctrine. It was a change in Supreme Court personnel. *Certiorari* was denied in *Comfort* on December 5, 2005, when Justice O'Connor—the author of *Grutter*—was still on the Court.[280] However, the membership of the Supreme Court was reconfigured in June 2006, when Chief Justice Roberts replaced Chief Justice Rehnquist, and Justice Alito replaced Justice O'Connor.[281] Although there was no Circuit split on the issue of whether *Grutter* diversity permitted the types of *de facto* integration plans at issue in *Comfort* and the *Resegregation* case, the Supreme Court nevertheless granted *certiorari* in the *Resegregation* case. The racial politics of the Court had simply changed, and the substitution of Justice Alito for Justice O'Connor meant that there were no longer five Justices who supported the application of *Grutter* diversity to voluntary *de facto* integration.[282] The

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[277] 532 U.S. 234, 257–58 (2001) (permitting use of race in redistricting as proxy for political affiliation).

[278] 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1061 (2005) (upholding Massachusetts school integration plan).

[279] *Compare Comfort*, 418 F.3d at 5–10 (upholding plan) *with Parents Involved*, 127 S. Ct. at 2746–50 (Roberts, C.J., majority opinion) (describing lower court decisions).

[280] *See Comfort*, 546 U.S. at 1061 (denying *certiorari* on Dec. 5, 2005).

[281] *See* Linda Greenhouse, *Justices, Voting 5–4, Limit the Use of Race In Integration Plans*, N.Y. TIMES, June 29, 2007, at A1 (discussing political change in Court membership); *see also* Biskupic, *supra* note 264, at 9A (discussing political leanings of new Supreme Court Justices).

[282] *See* Greenhouse, *supra* note 281, at A1; *see also* Biskupic, *supra* note 264, at 9A.

granting of *certiorari* in the *Resegregation* case was not about doctrine. It was about Supreme Court racial politics. And so was the outcome of the case.

2. *Stare Decisis*

The doctrine of *stare decisis* is the thing that is supposed to insulate judicial decisionmaking from the political preferences of the judges who issue judicial decisions. The need to follow precedent is said to constrain the discretion of judges, so that they cannot give full vent to their political biases and predispositions in deciding the cases that they are asked to resolve.[283] It seems pretty clear that the *Brown* precedent was about desegregating schools, and not about resegregating them.[284] As the *Resegregation* dissent forcefully points out, under any non-tortured interpretation of *Brown* and its progeny, *stare decisis* would permit rather than prohibit voluntary efforts to promote integration and prevent resegregation. *Brown* was about eliminating the nation's "inherently unequal" segregated schools, and the *Swann* line of cases authorized the use of race-conscious remedies to prevent that inherent inequality.[285] Nevertheless, Chief Justice Roberts chose not to adhere to this common understanding of *Brown*.

After a series of make-weight arguments,[286] the primary claim offered by Chief Justice Roberts to distinguish the *Brown* line of cases from the *Resegregation* case is that *Brown* concerned *de jure* segregation, and the type of segregation at issue in the *Resegregation* case was merely *de facto* in nature.[287] That claim rests upon a distinction between public and private action that has been thoroughly destabilized by decades of critical legal scholarship.[288] It has now become child's play to manipulate the state action doctrine in order to justify a wide range of desired discretionary results.[289] Justice Breyer's

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[283] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4–52, 83–84 (2001) (discussing *stare decisis* as constraint on judicial discretion); *see generally* Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006) (discussing role of *stare decisis* in constitutional adjudication).

[284] *See supra* Part II.A (arguing that the *Resegregation* case "overruled" *Brown*).

[285] *See Parents Involved*, 127 S. Ct. at 2811–20; 2835–36 (Breyer, J., dissenting).

[286] *See id.* at 2816–20 (discussing counterarguments offered by Chief Justice Roberts).

[287] *See id.* at 2751–52, 2761–64 (Roberts, C.J., majority opinion).

[288] *See, e.g.*, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (discussing incoherence of public/private distinction).

[289] *See, e.g.*, SPANN, *supra* note 241, at 41–50 (illustrating degree of discretionary play inherent in distinction between state and private action).

dissent emphasizes the artificiality of the distinction between *de facto* and *de jure* discrimination by noting that the difference between the two can turn on nothing more significant than whether a discrimination claim is or is not settled prior to final adjudication—a distinction that is, in fact, reflected in the respective histories of the Seattle and Louisville integration plans themselves.[290] It is noteworthy that Chief Justice Roberts chose to rest an issue as grave as the future integration or segregation of the nation's schools on a doctrinal distinction that was this tenuous. However, that tenuous doctrinal distinction did have a certain instrumental value.

The doctrinal play that exists in the distinction between *de facto* and *de jure* discrimination does not simply *permit* political considerations to enter into a *stare decisis* analysis of *Brown*. It *requires* recourse to such political policy preferences in order to give the distinction any operative meaning at all. Like the concept of equality,[291] the *de facto* versus *de jure* distinction provides an open invitation for the Court to infuse its own racial policy preferences into its adjudications. And Chief Justice Roberts elected to place dispositive weight on that distinction in order to take advantage of that invitation. The Supreme Court's resolution of the *Resegregation* case was, therefore, political rather than doctrinal, because it could not have been anything else.

B. The Emperor's New Clothes

In the Hans Christian Anderson fairy tale *The Emperor's New Clothes*, adults are tricked, through appeals to their vanity and self-interest, into pretending to see and admire a magnificent new suit of clothes that is supposedly worn by their Emperor. Eventually, a puzzled child—too young and innocent to appreciate the importance of collective pretense—announces that the Emperor is in fact wearing *no* clothes at all. It is only then that the adults publicly admit to each other what they privately have known to be true all along.[292]

In a sense, everyone privately knows that Supreme Court judicial review in race cases rests on the unstated racial policy preferences of the Justices. Nevertheless, we publicly pretend that Supreme Court adjudication is guided by

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[290] *See supra* text accompanying notes 106–07 (discussing artificiality of distinction between *de facto* and *de jure* discrimination).

[291] *See supra* text accompanying notes 237–38 (discussing imprecise meaning of equality).

[292] *See* Wikipedia, *The Emperor's New Clothes*, http://en.wikipedia.org/wiki/The_emperor%27s_new_clothes (last visited Dec. 5, 2007).

doctrinal principles rather than by political ideology. What we need is for someone to break this spell of collective pretense by announcing that, doctrinally speaking, the Justices are wearing no clothes to conceal their normative preferences. It is my hope that the politics underlying the Supreme Court's *Resegregation* decision is so transparent that the case will itself constitute such an announcement, and that the decision will begin to eroded the legitimacy of judicial review.

Perhaps, the most insulting aspect of the Roberts opinion in the *Resegregation* case is its insistence on pretending that the outcome it reaches is compelled by *Brown*.[293] That is what seems to have incensed the dissenters,[294] and many commentators have condemned the Court's departure from *Brown*.[295] The reason I tried to characterize the *Resegregation* case as overruling *Brown*[296] was precisely to increase public skepticism about the *Resegregation* decision. Rightly or wrongly, *Brown* has come to be revered by the culture at large. As a result, transparent Supreme Court exploitation of *Brown* for parochial political purposes may exceed public tolerance for Supreme Court policymaking in the guise of judicial review. If the young and innocent child in *The Emperor's New Clothes* were able to read the *Resegregation* opinion authored by Chief Justice Roberts, I think the child would conclude that the opinion and the Emperor were similarly attired.

1. Loss of Legitimacy

The Roberts Court purports to be a conservative, incrementalist Court that is opposed to judicial activism.[297] Accordingly, when such a Court re-

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[293] *See Parents Involved*, 127 S. Ct. at 2767–68 (Roberts, C.J., plurality opinion) (arguing that result is compelled by *Brown*).

[294] *See id.* at 2797–2800 (Stevens, J., dissenting) (objecting to reliance on *Brown*); *id.* at 2800–01, 2834–37 (Breyer, J., dissenting) (same).

[295] *See Editorial: Race Matters*, ST. LOUIS POST-DISPATCH, July 2, 2007, at B8 (criticizing Supreme Court for not following *Brown*); *Editorial: Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28 (same); Dana Slagle, *Blacks View High Court's Vote to End Race-Based Integration Plans As A Step Backward*, JET , July 16, 2007, at 4 (same).

[296] *See supra* Part II.A (arguing that the *Resegregation* case overrules *Brown*).

[297] *See* Vikram Amar, *The Roberts Hearings: Blah and More Blah: Lack of Answers from Likely Chief Justice Equals Lack of Drama—And That's a Problem*, SAN JOSE MERCURY NEWS, Sept 18, 2005, at 1 (suggesting that Roberts may be conservative incrementalist); Jan Crawford Greenburg, *Roberts' Philosophy Likely to Mirror Rehnquist's*, SUNDAY GAZETTE & DAILY MAIL, Sept. 11, 2005, at 17A (same); Jeffrey Rosen, *In Search of John Roberts*, N.Y. TIMES, July 21, 2007, at A29 (same); *see also* Donna Cassata, *Experts View Alito as Incrementalist, Not a*

institutionalizes school segregation in one fell swoop, it seems fair to ask whether the opinion authorizing that re-institutionalization makes any sense. The Roberts *Resegregation* opinion is highly formalist in its non-instrumental insistence on colorblind race neutrality.[298] But the opinion ultimately rests on a litany of prior doctrinal *ipsi dixits* that are themselves as insubstantial as the Emperor new clothes.

Nicholas Lehman argued in *The New Yorker* that no version of original intent supports the theory of colorblindness that Chief Justice Roberts attempted to invoke in his *Resegregation* opinion.[299] In the past, the Equal Protection Clause has been viewed as consistent with both *de jure* segregation and with race-conscious affirmative action. "But, as a mater of history," Lehman stresses, "the idea that the amendment was meant to make the country 'color-blind' is wrong, and wrong in a way that is instructive for people thinking about American race relations today."[300] I find the Lehman observation to be encouraging, because it comes from a non-lawyer, and because it is published in a highly regarded, non-legal publication. If legal experts find it possible to reason their way to the result produced by the *Resegregation* case, then the future of the nation's racial progress may end up better nurtured in the hands of non-lawyers.

The ahistorical formalism of the Roberts opinion does not offer any actual *reasons* for invalidating the Louisville and Seattle integration plans. Indeed, Justice Breyer rebukes Chief Justice Roberts for precisely this deficiency.[301] Rather, Chief Justice Roberts merely relies on a standard litany of assertions, derived from prior affirmative action cases, that were never themselves supported by adequate instrumental justifications. He argues that the applicable level of constitutional scrutiny does not distinguish between benign and invidious uses of race;[302] that the Constitution does not permit remedies for general "societal discrimination;"[303] and that the Constitution prohibits efforts to

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Radical, CENTRE DAILY TIMES, Jan. 15, 2006, at A9 (suggesting that Alito, like Roberts, will be conservative incrementalist).

[298] *See Parents Involved*, 127 S. Ct. at 2768 (Roberts, C.J., plurality opinion) (favoring colorblindness).

[299] *See* Nicholas Lehman, *Comment: Reversals*, THE NEW YORKER, July 30, 2007, at 27.

[300] *Id.*

[301] *See Parents Involved*, 127 S. Ct. at 2816 (Breyer, J., dissenting) (arguing that Chief Justice Roberts does not explain *why* he is abandoning *Swann* integration principle).

[302] *See id.* at 2764–68 (Roberts, C.J., plurality opinion) (applying strict scrutiny to benign and invidious racial classifications); *see also id.* at 2774–75 (Thomas, J., concurring) (same).

[303] *See id.* at 2758–59 (Roberts, C.J., plurality opinion) (rejecting remedies for societal discrimination); *see also id.* at 2772 (Thomas, J., concurring) (same); *id.* at 2795 (Kennedy, J., concurring in part and concurring in the judgment) (same).

achieve racial balance.[304] I have in the past argued that there are serious doctrinal difficulties with each of those assertions.[305] However, for present purposes, the important point is that all of the assertions also lack *intuitive* appeal.

It seems obvious that the difference between benign and invidious uses of race is quite significant, given the history of race relations in the United States. There are important differences between efforts to promote slavery or segregation on the one hand, and to promote affirmative action or integration on the other. And a Supreme Court holding that insists on the doctrinal irrelevance of this commonsense distinction cannot hope to have much intuitive appeal. Similarly, the notion that the Constitution precludes race-conscious efforts to remedy the subtle forms of societal discrimination that pervade most aspects of contemporary culture, seems equally indefensible. Because such societal discrimination perpetuates tacit beliefs in racial caste inferiority, and promotes unthinking racial oppression through inertia, one would intuitively think that general societal discrimination is *precisely* the sort of discrimination to which the Equal Protection Clause would apply with the greatest force. Finally, the suggestion that remedial efforts to promote racial balance are unconstitutional seems simply perverse. In a nondiscriminatory culture, one would expect societal resources to be distributed in a racially proportional manner. Therefore, efforts to replicate the results that would be produced by a nondiscriminatory culture hardly seem to merit Supreme Court condemnation as a form of unconstitutional discrimination.

In addition to invoking the standard litany of arguments for resisting efforts to promote racial equality, Chief Justice Roberts also rejects two other distinctions offered by the *Resegregation* dissenters that seem to have palpable appeal. First, Justices Stevens and Breyer argue that there is an important distinction between race-conscious efforts that seek to *include*, and race conscious efforts that seek to *exclude*, racial minorities.[306] But the Roberts plurality opinion rejects the importance of that distinction, relying simply on a

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[304] *See id.* at 2755, 2758–59 (Roberts, C.J., plurality opinion) (rejecting racial balancing); *see also id.* at 2769–70 nn.2–3, 2773 (Thomas, J., concurring) (same).

[305] *See, e.g.*, Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOWARD L.J. 1, 63–90 (discussing benign and invidious discrimination); Girardeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENTARY 221, 231–36 (discussing societal discrimination); *id.* at 239–42 (discussing racial balancing).

[306] *See Parents Involved*, 127 S. Ct. at 2798 n.3 (Stevens, J. dissenting) (distinguishing between inclusion and exclusion of racial minorities); *id.* at 2815, 2817–18, 2834–35 (Breyer, J., dissenting) (same).

series of prior cases in which the difference between benign an invidious discrimination was rejected.[307] Second, Justice Breyer argues that schools can take voluntary integration actions, even when they could not be compelled by a court to take those actions, because there is an important difference between what is *required* and what is *permitted* by the Constitution.[308] Chief Justice Roberts also rejects the importance of that distinction, offering a variety of technical arguments relating to the *de facto* versus *de jure* divide; the legal force of dicta; and the irrelevance of benign or invidious motivation.[309]

The harm of adopting a jurisprudence that will result in the resegregation of public schools is obviously quite high. But the harm that Chief Justice Roberts claims to be preventing in return is quite small. That harm is simply the danger that people will come to understand that they live in a culture that does not allocate resources in a race-neutral manner. Far from being a harm, I would deem it an affirmative good for people to come to understand that they live in a culture whose ideal of colorblind race neutrality is not being realized in practice. It is also an affirmative good for people to realize that the best way of pursuing the ideal of racial equality is through the present use of race conscious remedies. In *Adarand*, the danger that the Supreme Court invoked in evaluating an affirmative action set aside for minority construction contractors was noticeably small. The only thing that ended up posing constitutional difficulties was a rebuttable presumption, contained in two federal statutes, stating that racial minorities were economically and socially disadvantaged.[310] Most people would view such a presumption—*rebuttable* in atypical cases—as descriptively undeniable. But the *Adarand* Supreme Court found that the presumption was subject to nearly-always-fatal strict scrutiny.[311] The *Resegregation* Court's

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[307] *See id.* at 2764–65 (Roberts, C.J., plurality opinion) (rejecting distinction between minority inclusion and exclusion).

[308] *See id.* at 2812, 2823–24 (Breyer, J., dissenting) (distinguishing between what is required and what is permitted).

[309] *See id.* at 2816 (discussing responses of Justice Roberts to distinction between what is required and what is permitted).

[310] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 205–10 (1995) (describing presumption).

[311] *See id.* at 226–27 (applying strict scrutiny). The only two cases in which a racial classification has survived strict equal protection scrutiny are the now-discredited World War II Japanese-American exclusion case of *Korematsu v. United States*, 323 U.S. 314, 215–20 (1944) (upholding World War II exclusion order that led to Japanese-American internment), and the recent affirmative action case of *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (upholding Michigan Law School affirmative action plan as a narrowly tailored means of advancing compelling interest in student diversity).

invalidation of the Louisville and Seattle integration plans seems similarly strained and artificial in its suggestion that the dangers of race-conscious integration are so great that they require us to endure the resegregation of the nation's schools.

I am hoping that the underlying intuitive appeal of the arguments that Chief Justice Roberts rejects, combined with the intuitive dissatisfaction that is likely to accompany his way of balancing the competing interests, will be strong. I am hoping that it will be sufficiently strong that members of the general public will opt to follow their own intuitions, rather than the Chief Justice's more esoteric foray into doctrinal analysis. Consistent with the phenomenon illustrated by the *Emperor's New Clothes*, my goal is to get people to admit what they already know to be true. Chief Justice Roberts believes that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[312] He favors colorblind race neutrality, but it is the same form of colorblind race neutrality that Justice Harlan taught us in his *Plessy* dissent is inevitably linked to white supremacy.[313]

2. *Resegregating Democracy*

If the Supreme Court is intent on reinstituting segregation, I have a form of segregation that it would be helpful for the Court to revive. The Court could beneficially resegregate democratic policymaking from countermajoritarian adjudication. I have never been a big believer in the distinction between law and politics. But the conventional legitimacy of judicial review depends upon the coherence of that distinction. Since most members of the Supreme Court—and perhaps most members of the general public—*do* believe that the distinction is a meaningful one, the Supreme Court should try its best to honor that distinction, and to stay on the adjudicatory side of the line. Supreme Court nominees ritualistically promise during their confirmation hearings that they

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[312] *Parents Involved*, 127 S. Ct. at 2768 (Roberts, C.J., plurality opinion).

[313] *See id.* at 2758 (citing the "Our Constitution is color-blind" language of *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). In addition to announcing that the Constitution is colorblind, Justice Harlan's *Plessy* dissent also explicitly endorsed a belief in white supremacy. *See Plessy*, 163 U.S. at 559 (asserting that the white race was "the dominant race in this country . . . in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage . . . .").

will apply the law rather than make it.[314] Accordingly, it does not seem unfair to ask that they refrain from violating the separation of legislative and judicial powers, at least where the violations are particularly egregious.

Wherever the line may lie between legislative and judicial power, the raw political policymaking that was entailed in the majority's resolution of the *Resegregation* case seem plainly to fall on the policymaking side of the line. There is no credible argument that either the text or the original intent of the Constitution requires the Supreme Court to invalidate integration programs that are voluntarily adopted by politically accountable, white majoritarian, government policymaking officials. And as a matter of relative institutional competence, there is simply no reason whatsoever to believe that an institution with the racial track record of the Supreme Court is better able than a legislature or school board to decide whether primary and secondary school integration is in the best interests of a pluralistic, multicultural society. As cases from *Dred Scott*[315] to *Lochner*[316] illustrate, the Supreme Court has historically been an impediment to social progress. Perhaps, having a conservative institution that retards a culture's evolution beyond the *status quo* is a good thing to have. I am skeptical. But even if I am wrong about this, it does not seem too much to ask that such an institution confine its socially regressive efforts to matters that are at least arguably within the scope of its institutional competence.

CONCLUSION

In *Parents Involved In Community Schools v. Seattle School District No. 1*,[317] a 5–4 majority of the Supreme Court decided that it was better to disintegrate the public schools than to allow race-conscious efforts to prevent resegregation. By allowing the cultural forces of passive resegregation to trump

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[314] *See* Mark V. Tushnet, *Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781–82 (1983) (describing federal judge confirmation ritual).

[315] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction & invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners).

[316] Lochner v. New York, 198 U.S. 45, 57–64 (1905) (invalidating as due process violation New York maximum hours health and safety legislation for bakers).

[317] 127 S. Ct. 2738 (2007) (invalidating race-conscious efforts to prevent resegregation of public schools in consolidated cases involving the Seattle, Washington and Louisville/Jefferson County, Kentucky school systems).

school board efforts to promote integration, the Court ended up constitutionalizing *de facto* racial segregation. Because the case was decided in a context where the conscious consideration of race appears to provide the only way of preventing resegregation, the Court was willing to overrule *Brown*'s commitment to actual integration in order to advance a formalist doctrinal agenda.

The Court's agenda favors a type of prospective, colorblind, race neutrality that, in reality, is neither colorblind nor race neutral. Rather, it is the same agenda that the Supreme Court has historically chosen to pursue—an agenda in which the interests of racial minorities are knowingly sacrificed in order to advance the perceived interests of the white majority. Even more disturbing than the Court's insistence that the *Resegregation* result was compelled by *Brown*, is the insistence by Chief Justice Roberts that his new gloss on old fashioned racism was compelled by the principle of racial equality itself. Because the attempt to equate *Brown* equality with this new form of Roberts's racism is both intuitively implausible and transparently political, my hope is that the *Resegregation* case will cause the Supreme Court to begin to lose the perceived legitimacy that is needed for the Court to continue its racially oppressive brand of judicial review.

In *Dred Scott* and *Lochner*, popular opposition was ultimately sufficient to overrule the Supreme Court's countermajoritarian political value preferences.[318] And hopefully, the Court's preference for continued racial subordination will soon come to be overruled as well. But I am a realist, and I understand that my hopes may not be achieved. I remember the deafening lack of public indignation that accompanied the Supreme Court's decision to choose the next President of the United States in *Bush v. Gore*.[319] And I realize that, depending on how the question is phrased in opinion polls, many members of the public remain untroubled by the Court's *Resegregation* decision as well.[320] It is unrealistic to expect a culture to behave in a way that is different from the way that the culture is at heart, and the Supreme Court's racially oppressive judicial

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[318] *Dred Scott* was ultimately "overruled" by the Civil War and the Fourteenth Amendment, and *Lochner* was ultimately "overruled" by the New Deal. *See* STONE ET AL., *supra* note 7, at 456–60, 755–62 (discussing *Dred Scott* and *Lochner*).

[319] *See* Bush v. Gore, 531 U.S. 98 (2000) (holding unconstitutional a Florida Supreme Court order to recount votes in the extremely close 2000 presidential election, thereby enabling George W. Bush to become President of the United States).

[320] *See* Jon Cohen, *Poll Results Can Ride on Wording*, WASH. POST, Aug 17, 2007, at A2 (reporting that majority of registered voters either agree with or oppose *Resegregation* case, depending on wording of poll).

review may simply be a part of the culture. But being a realist does not inevitably preclude the possibility of hope.