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# Limiting the Equal Protection Clause Roberts Style

WENDY PARKER†

## ABSTRACT

*Evoking Brown v. Board of Education, the Supreme Court recently decided that the school boards in Jefferson County, Kentucky and Seattle, Washington could not voluntarily do what federal courts once routinely ordered in the name of Brown: consider race or ethnicity for the purpose of increasing student integration. While this outcome might have been the same under the Rehnquist Court, the Roberts Court in reaching that conclusion indicated a very different approach to the Equal Protection Clause and Brown v. Board of Education than that of the Rehnquist Court. The Rehnquist Court typically utilized an interest-balancing approach to the Equal Protection Clause that considered many values. The Roberts Court, on the other hand, has begun to minimize the Equal Protection Clause to concern only capitalizing individual treatment, to the detriment of other values. As a result, the Roberts Court has narrowed considerably the meaning of Brown v. Board of Education and calls into question the legitimacy of long-standing, bed-rock school-desegregation principles.*

## INTRODUCTION

Three times the Supreme Court has limited the potency of *Brown v. Board of Education*<sup>1</sup> to effectuate change. The first two came about twenty years after *Brown*, in 1973 and 1974, as products of the Burger Court. The first was *San Antonio Independent School District v. Rodriguez*.<sup>2</sup> Here the Court held that education is not a fundamental right or interest and thereby defined *Brown* as not about equal educational opportunity for all students (including students in low-funded school districts), but instead only about state-sponsored racial or ethnic separation.<sup>3</sup> The second was *Milliken v. Bradley*, the Detroit school-desegrega-

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1. 347 U.S. 483 (1954).

2. 411 U.S. 1 (1973).

3. See *id.* at 37–38. For a thorough discussion of this case, see Betsy Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187,

tion opinion, where the Court made *Brown* largely inapplicable to large, urban, predominately minority school districts and their surrounding suburban, predominately white school districts.<sup>4</sup> Together, these two decisions isolated students in predominately minority and predominately poor school districts from the reach of the Equal Protection Clause, which had the potential to equalize or improve their educational opportunity.

For thirty years, these two limits on *Brown* were sufficient. *Brown* would concern racial and ethnic separation within school districts not predominately of one race or ethnicity. Where *Brown* applied, however, it reached beyond equal admission standards to all facets of school operation. That is, *Brown* required more than race-neutral admission standards. It also compelled the elimination of present day inequities caused by the illegal de jure system to the extent practicable. The school-desegregation inquiry included, thus, not just which students were enrolled in which schools, but also inequalities in staffing, facilities, transportation, extra-curricular activities, and the quality of education generally.<sup>5</sup>

This approach largely continued under the Rehnquist Court in its three school-desegregation opinions.<sup>6</sup> The significant contribution of the Rehnquist Court in defining *Brown* was limiting the school district's legal responsibility for continuing segregation on the grounds of causation.<sup>7</sup> That is, it emphasized the requirement that the school districts were only legally responsible for inequalities caused by their past illegality, a requirement long found in earlier school-desegregation opinions.<sup>8</sup> This emphasis, however, was not a radical change to the meaning of *Brown*, but more a debate about the extent of judicial power.<sup>9</sup>

In short, the Rehnquist Court left the basic nature of *Brown* undis-

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198-204 (1979), and James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 563-66 (1999).

4. 418 U.S. 717, 737-47 (1974). For a thorough discussion of this case, see Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 26-32 (1978) and Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, LAW & CONTEMP. PROBS., Autumn 1978, at 57, 93-99.

5. The first four factors are the so called *Green* factors, from *Green v. County School Board*, which held that compliance with *Brown* will concern student assignment, faculty assignment, staff assignment, facilities, transportation, and extra-curricular activities. 391 U.S. 430, 435 (1968). The Supreme Court subsequently held that quality of education could be added to that list. See *Freeman v. Pitts*, 503 U.S. 467, 492-93 (1992) (concluding that it was not an abuse of discretion for a district court to examine quality of education in assessing unitary status).

6. See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman*, 503 U.S. 467; Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); *infra* notes 143-44, 177-84 and accompanying text.

7. See Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 519-21, 528-33 (1999).

8. See, e.g., *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280-81 (1977).

9. See Parker, *supra* note 7, at 522-28; *infra* text accompanying note 177.

turbed. It did so even as it was redefining the rights and remedies in voting rights and affirmative action in ways generally disfavored by minorities.<sup>10</sup> Interestingly, in both sets of cases—keeping school desegregation largely as it had been, while shifting basic principles in voting rights and affirmative action to provide new protections to whites—the Rehnquist Court often weighed multiple constitutional and structural values.<sup>11</sup> Thus, the Court would consider individual rights, but also the harms of segregation and the importance of local control. To borrow a term coined by Professor Paul Gewirtz in another context, the Rehnquist Court engaged in “Interest Balancing” when interpreting the Equal Protection Clause in school-desegregation, affirmative-action, and voting-rights cases.<sup>12</sup>

While the Roberts Court is quite young in its tenure, which is expected to be quite long, it would be hard to define this Court’s approach to school desegregation as moderate.<sup>13</sup> Its plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>14</sup> is as significant in its approach to the meaning of *Brown* as are *Rodriguez* and *Milliken*. That opinion is the third major limit on *Brown* imposed by the Supreme Court.<sup>15</sup> *Parents Involved* signals a direction of *Brown* never seen before in the Supreme Court—limiting the goal of *Brown* to equal treatment for individuals, foregoing any value in *Brown* of the importance of eradicating actual segregation, and signaling a meaning of *Brown* advocated by early resisters to the change imposed

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10. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 207, 227 (1995) (protecting whites from race-conscious affirmative action); *Shaw v. Reno*, 509 U.S. 630, 641–42 (1993) (extending to whites protections from racial gerrymandering of voting districts); Neal Devins, *Adarand Constructors, Inc. v. Peña and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 675–78 (1996) (discussing *Adarand*); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 490–92 (1993) (discussing *Shaw*). Similarly, the Rehnquist dramatically redefined state immunity law. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363–64 (2001) (reviewing the cases following *Seminole*); *Seminole Tribe v. Florida*, 517 U.S. 44, 72–76 (1996) (holding that Congress cannot override the states’ Eleventh Amendment rights through legislation enacted under Article I powers).

11. See discussion *infra* Part II.B.

12. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983) (identifying one remedial approach to be “Interest Balancing,” which deems that some social interests “may justify some sacrifice of achievable remedial effectiveness”). Here I’m using the term to identify not social interests that interfere with remedial effectiveness but the balancing of constitutional values in interpreting the commands of the Equal Protection Clause.

13. Chief Justice Roberts’ tenure began in 2005, when he was fifty-years old. See Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, at A1.

14. 127 S. Ct. 2738 (2007).

15. See discussion *infra* Part II.A.

by *Brown*.<sup>16</sup> In doing so, the Roberts Court questions the legitimacy of long-standing school-desegregation opinions.<sup>17</sup>

In addition to changing the meaning of *Brown*, the plurality opinion signals a very different Equal Protection Clause jurisprudence.<sup>18</sup> While the Rehnquist Court used an interest-balancing approach to the Equal Protection Clause, the Roberts Court has begun to minimize the Equal Protection Clause to concern only capitalizing individual treatment. The Roberts Court largely ignores constitutional values that hinder maximizing equal individual treatment, namely anti-segregation and federalism principles.

This Essay proceeds in two parts. Part I is a brief overview of the opinion in *Parents Involved* and contends that the outcome of *Parents Involved* might have been the same under the Rehnquist Court. Part II is the heart of this Essay. Here I argue that Chief Justice Roberts's approach to the Equal Protection Clause jurisprudence and *Brown v. Board of Education* is fundamentally different from the Rehnquist Court's. He defines only individual treatment of constitutional significance at the cost of previously identified constitutional values.

#### PART I: THE OUTCOME

In his dissenting opinion in *Parents Involved*, Justice Stevens opined, “[N]o Member of the Court that I joined in 1975 would have agreed with today’s decision.”<sup>19</sup> Whether this is true or not, the Rehnquist Court might have reached the same result as the Roberts Court did in *Parents Involved*. In other words, the addition of Chief Justice Roberts and Justice Alito, replacing Chief Justice Rehnquist and Justice O’Connor, may not have changed the outcome of prohibiting the two challenged plans.<sup>20</sup> This Part briefly reviews the outcome in *Parents Involved* and explains why it may have been the same under the Rehnquist Court.

*Parents Involved* concerned two plans, one in Jefferson County, Kentucky and the other in Seattle, Washington. Both school districts voluntarily sought to increase integration in their schools.<sup>21</sup> The Jeffer-

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16. See *infra* notes 107–17 and accompanying text. Some would argue that this is the true meaning of *Brown*, and some courts in the immediate aftermath of the two *Brown* decisions so decided. That definition of *Brown*, however, was expressly rejected in *Green*, a 1968 Supreme Court case. See *Green v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

17. See discussion *infra* Part II.A.

18. See discussion *infra* Part II.B.

19. 127 S. Ct. at 2800 (Stevens, J., dissenting).

20. Nor is it clear that the Rehnquist Court would have accepted review of *Parents Involved*. It had previously denied certiorari in a very similar case, *Comfort v. Lynn School Committee*, 546 U.S. 1061, denying cert. to 418 F.3d 1 (1st Cir. 2005).

21. 127 S. Ct. at 2746, 2749.

son County plan under review concerned elementary-school enrollment.<sup>22</sup> Its elementary students were placed in an attendance zone depending on their residential home and classified as either “black” or “other.”<sup>23</sup> Their parents could then make choices within that zone for their child’s elementary school.<sup>24</sup> A student’s actual assignment would depend on many factors.<sup>25</sup> One consideration was the student’s racial and ethnic classification and whether the student’s enrollment would benefit or hinder the expected integration levels of each elementary school.<sup>26</sup> The district’s overall student population was approximately thirty-four percent black and sixty-six percent white.<sup>27</sup> The school board’s plan required that non-magnet elementary schools enroll between fifteen and fifty percent black students.<sup>28</sup> This racial and ethnic rule affected approximately three percent of student assignments.<sup>29</sup>

The Seattle plan before the Court addressed high-school assignment.<sup>30</sup> The school board classified students as either “white” or “non-white.”<sup>31</sup> Rising ninth graders could submit preferences for all ten Seattle high schools.<sup>32</sup> Admission depended on several factors, including how the student’s enrollment would affect the school’s compliance with a racial and ethnic standard.<sup>33</sup> In Seattle, the school district’s overall student population was roughly sixty percent nonwhite and forty percent white, and the school board required that high schools be within plus or minus ten percent of that overall population.<sup>34</sup> As in Jefferson County, racial and ethnic considerations affected small numbers of students, with around 300 students impacted in some way by the rule.<sup>35</sup>

Five Justices voted to prohibit both programs: Chief Justice Roberts

22. *Id.* at 2749.

23. *Id.* at 2746, 2749–50.

24. *Id.* at 2749.

25. For example, the school district also considered school capacity, residence, parental choice, and random assignment. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev’d sub nom. Parents Involved*, 127 S. Ct. 2738.

26. *Parents Involved*, 127 S. Ct. at 2749–50.

27. *Id.* at 2749.

28. *Id.*

29. *Id.* at 2760.

30. *Id.* at 2746.

31. *Id.* at 2747.

32. *Id.*

33. *Id.* Other factors included whether a sibling attended the school and the proximity between the student’s home and preferred school. *Id.*

34. *Id.*

35. Specifically, 307 students “were affected by the racial tiebreaker.” *Id.* at 2759. Yet, the Supreme Court concluded that “only [fifty-two] students . . . were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.” *Id.* at 2760.

and Justices Alito, Kennedy, Scalia, and Thomas.<sup>36</sup> Justice Kennedy refused, however, to join two parts of Chief Justice Roberts's opinion, and he wrote a relatively short opinion concurring in part and concurring in the judgment.<sup>37</sup> That left Justices Breyer, Ginsburg, Souter, and Stevens in dissent.<sup>38</sup>

Given that four years ago the Supreme Court had upheld the consideration of race and ethnicity in admission to the University of Michigan Law School<sup>39</sup> and the Court had added two new members since then, an obvious question arises—would the outcome have been different with Chief Justice Rehnquist and Justice O'Connor on the Court rather than Chief Justice Roberts and Justice Alito? For four reasons, the decision of the Roberts Court to outlaw the two programs at issue might have been quite similar to that reached by the Rehnquist Court.

First, the two K-12 programs shared more with the University of Michigan undergraduate program prohibited by the Rehnquist Court in *Gratz v. Bollinger*<sup>40</sup> than with the University of Michigan Law School program upheld in *Grutter v. Bollinger*.<sup>41</sup> The University of Michigan's undergraduate program had admitted freshman under a 150-point system.<sup>42</sup> One-hundred points guaranteed admission, but admissions counselors could "flag" for additional review certain applications.<sup>43</sup> Minority applicants automatically received twenty points in the admissions process, while non-minority applicants did not.<sup>44</sup> Applicants could also receive points for many other factors, such as being a legacy or graduating from a high school with high average SAT scores.<sup>45</sup>

The Supreme Court held this system unconstitutional in *Gratz*.<sup>46</sup> In doing so, the Court emphasized the lack of individual review under the system, given the mechanical awarding of points based on race and ethnicity.<sup>47</sup> Justice O'Connor, in her concurring opinion, faulted the system for "assign[ing] every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant."<sup>48</sup>

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36. See *id.* at 2746.

37. See *id.* at 2788-97 (Kennedy, J., concurring in part and concurring in the judgment).

38. See *id.* at 2797-2800 (Stevens, J., dissenting); *id.* at 2800-37 (Breyer, J., dissenting).

39. See *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003).

40. 539 U.S. 244, 253-57 (2003).

41. 539 U.S. at 343-44.

42. *Gratz*, 539 U.S. at 255.

43. *Id.* at 255-57.

44. *Id.* at 255. More precisely, applicants who were identified as African American, Hispanic, or Native American received additional admission points. *Id.* at 253-54.

45. *Id.* at 255.

46. *Id.* at 275-76.

47. *Id.* at 272.

48. *Id.* at 276-77 (O'Connor, J., concurring). In addition, Justice O'Connor also faulted the

She, along with five other Justices, concluded that the system therefore lacked the requisite narrow tailoring.<sup>49</sup>

In Jefferson County and Seattle, race and ethnicity automatically meant different treatment, just as was true in *Gratz*. In all three situations—the University of Michigan undergraduate, Jefferson elementary, and Seattle high school admissions—race *alone* did not determine admission, as was often the case under de jure segregation. Students were not denied or granted admission simply because of their race; other factors mattered as well. Yet, a student’s designated race or ethnicity operated as an absolute, mechanical tiebreaker in all three instances. Students in the same position for other admission factors would be treated differently because of their race or ethnicity, and the different treatment would mean a mechanical admission of some students because of their race or ethnicity. That is, some students were admitted due to many factors, but a determining, “decisive” factor was race and ethnicity.<sup>50</sup>

Second, the University of Michigan Law School considered not just merely race and ethnicity, but also meaningfully evaluated non-racial diversity factors.<sup>51</sup> The policy gave the following as examples of non-racial and non-ethnic diversity factors: “admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community services, and have had successful careers in other fields.”<sup>52</sup> This led to “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>53</sup> The Court specifically noted that the broad definition of diversity was reflected in actual admission decisions as well.<sup>54</sup> This broad approach to diversity was critical to the Supreme Court upholding the legality of the program because it indicated true individual review, rather than the automatic

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granting of automatic points to other characteristics: “[T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.” *Id.* at 279.

49. *See id.* at 275 (majority opinion). In dissenting in *Gratz*, Justice Ginsburg implied that the point system in *Gratz* only made explicit what was also present in *Grutter*: A plus factor was afforded to minority applicants. *See id.* at 304–05 (Ginsburg, J., dissenting).

50. *See id.* at 272 (majority opinion) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).

51. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003); *see also id.* at 338 (“What is more, the Law School actually gives substantial weight to diversity factors besides race.”).

52. *Id.* at 338.

53. *Id.* at 337.

54. *See id.* at 338 (“The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected.”).

treatment of race and ethnicity in *Gratz*.<sup>55</sup>

The two *Parents Involved* plans, however, defined their overall purposes much more narrowly than the University of Michigan Law School. While many other, non-racial factors were at play in admission—namely geographic proximity between the student's home and the school, the presence of a sibling at the school, and the capacity of the school<sup>56</sup>—only race and ethnicity were relevant to the school district's stated goals.<sup>57</sup>

Even the school boards' definition of race was narrower than that in *Grutter*. The University of Michigan Law School gave particular attention to three racial groups typically underrepresented in its student body: African Americans, Hispanics, and Native Americans.<sup>58</sup> Yet, the classifications used in Jefferson County and Seattle were far less precise. Only two racial and ethnic categories were recognized: black and nonblack in Jefferson County, white and nonwhite in Seattle.<sup>59</sup> The racial and ethnic makeup of the Seattle, however, was much more complex. Seattle had many different groups comprising its "nonwhite" category; yet, it classified these students similarly.<sup>60</sup> The Supreme Court specifically criticized Seattle's characterization of a school district as racially unbalanced if a school had "30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students," but would define a school as balanced if it were evenly split between Asian American and

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55. See *id.* at 337 ("[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."); *id.* ("Like the Harvard plan, the Law School's admissions policy 'is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" (quoting *Bakke*, 438 U.S. at 317 (1978) (opinion of Powell, J.))). The dissenting Justices in *Grutter* sharply criticized how "true" that individual review was in actual practice. See *id.* at 385–86 (Rehnquist, C.J., dissenting) ("[T]he ostensibly flexible nature of the Law School's admission program . . . appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."); *id.* at 389 (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.").

56. See *supra* notes 25, 33 and accompanying text.

57. See *supra* text accompanying notes 28, 34.

58. *Grutter*, 539 U.S. at 316.

59. See *supra* text accompanying notes 23, 31.

60. Specifically, Seattle had 23.8% Asian American, 23.1% African American, and 10.3% Latino student populations. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2747 n.2 (2007); see also *id.* at 2790–91 (Kennedy, J., concurring in part and concurring in the judgment) ("It [the Seattle School District] has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions.").

white students.<sup>61</sup> This limited view of race also narrowed the definition of what counts as diversity in ways contrary to *Grutter*'s broad quest for diversity.

Third, both school districts in *Parents Involved* numerically specified the desired student population.<sup>62</sup> The law school in *Grutter*, on the other hand, sought an undefined "critical mass."<sup>63</sup> The law school enrolled minorities in a range from 13.5% to 20.1% during the years in question, and no one confessed to having a precise numerical goal.<sup>64</sup> The absence of a numerical standard was key to the Court's finding of individual, constitutional treatment rather than treatment based on race.<sup>65</sup>

The two K–12 school systems, however, had a harder time justifying their numerical standards. The plurality specifically faulted the plans for their numerical goals, which were entirely dependent on the school district's demographic student population and resulted in admission not based solely on individual treatment.<sup>66</sup>

The fourth reason concerns deference.<sup>67</sup> The *Grutter* Court afforded the defendants substantial deference in its constitutional review. The decision to defer to the University of Michigan defendants was key to

61. *Id.* at 2754 (majority opinion).

62. *See supra* text accompanying notes 28, 34.

63. *Grutter*, 539 U.S. at 316.

64. *See id.* at 336. In devising the admission policies under review in *Grutter*, the law school had dropped an earlier reference to a numerical standard. *See* GREG STOHR, *A BLACK AND WHITE CASE: HOW AFFIRMATIVE ACTION SURVIVED ITS GREATEST LEGAL CHALLENGE* 82 (2004).

65. *See Grutter*, 539 U.S. at 335–36 ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota."); *id.* at 336 ("[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota." (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (opinion of Powell, J.) (alteration in original))). The Court reached this conclusion even though narrower ranges existed in different time periods—as Justice Kennedy noted in his opinion. *See Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). Further, Chief Justice Rehnquist demonstrated that admission rates of racial and ethnic groups closely mirrored their application rates over time. For example, the percentage of Latino applicants in 1995 was 5.1%, with their admission rate at 5%. *See id.* at 384 tbl.2 (Rehnquist, C.J., dissenting). He demonstrated similarly tight correlations for African Americans, Latinos, and Native Americans from 1995 to 2000. *Id.* at 384 tbls.1–3. The plurality in *Parents Involved* noted the disagreement in *Grutter* over the absence of numerical standards for the Michigan Law School program. *See Parents Involved*, 127 S. Ct. at 2757 (plurality opinion).

66. *See Parents Involved*, 127 S. Ct. at 2755 (plurality opinion) ("[T]he racial demographics in each district—whatever they happen to be—drive the required 'diversity' numbers."). Nor were the numbers educationally justified. *Id.* at 2756.

67. Two more reasons are worth briefly noting as well. *Grutter* concerned higher education, which is entitled to unique constitutional protections. *See id.* at 2754 (majority opinion); *Grutter*, 539 U.S. at 329. Further, without the diversity plan, the student demographics at the University of Michigan Law School would be noticeably different. *See Grutter*, 539 U.S. at 338. Yet, only a few students were affected by the plans in *Parents Involved*. *See supra* notes 29, 35 and accompanying text.

upholding the constitutionality of the law school's plan.<sup>68</sup> The plurality in *Parents Involved*, however, quickly decided that the two K–12 school boards before it were not entitled to *any* deference.<sup>69</sup> This conclusion, I argue below, signals a very different approach to equal protection than seen by the Rehnquist Court in the school arena.<sup>70</sup> Yet, it is entirely conceivable that the Rehnquist Court would have, in the end, afforded these two school districts less deference (but not the complete lack of deference in *Parents Involved*) than it did to the University of Michigan Law School and—given the importance of deference in constitutionalizing the law school's plan—possibly hold the K–12 plans unconstitutional.

The deference afforded to the University of Michigan Law School is arguably unprecedented.<sup>71</sup> The *Grutter* opinion only uses a few paragraphs to articulate the meaning of the Equal Protection Clause, and merely repeats standard rules. The Court's analysis really begins in *Grutter* when Justice O'Connor offers this principle: "The Law School's educational judgment that such diversity is essential to its education mission is one to which we defer."<sup>72</sup> That declaration, the first sentence after the majority states its conclusion that diversity can be a compelling governmental interest, is a driving force in the majority's analysis. This deference means the majority accepts the defendant's story more than questions it and effectively ensures the story's constitutionality.

That extraordinary deference arose in large part from two factors, neither present in *Parents Involved*. First, the diversity argument of the

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68. See Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 939 (2008) ("The *Grutter* Court's deferential application of strict scrutiny review clearly affected the outcome."); Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins, in EDUCATION LAW STORIES* 83, 98 (Michael A. Olivas & Ronna Greff Schneider eds., 2007).

69. See *Parents Involved*, 127 S. Ct. at 2766 (plurality opinion) ("Such deference is fundamentally at odds with our equal protection jurisprudence." (internal quotation marks omitted) (quoting *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005))).

70. See discussion *infra* Part II.B.5.

71. See *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part) ("Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'"); *id.* at 380 (Rehnquist, C.J., dissenting) (faulting the majority's "unprecedented" deference"); *id.* at 388 (Kennedy, J., dissenting) (declaring the majority's approach not strict scrutiny and "nothing short of perfunctory"); Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 TUL. L. REV. 1941, 1943 (2004) ("*Grutter*, with its application of what the Court resolutely calls 'strict scrutiny,' but in an undeniably relaxed manner, is consistent with a robust rather than restrained vision of judicial review."); Jack Balkin, Plessy, Brown, and *Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1724 (2005) ("The fact that the Court engages in this sort of deference is a tell-tale sign that it is not applying a scrutiny as strict as it claims.").

72. *Grutter*, 539 U.S. at 328.

University of Michigan drew almost universal support from “elites.”<sup>73</sup> Almost a 100 colleges, universities, and educational associations filed amici briefs supporting diversity, as did 124 members of the House, 13 Senators, and 23 states.<sup>74</sup> A Fortune 500 Supreme Court amicus brief included sixty-five companies.<sup>75</sup> In addition, seventeen media companies, the AFL-CIO, eleven Indian Tribes, and eight Jewish groups filed amici briefs.<sup>76</sup> Law students numbering 13,922 submitted their own eight-page brief.<sup>77</sup> A brief by twenty-nine retired military officers—a number capped by the brief authors<sup>78</sup>—on the need for diversity in the military academies drew intense questioning during the Supreme Court oral argument; the opinions of these retired officers even made its way into the majority opinion.<sup>79</sup> A total of 102 amici briefs supported the University of Michigan defendants.<sup>80</sup>

Only nineteen amici briefs opposed the University of Michigan defendants, and none by any educational institution, major business, or member of Congress.<sup>81</sup> Only one State—Florida—filed on the side of the plaintiffs, but even that brief accepted the value of diversity.<sup>82</sup> Similarly, the brief by the United States in opposition to the University of Michigan defendants recognized the value of diversity, although it did not conclude whether diversity was a compelling governmental interest.<sup>83</sup> As noted by Professor Neal Devins, “[W]hen compared to other controversial social issues (abortion or religion in the schools), the absence of important, powerful voices on one side of the issue seems especially stark.”<sup>84</sup>

The support of the two K–12 school boards, on the other hand, was

73. See Parker, *supra* note 68, at 95–97.

74. Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 366–68 (2003). For a thorough look at the amicus filings, see Devins, *supra*, at 366–72.

75. See *id.* at 369 & n.102.

76. See Parker, *supra* note 68, at 95–96.

77. Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241).

78. Stone, *supra* note 64, at 248.

79. See *Grutter*, 539 U.S. at 331 (“[A] ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’” (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241))); Devins, *supra* note 74, at 369.

80. Devins, *supra* note 74, at 366.

81. See *id.* at 366–68.

82. See Brief of the State of Florida & the Honorable John Ellis “Jeb” Bush, Governor, as Amici Curiae in Support of Petitioners at 1, *Grutter*, 539 U.S. 306 (No. 02-241).

83. See Brief for United States as Amici Curiae Supporting Petitioner at 8, *Grutter*, 539 U.S. 306 (No. 02-241) (“Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective.”).

84. See Devins, *supra* note 74, at 370.

strong but more muted than the support for diversity for postsecondary education. While the amici briefs overwhelmingly supported the school districts—forty-eight briefs versus twelve briefs—the breadth of the support was thinner than that for the University of Michigan defendants. In *Parents Involved*, no Fortune 500 brief was filed, nor did the AFL-CIO, Indian Tribes, or Jewish groups file briefs. The number of important signatories declined as well. The number of states declined from the twenty-three in *Grutter* to twenty.<sup>85</sup> The Senators went from thirteen to seven;<sup>86</sup> members of the House of Representatives fell from 124 to 69.<sup>87</sup> Retired military officers again filed a brief, but this time only ten signed, and the brief got no attention during oral argument or in the opinions of the Court.<sup>88</sup>

The second reason the law school was given a level of deference that the school boards might not have gotten from the Rehnquist Court goes to the quality of the plans before the Court. The *Grutter* plan was written by law professors at what Justice O'Connor calls "among the Nation's top law schools" in her opening paragraph.<sup>89</sup> Ted Shaw—a professor with a former life as a prominent civil-rights litigator—chaired the committee devising the policy, and the committee expected future litigation on the plan's constitutionality.<sup>90</sup> The law school decided to revise its admission policy so that it would comply with Justice Powell's opinion in *Regents of the University of California v. Bakke*,<sup>91</sup> and, with law professors in charge, it is not surprising that they got it somewhat right.<sup>92</sup>

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85. See Brief of the States of New York et al. as Amici Curiae in Support of Respondents at 30–32, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915); Devins, *supra* note 74, at 366–68. Florida again was the only State with an amicus brief in opposition to the defendants. See Brief of Florida Governor John Ellis "Jeb" Bush & the State Board of Education as Amici Curiae in Support of Petitioners, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915). It went so far as to call for the overruling of *Grutter*'s command that diversity could be a compelling governmental interest. *Id.* at 6, 9.

86. See Brief for Amici Curiae Senators Edward M. Kennedy et al. in Support of Respondents at 1, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915); Devins, *supra* note 74, at 367.

87. See Brief of Rep. Jim McDermott et al. as Amici Curiae in Support of Respondents at 1, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915); Devins, *supra* note 74, at 367.

88. See Brief for Hon. Clifford L. Alexander, Jr. et al. as Amici Curiae in Support of Respondents at 1, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915). In the context of K–12 schooling on military bases, which are well known for their successful integration, the retired military officers cited no examples of determining student admission on that basis. See *id.* at 11–15.

89. *Grutter v. Bollinger*, 539 U.S. 306, 312 (2003).

90. See STOHR, *supra* note 64, at 81–82.

91. 438 U.S. 265 (1978).

92. Law professors are not always successful in drafting policies surviving constitutional challenge. See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) (rejecting, by an eight-to-zero vote, an attempt by law professors to have the Solomon Amendment declared unconstitutional).

The school districts, on the other hand, had plans full of ambiguity that could have proven as troubling to the Rehnquist court as they were to the Roberts Court. Both school districts had broad racial and ethnic classifications, as discussed previously.<sup>93</sup> This was particularly troublesome in Seattle, where the student population was more complex than the white and nonwhite categories capture.<sup>94</sup> Further, the Lexington plan lacked clarity about which grades it covered and how the policy was actually practiced.<sup>95</sup> Nor could the school districts demonstrate much urgency to their needs. While the University of Michigan Law School demonstrated that its overall minority enrollment would drop from 14.5% to 4%,<sup>96</sup> the school districts could not demonstrate that the overall student demographic distribution would be very different without the race conscious plans.<sup>97</sup> While this could indicate narrow tailoring, the Supreme Court deemed it as an indication of a lack of need. For these reasons, the Rehnquist Court would likely have had difficulty in finding the plans in *Parents Involved* narrowly tailored.

This argument that the Rehnquist Court might have decided the outcome of *Parents Involved* the same as the Roberts Court is not to suggest that the outcome in *Parents Involved* necessarily follows *Gratz* and *Grutter*.<sup>98</sup> After the two University of Michigan cases, most of the

93. See *supra* notes 59–61 and accompanying text.

94. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2756–57 (2007) (plurality opinion) (“When the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity.”); *id.* at 2790–91 (Kennedy, J., concurring in part and concurring in the judgment) (“[Seattle] has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as ‘white,’ it has employed the crude racial categories of ‘white’ and ‘non-white’ as the basis for its assignment decisions.”); *id.* at 2791 (“Other problems are evident in Seattle’s system, but there is no need to address them now.”). *But see id.* at 2829 (Breyer, J., dissenting) (“Seattle’s experience indicates that the relevant circumstances in respect to each of these different minority groups are roughly similar . . . .”); *id.* (“Seattle has been able to achieve a desirable degree of diversity without the *greater* emphasis on race that drawing fine lines among minority groups would require.”).

95. *Id.* at 2750 n.8 (majority opinion) (noting that the policy was applied to a kindergartener, when the terms of the plans did not); *id.* at 2790 (Kennedy, J., concurring in part and concurring in the judgment) (noting the many “contradictions and confusions” of the Jefferson County plan). Justice Breyer argues that the plans are more understandable than Justice Kennedy presents. See *id.* at 2827–29 (Breyer, J., dissenting).

96. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

97. See *Parents Involved*, 127 S. Ct. at 2793 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means.”); *id.* at 2760 (majority opinion) (“[T]he minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”).

98. The two opinions themselves are, after all, far from clear, as Justice Scalia argued in his *Grutter* opinion. *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part) (“Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state

courts of appeals considering the issue determined that the diversity rationale applied in the K–12 setting and that plans before them seeking to achieve that diversity, while fundamentally different from the merit-based plan in *Grutter*, were still constitutional.<sup>99</sup> That precedent is easily read as consistent with *Grutter*. The *Grutter* Court was fairly expansive in defining the need and reach of the diversity justification, and K–12 schools could have easily fit within that diversity justification.<sup>100</sup>

I'm not arguing, however, that *Parents Involved* is inconsistent with *Grutter*. Instead, I'm contending that although one could read *Parents Involved* as consistent with *Grutter*—the topic of this part—*Parents Involved* still signals a very different approach to *Brown v. Board of Education* and the Equal Protection Clause than seen in the Rehnquist Court. This is the topic of the next Part.

## PART II: A COLOR BLIND FOCUS ON INDIVIDUAL RIGHTS

What was most surprising about *Parents Involved* was not its outcome, but the plurality decision, authored by Chief Justice Roberts and joined by Justices Alito, Scalia, and Thomas. That opinion defined the Equal Protection Clause and *Brown v. Board of Education* in ways significantly different than that of the Rehnquist Court. That is the subject of this Part.

### A. Redefining *Brown v. Board of Education*

In the five opinions that make up *Parents Involved*, *Brown v. Board of Education* was evoked about seventy-seven times.<sup>101</sup> To close his

educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation."); see also Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 31 HASTINGS CONST. L.Q. 587, 595–603 (2003) (analyzing the questions resolved by *Grutter* and *Gratz* and those left open).

99. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1192–93 (9th Cir. 2005) (en banc) (holding diversity to be a compelling governmental interest in K–12 setting and that having race be a tie-breaker for high school admissions is narrowly tailored), *rev'd*, 127 S. Ct. 2738; *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005) (per curiam) (affirming district court's conclusion that assignment plan, which used racial guidelines, was constitutional), *rev'd sub nom. Parents Involved*, 127 S. Ct. 2738; *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 12–23 (1st Cir. 2005) (en banc) (upholding race-based transfer as a part of voluntary-desegregation planning and diversity as a compelling governmental interest in K–12 schools). *But see Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 260 (5th Cir. 2005) (deeming a goal of fifty-fifty plus or minus fifteen percent a quota and different racial admissions scores not narrowly tailored, and leaving open the question of whether diversity a compelling governmental interest at K–12 level).

100. See Adams, *supra* note 68, at 946–47; James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 336–39 (2006).

101. Specifically, *Brown* was evoked about ten times by Chief Justice Roberts, twenty-five times by Justice Thomas, three times by Justice Kennedy, seven times by Justice Stevens, and twenty-two times by Justice Breyer.

opinion, Chief Justice Roberts argued that the decision in *Parents Involved* was “faithful to the heritage of *Brown*.”<sup>102</sup> In support, he quotes the brief and oral argument of the plaintiffs in *Brown*.<sup>103</sup> Chief Justice Roberts defines the quest of the *Brown* plaintiffs for one purpose only: “that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”<sup>104</sup>

It is interesting that Chief Justice Roberts chose to invoke the words of the litigants in *Brown*. The arguments of litigants in another case, albeit a very famous case, are usually not used by Justices as justifications for their conclusions. Nor were the lawyers pleased to be quoted by Chief Justice Roberts.<sup>105</sup>

Yet, the implications could not be more significant. With the words of the *Brown* litigants, Chief Justice Roberts legitimizes the reduction of the goal of *Brown* to two phrases in *Brown v. Board of Education (Brown II)*<sup>106</sup>: admission on “a nondiscriminatory basis” and admission “on a nonracial basis.”<sup>107</sup> Then individual treatment is equalized, and the ultimate goal of *Brown* achieved.<sup>108</sup>

In taking this approach, Chief Justice Roberts returns the Court to a debate that first began in the aftermath of *Brown II* over whether an adequate school-desegregation remedy could be a racially neutral assignment that produced racially segregated schooling. Southern states and school districts very often responded to *Brown II* with student-assignment plans that were race neutral by their terms, but incredibly segregative. They argued that these plans complied with the mandate of *Brown* because children were no longer assigned by skin color. One such approach was freedom-of-choice plans by which parents could choose the school for their children.<sup>109</sup> The overwhelming majority of parents choose the school historically associated with their race.<sup>110</sup> Some

102. *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

103. *Id.*

104. *Id.* at 2767–68 (internal quotation marks omitted) (quoting Transcript of Oral Argument at 7, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4 & 10) (statement of Robert L. Carter)).

105. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (noting that Judge Robert L. Carter, Professor Jack Greenberg, and William T. Coleman, Jr. dispute Chief Justice Roberts’s use of the plaintiffs’ arguments in *Brown*).

106. 349 U.S. 294 (1955).

107. *Parents Involved*, 127 S. Ct. at 2768 (plurality opinion) (emphasis omitted) (quoting *Brown II*, 349 U.S. at 300–01).

108. *See id.* at 2767–68 (limiting *Brown* to a concern with individual treatment).

109. *See* Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1717 & n.134 (2004).

110. *See* James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 44, 56, 64–65 (1967).

courts initially upheld these plans as fulfilling the mandate of *Brown*.<sup>111</sup> Even more pernicious, perhaps, were the pupil-assignment laws, passed by ten of the eleven former states of the confederacy (all but Georgia) from 1954 to 1957.<sup>112</sup> The assignment laws were race neutral but clearly designed to continue segregation. Factors in admission included “academic preparation, [s]cholastic aptitude and relative intelligence or mental energy or ability of pupil, and [p]sychological qualification of pupil for type of teaching and associations involved.”<sup>113</sup> “[C]ourts in the Fourth and Fifth Circuits held the North Carolina and Alabama statutes facially constitutional.”<sup>114</sup>

Both freedom-of-choice plans and pupil-assignment laws would satisfy the argument of one of the *Brown* counsel from oral argument, and quoted by Chief Justice Roberts, that states were not to “use race as a factor” in student assignment. Yet, the Supreme Court, beginning with *Green v. County School Board*, has held that *Brown* promised more than race neutrality.<sup>115</sup> The Court in that case deemed freedom-of-choice plans inadequate not because they did not treat individuals equally, but because they failed to produce the integration promised by *Brown*.<sup>116</sup> Further, courts eventually struck down pupil-assignment laws in as-applied challenges because those laws, too, were continuing the segregation of the de jure segregation.<sup>117</sup> After *Green*, the school-desegregation remedy sought to redress the segregation produced by de jure systems in the so-called *Green* factors—faculties, staffs, facilities, transportation, and extra-curricular activities.<sup>118</sup> After *Green* and until the plurality opinion in *Parents Involved*, southern states and school districts lost before the Supreme Court with the argument that *Brown* was only about race-neutral admission standards.<sup>119</sup>

The idea that *Brown* was only about equal treatment of individuals was also not the analysis of the Rehnquist Court in its trio of school-desegregation opinions in the 1990s.<sup>120</sup> In all three opinions, the Rehnquist Court increased the possibility of school-desegregation litigation

111. See, e.g., *Bowman v. County Sch. Bd.*, 382 F.2d 326, 327, 332 (4th Cir. 1967) (en banc) (upholding freedom-of-choice plan for Charles City County, Virginia).

112. *Parker*, *supra* note 109, at 1709.

113. *Id.* at 1710 (alterations in original) (internal quotation marks omitted).

114. *Id.*

115. 391 U.S. 430, 437–38 (1968).

116. *Id.* at 441.

117. *Parker*, *supra* note 109, at 1713.

118. See *supra* note 5 and accompanying text.

119. See generally J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE* (1979) (discussing the Supreme Court’s responses to arguments that racial neutrality alone fulfilled the mandate of *Brown*).

120. *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

coming to an end.<sup>121</sup> The Court said that it was doing so in the name of local control,<sup>122</sup> and because of the limited causal link between present day inequalities and past illegality.<sup>123</sup> At no time, however, did the Court suggest that integration was not a goal of school-desegregation litigation or that race-neutral admission standards were the only goal.

Thus, in *Board of Education v. Dowell*, Chief Justice Rehnquist wrote that district courts must determine “whether the vestiges of past discrimination had been eliminated to the extent practicable . . . [by] look[ing] not only at student assignments, but ‘to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.’”<sup>124</sup> These *Green* factors on the vestiges of discrimination still needed to be eliminated—to the extent traceable to de jure segregation—under *Dowell*. The race-neutral policies of the school board would not be sufficient by themselves to release judicial supervision.

Similarly, in *Freeman v. Pitts*, Justice Kennedy quotes at length the words of *Brown* on the problem of segregation, and he defines “the principal wrong of the de jure system [as] the injuries and stigma inflicted upon the race disfavored by the violation.”<sup>125</sup> He also focuses on the *Green* factors, along with the quality of education, as indicating whether the vestiges of discrimination are still present.<sup>126</sup> Lastly, Chief Justice Rehnquist in *Missouri v. Jenkins* continues to focus on the vestiges of discrimination.<sup>127</sup>

This is not to suggest that these opinions were uncontroversial. They were; Justice Marshall vigorously dissented in *Dowell*,<sup>128</sup> as did Justice Souter in *Jenkins*.<sup>129</sup> Justices in *Freeman* likewise disagreed on the reach and meaning of the majority’s test for “partial unitary sta-

121. See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. Rev. 1623, 1645–52 (2003); Wendy Parker, *The Future of School Desegregation*, 94 Nw. U. L. Rev. 1157, 1162–74 (2000).

122. Parker, *supra* note 109, at 1728–30.

123. *Freeman*, 503 U.S. at 496.

124. 498 U.S. at 250 (footnote omitted) (quoting *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968)).

125. 503 U.S. at 485 (emphasis omitted).

126. *Id.* at 486.

127. 515 U.S. 70, 89 (1995) (“The ultimate inquiry is ‘whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree . . . and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.’” (first, second, and fourth alterations in original) (quoting *Freeman*, 503 U.S. at 492)).

128. 498 U.S. at 251 (Marshall, J., dissenting). Specifically, Justice Marshall criticized the majority for not recognizing the return of one-race schools as a vestige of discrimination and thus in need of redress. See *id.* at 257 (“In my view, a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools.”).

129. See 515 U.S. at 138 (Souter, J., dissenting). Justice Souter complained that the majority went beyond the issue before it effectively to “overrule a unanimous constitutional precedent of

tus.”<sup>130</sup> But the disagreements were more about the limits of judicial power and not directly about the meaning of *Brown*, the approach of the plurality in *Parents Involved*. In key aspects, the disputes in the Rehnquist Court mirror a long-standing debate about the remedial power of the federal courts in injunctive-relief cases—whether the courts are confined to putting plaintiffs in their “rightful” position (the position the plaintiffs would have occupied but for the violation) or can do what equity allows.<sup>131</sup>

The majorities in *Dowell*, *Freeman*, and *Jenkins* were all confining the remedial power of the courts to the rightful-position doctrine, which explains their requiring a tight causal link between the de jure violation and present-day inequities. Those not joining the majorities were instead advocating a broader judicial power to pursue equity.<sup>132</sup> While debates about remedies are very often debates about rights,<sup>133</sup> no one was suggesting that *Brown* meant one thing and only one thing, as Chief Justice Roberts did in *Parents Involved*. Instead, all the Justices were assuming that *Brown* meant an end to segregation, which the majorities limited to segregation caused by the de jure violation. The dissenting Justices disagreed on the grounds that judicial power extended to less causally related inequities.

The moderation of the Rehnquist Court in its school-desegregation opinions is also indicated by the far-from-moderate approaches that Court took in other constitutional matters. The Court made bold changes in the limits of the Eleventh Amendment on Congressional Article I power,<sup>134</sup> in the reach of the Equal Protection Clause to the rights of whites to challenge racial gerrymandering,<sup>135</sup> and in the legality of

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20 years’ standing, which was not even addressed in argument, was mentioned merely in passing by one of the parties, and discussed by another of them only in a misleading way.” *Id.* at 139.

130. See 503 U.S. at 507 (Souter, J., concurring); *id.* at 509–10 (Blackmun, J., concurring in the judgment).

131. See Parker, *supra* note 7, at 522–33.

132. See *supra* notes 127–29.

133. See, e.g., Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL’Y 103, 103 (1991) (“When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm.”); Gewirtz, *supra* note 12, at 593 n.16 (“Criticism of a remedy . . . may reflect criticism of the underlying right.”); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1382 (1991) (“At least some of the debate over the court’s proper remedial role is a thinly veiled attack on the prevailing interpretation of the Constitution.”).

134. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363–64 (2001) (reviewing the cases following *Seminole*); *Seminole Tribe v. Florida*, 517 U.S. 44, 72–76 (1996) (holding that Congress cannot override the states’ Eleventh Amendment rights through legislation enacted under Article I powers).

135. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (setting the standard for a section 5 of the Voting Rights Act review of majority-minority voting districts); *Shaw v. Reno*, 509 U.S.

affirmative action in government contracting.<sup>136</sup> *Brown*, on the other hand, was largely left alone.

Nor can the three school-desegregation opinions from the Rehnquist Court be dismissed as irrelevant to the meaning of *Brown* or the use of *Brown* in the *Parents Involved* plurality opinion because they address the school desegregation *remedy* instead of the school desegregation *right*. As has long been documented, right and remedy are interdependent in public-law rights, with no clear demarcation between right and remedy.<sup>137</sup> The two instead explain and depend on each other. The right to be free of de jure segregation is only knowable by referencing what the remedy is—the remedy informs the right, just as the right informs the remedy. In short, the meaning of *Brown* is consistently found in its remedial implications.

### B. *Limiting the Equal Protection Clause*

The *Parents Involved* plurality reduces not just *Brown* to one value, but reduces the Equal Protection Clause as well. To Chief Justice Roberts, equal individual treatment is the sole fulfillment of the Equal Protection Clause, to be pursued even when it is inconsistent with other constitutional values previously recognized by the Court. I describe this as “Capitalizing Individual Rights.” The Rehnquist Court, on the other hand, recognized multiple equal-protection values and engaged in “Interest Balancing” when it limited integration.<sup>138</sup>

#### 1. PARENTS INVOLVED AND INDIVIDUAL TREATMENT

The plurality opinion in *Parents Involved* defined the ultimate goal of the Equal Protection Clause as the equal treatment of individuals through the end of considering race and ethnicity in government decision-making.<sup>139</sup> This conclusion depends on two steps: first, that the

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630, 658 (1993) (holding that white plaintiffs have an Equal Protection Clause claim to challenge to a majority-minority voting district).

136. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (holding that strict scrutiny applied to minority set asides for federal government construction contracts).

137. See *Parker*, *supra* note 7, at 517–18.

138. For example, the Rehnquist Court limited the reach of school-desegregation remedies because of local control and limited judicial power. See *Parker*, *supra* note 109, at 1705–16. The Court never defined integration as unimportant, as the plurality arguably did in *Parents Involved*. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2761–68 (2007) (plurality opinion).

139. See *Parents Involved*, 127 S. Ct. at 2768 (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (“In the real world, it is regrettable to say, [Justice Harlan’s color-blind axiom] cannot be a universal constitutional principle.”).

Equal Protection Clause protects individuals, not groups.<sup>140</sup> The second is defining “the ‘ultimate goal’” as “eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race.”<sup>141</sup> The plurality makes only a brief, passing mention of why different treatment is harmful, and the injuries are all described only in terms of their effect on individuals.<sup>142</sup>

The Court does not seem to be advocating, however, the complete abandonment of racial and ethnic classifications in government. The plurality affirms the legitimacy of federal statutes, for example, that consider and legitimate the relevancy of racial and ethnic classifications.<sup>143</sup> Instead, the “color blind” approach is geared toward achieving the treatment of individuals without regard to their race. This does not require the complete absence of race or ethnicity in decision-making; only that the race and ethnicity of an individual does not change the treatment of that individual. That is how the school boards in Lexington and Seattle failed.

## 2. OTHER EDUCATION OPINIONS AND INDIVIDUAL TREATMENT

Interestingly, in the school context, individual treatment had received relatively little equal-protection attention. This is most easily demonstrated in the school-desegregation arena, where the analysis includes no recognition of individual rights. For example, the Court has never recognized any individual, constitutional right to attend a neighborhood school, to choose a school, or to receive particular educational offerings.<sup>144</sup> Neither has the court identified any individual burden of being bussed or being subject to any other school-desegregation practice of any constitutional significance. The trio of school-desegregation opin-

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140. *Id.* at 2757 (plurality opinion) (“[A]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995))).

141. *Id.* at 2758 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

142. The harms are all expressed in terms of how they affect individuals. *See id.* at 2767. For example, the plurality quotes prior opinions about the general harms suffered if individuals are treated differently. *Id.* The plurality Justices could have held the programs unconstitutional and still at least stated the value of integration—as Justice Kennedy did in his concurring opinion. *See id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment). Instead, the plurality decided to take a different approach that stressed only the importance of a color-blind approach that treated individuals the same regardless of race or ethnicity.

143. *Id.* at 2766 (plurality opinion) (concluding without analysis that the No Child Left Behind’s requirement of academic progress of all racial and ethnic groups has “nothing to do with the pertinent issues in these cases”).

144. Yet, Title VI guarantees access to curriculum to English language learners. *See, e.g., Lau v. Nichols*, 414 U.S. 563, 564–69 (1974).

ions of the Rehnquist Court has nothing to say about individual rights, with the exception of one concurring opinion by Justice Thomas.<sup>145</sup> Otherwise, individual rights are of no importance.<sup>146</sup>

The Rehnquist Court in *Grutter*, however, emphasized the importance of individual treatment. For example, in deeming the law school's plan narrowly tailored, it was critical that the definition of diversity was broadly applied in a way that at least on paper had individual treatment.<sup>147</sup> No one, in other words, was automatically treated differently because of his or her race.<sup>148</sup> The *Grutter* majority mentions individual treatment several times in its opinion, and the plurality in *Parents Involved* heavily relies on that language.<sup>149</sup>

Yet, the *Grutter* majority pays little actual attention to the situation faced by the individual before it, Barbara Grutter—that as an individual she would have been treated differently if she were of a different race. In fact, the Court only identifies her by name once, thereafter identifying her as “petitioner.”<sup>150</sup> She would have received an undefined “leg up” in the admission process, and very likely would have been admitted, if she had been African American, Hispanic, or Native American.<sup>151</sup>

In the end, the *Grutter* opinion prefers achieving diversity to individual treatment. For example, the opinion states that “the diffusion of knowledge and opportunity through public institutions of higher education must be *accessible to all individuals regardless of race or ethnic-*

145. Justice Thomas' concurring opinion in *Jenkins* is the only time in the trio of school-desegregation opinions of the Rehnquist Court that a Justice references often repeated maxims about individual treatment at the heart of the Equal Protection Clause. See *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) (“At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.”); *id.* at 137 (“It goes without saying that only individuals can suffer from discrimination, and only individuals can receive the remedy.”). No other Justice joined the opinion.

146. The closest recognition of individual rights in the context of school desegregation is a quote from *Swann in Freeman*: “The task is to correct, by a balancing of the individual and the collective interests, the condition that offends the Constitution.” *Freeman v. Pitts*, 503 U.S. 467, 487 (1992) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16 (1971)).

147. See *supra* notes 47–49 and accompanying text.

148. See *supra* notes 51–56 and accompanying text.

149. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753 (2007) (“The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual . . .”).

150. See *Parker*, *supra* note 68, at 98.

151. It seems very likely that the plaintiff in *Grutter*, Barbara Grutter, would have been admitted to the University of Michigan Law School if she had been African American or Hispanic. See *id.* at 92 (noting the testimony of the plaintiff's expert that indicated “that for those with Grutter's scores—undergraduate GPAs of 3.75 and above, and LSATs of 161–163—the 1995 admission rate for minority applicants was 100%: three out of three, while the rate for other applicants was 9%: 13 out of 138”).

ity.”<sup>152</sup> The implication of this statement is not, however, completely race-neutral admissions; the emphasis is on being “accessible” not “regardless of race or ethnicity.” The opinion then turns immediately to announce the importance of integration: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>153</sup>

In short, the Court in *Grutter* recognizes the value of individual treatment, and the degree of individual treatment afforded by the law school’s plan. Yet, individual treatment is not the only value of that opinion; otherwise, *Grutter* would have won her case. How she was treated does not meet Chief Justice Roberts’s command that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>154</sup> She was treated differently because of her race when the admission plan assigned value to applicants who were African American, Hispanic, or Native American.

Other opinions in the voting-rights and public-contracting arenas are more easily explainable on the grounds of individual treatment.<sup>155</sup> In these two areas, the Rehnquist Court was sympathetic to the claims of whites who claimed discrimination from state decision-making designed to benefit minorities.<sup>156</sup> Yet, individual, equal treatment was not the only constitutional value identified in these cases. For example, the Rehnquist Court recognized that race continues to impact us as individuals and as a society.<sup>157</sup> In *City of Richmond v. J.A. Croson Co.*, a public contracting case, Justice O’Connor made fairly strong statements in the majority opinion for *Croson* that we should not expect an even distribution of

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152. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (emphasis added).

153. *Id.* at 332.

154. *Parents Involved*, 127 S. Ct. at 2768 (plurality opinion).

155. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” (internal quotation marks omitted) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting))); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25 (1995) (“When they touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (“Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition.”).

156. The *Parents Involved* plurality uses these precedents in defining the equal-protection goal as equal individual treatment. See *Parents Involved*, 127 S. Ct. at 2753 (stressing the importance of individual treatment in *Grutter*); *id.* at 2757–58 (plurality opinion) (detailing past case law on the importance of how individuals are treated); *id.* at 2765 (same).

157. See *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (“[R]ace in this case correlates closely with political behavior.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) (“Blacks may be disproportionately attracted to industries other than construction.”).

minorities employed in the construction field.<sup>158</sup> This necessarily implies a difference among races and ethnicities, even if that difference did not justify race-conscious goals.<sup>159</sup> In the racial redistricting litigation, the Court has accepted that race and ethnicity may correlate with political affiliation.<sup>160</sup> Similarly, in *Grutter* the Court recognizes that race and ethnicity continue to matter and that this corresponds with different experiences.<sup>161</sup>

Granted, these statements of the Rehnquist Court simply reflect the reality in which we live—racial and ethnic disparities and differences cannot be denied. They are entirely absent, however, from the *Parents Involved* majority and plurality opinions. These opinions have nothing at all to say about any possible differences due to race and ethnicity. Given its strong commitment to color-blind decision-making, it is not surprising that the Roberts Court proved unwilling to recognize meaningful differences from race and ethnicity.

### 3. THE HARMS OF SEPARATISM

What is surprising, however, is that the plurality in *Parents Involved* has no apparent concern with the situation faced by the two school boards—segregated schooling. The plurality has much to say about the value of race-neutral individual treatment by local governments,<sup>162</sup> but *nothing* to say about whether present-day segregation is worthy of any redress or concern. It ignores the issue, thereby suggesting its irrelevance to the Constitution. In *Parents Involved*, it takes Justice Kennedy, along with the dissents, to describe why integration is important.<sup>163</sup> Justice Kennedy goes so far as to begin his opinion by

158. Justice O'Connor spoke at length in *Croson*, the Richmond public contracting case, stating that proportionality should not be expected. See 488 U.S. at 499 (“It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination . . .”).

159. *Id.* at 507 (“It [a thirty percent hiring goal] rests upon the ‘completely unrealistic’ assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part))).

160. See *Easley*, 532 U.S. at 257 (“The evidence taken together, however, does not show that racial considerations predominated in the drawing of District 12’s boundaries. That is because race in this case correlates closely with political behavior.”).

161. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”); *id.* at 338 (“By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

162. See *supra* notes 137–40 and accompanying text.

163. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (Kennedy, J., concurring in part and concurring in the judgment) (“This Nation has a moral and

stressing the importance of integration.<sup>164</sup>

Not only did the plurality fail to mention any value associated with integration or any harms associated with segregation, the plurality also refused to offer any legitimacy to race-neutral means of achieving integration. The plurality declined to discuss the constitutionality of such approaches, which were not particularly before the Court.<sup>165</sup> Justice Kennedy, on the other hand, specifically approves such plans,<sup>166</sup> while the dissent largely faults such approaches for their ineffectiveness and not their unconstitutionality.<sup>167</sup>

The plurality's hesitation to validate such plans is interesting because school districts are often told to consider the race and ethnicity of their students for race-conscious reasons.<sup>168</sup> Even the United States in its *Parents Involved* brief recognized the legitimacy of such a goal: "School districts have an unquestioned interest in reducing minority isolation through race-neutral means."<sup>169</sup> Similarly, legislators drawing leg-

ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."); *id.* at 2820–21 (Breyer, J., dissenting) (articulating the moral, educational, and democratic benefits of integration).

164. *See id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.").

165. *See id.* at 2766 (plurality opinion) ("These other means [race-neutral plans] . . . implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta.").

166. *See id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) ("[S]chool authorities . . . are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."); *id.* ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.").

167. *See id.* at 2800 (Breyer, J., dissenting).

168. For example, the No Child Left Behind Act (NCLB) closely monitors race and ethnicity in determining whether schools are making adequate yearly progress. *See* 20 U.S.C. § 6301(3) (2006) (characterizing the aim of the act as "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers"); *id.* § 6311(b)(2)(C)(v) (setting forth in detail the requirements on closing the racial and ethnic achievement gap). Likewise, the federal Magnet Schools Assistance Program specifically seeks the reduction of racial and ethnic isolation. *See id.* § 7231(b)(1) (offering assistance for the "elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students"). Justice Breyer's dissenting opinion discusses state laws that encourage race-conscious measures to achieve integration. *See Parents Involved*, 127 S. Ct. at 2831–33 (Breyer, J., dissenting); *id.* at 2833 ("[T]oday's opinion will require setting aside the laws of several States and many local communities."). The plurality states, with almost no analysis, that NCLB has "nothing to do with the pertinent issues in these cases." *Id.* at 2766 (plurality opinion).

169. Brief for the United States as Amicus Curiae Supporting Petitioner at 7, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908).

islative voting districts can consider race and ethnicity and yet not trigger strict scrutiny so long as race and ethnicity is not the predominant factor in line drawing.<sup>170</sup> This refusal to state the constitutionality of race-neutral means suggests again the disinterest in the plurality in furthering integration. The focus of the plurality is on other matters altogether.

The disinterest in the harms of segregation stands in contrast to that of its predecessor Court. The Rehnquist Court often considered the meaning of the Equal Protection Clause in cases of whites claiming racial discrimination in the context of race-conscious public contracting and legislative districting. In evaluating these situations of separation designed to benefit minorities, that Court stressed the importance of eliminating different treatment—not an end in and of itself as in *Parents Involved*—so that we could eliminate the explicitly identified harms of segregation.<sup>171</sup> For example, in the voting-rights arena, the Rehnquist Court has expressed grave concern with the “balkanization” inherent in majority-minority voting districts and other forms of segregation.<sup>172</sup> Apart from the balkanization issue, the Court writes in ways that strongly imply that *any* special treatment stigmatizes minorities, regardless of whether it is state sponsored or not.<sup>173</sup> To treat a minority differ-

170. In the context of drawing voting districts, the Supreme Court has specifically held that race and ethnicity can be considered and not entail an illegal classification. Only when the “facially neutral law . . . is unexplainable on grounds other than race” and race is the predominant factor in line drawing is the demanding strict scrutiny triggered. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (internal quotation marks omitted).

171. *See, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting) (“They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”); *id.* at 610 (“We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (“[A] quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.” (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975))).

172. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.” (citations omitted)); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . .”).

173. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995) (“[A] statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting))); *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting) (“Special preferences also can foster a view that members of the favored groups are inherently less able to compete on their own.”); *Croson*, 488 U.S. at 493 (plurality opinion) (“Classifications based on race carry a danger of stigmatic

ently, according to the Court's approach, implies a stereotype and inferiority.<sup>174</sup> This concern with stereotypes is also reflected in the cases outlawing the consideration of race when using peremptory challenges.<sup>175</sup> Likewise, in *Grutter*, the Rehnquist Court voiced opposition to separatism.<sup>176</sup>

At its core, this approach prizes not just equal treatment before the law, but a sense that we are all better off when we are together; that separation runs counter to the spirit of the Equal Protection Clause. The Court could have decided the opinions, except for *Grutter*,<sup>177</sup> solely for the importance of equal individual treatment under the Equal Protection Clause. Instead, the Court noted at length another constitutional value—the elimination of segregation as part of the equal-protection equation as well.

I do not mean to suggest that the Rehnquist Court was pro-integration. It foreclosed significantly the availability of school-desegregation remedies to effectuate integration through its limited view of judicial power.<sup>178</sup> Instead, the Rehnquist Court prized, at the request of whites, equal treatment because of the harms of separateness. It tells us that separateness is harmful for whites (because it balkanizes) and minorities (because it also stigmatizes and stereotypes). Individual equal treatment was not the only value in cases valuing equal individual treatment. The

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harm. . . . [T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

174. See, e.g., *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion) (“But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.”); *id.* at 985 (“Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of stereotypes.”); *Shaw*, 509 U.S. at 647 (“It [racial gerrymandering] reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”); *Metro Broad.*, 497 U.S. at 604 (O’Connor, J., dissenting) (“Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.”).

175. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“Race cannot be a proxy for determining juror bias or competence.”); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (“[T]he Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes . . .”).

176. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race and ethnicity.”); *id.* at 332 (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”); *id.* (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

177. See *supra* text accompanying notes 148–49.

178. See *supra* text accompanying notes 7–9.

Rehnquist Court used the Equal Protection Clause to promote togetherness, while the Roberts Court has no concern with togetherness at all.

#### 4. STRUCTURAL VALUE OF LOCAL CONTROL

Another prominent value in the Rehnquist Court's Equal Protection Clause jurisprudence was the importance of local control in the education setting. When the Court has limited the reach of school-desegregation remedies, it has explicitly emphasized the limited nature of judicial power and the importance of local control over K–12 education as the justifications for limiting desegregation remedies.<sup>179</sup>

For example, in the Oklahoma City school-desegregation opinion, Chief Justice Rehnquist emphasized in the majority opinion that school-desegregation decrees must end to return schools to local control, even if it came at the expense of resegregation.<sup>180</sup> In fact, Justice Kennedy wrote in the majority opinion in *Freeman v. Pitts* that the “ultimate objective” of school-desegregation litigation is the return of local control—not an end to school segregation or inequality.<sup>181</sup> Similarly, in the Kansas City school-desegregation opinion, Chief Justice Rehnquist held that the district court's remedy reached beyond judicial authority, which is restrained by local control.<sup>182</sup>

In doing so, the Court has stressed the value of political processes in setting educational agenda<sup>183</sup> and the need of fostering community support in that agenda.<sup>184</sup> The superior competency of local school

179. See Parker, *supra* note 109, at 1705–39 (analyzing the federalism implications of school-desegregation jurisprudence). Justice Breyer's dissenting opinion argued the importance of allowing local choice over voluntary race-conscious integration plans. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2826 (2007) (Breyer, J., dissenting) (“[G]iving some degree of weight to a local board's knowledge, expertise, and concerns . . . simply recognizes that judges are not well suited to act as school administrators.”). The plurality labeled the argument as one of affording school districts deference, a principle it rejected as “fundamentally at odds with our equal protection jurisprudence.” *Id.* at 2766 (plurality opinion) (quoting *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005)). Yet, the outcome in *Grutter* fundamentally depends on deference. See *Grutter*, 539 U.S. at 328 (“The Law School's educational judgment that such diversity is essential to its education mission is one to which we defer.”); Parker, *supra* note 68, at 85–86 (analyzing the importance of deference in *Grutter*).

180. 498 U.S. 237, 248 (1991).

181. 503 U.S. 467, 489 (1992).

182. *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995).

183. See, e.g., *Freeman*, 503 U.S. at 490 (“When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.”); *Dowell*, 498 U.S. at 248 (“Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.”).

184. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

boards to establish educational policy was another common justification.<sup>185</sup> In *Parents Involved* these values receive no attention, which is ironic given that we now have school districts voluntarily pursuing what was once court-ordered—student integration.<sup>186</sup>

Related to the importance of local control in education is the deference to higher education afforded in *Grutter*.<sup>187</sup> Deference was a key part of the Court's decision in *Grutter*, as discussed above. The majority opinion in *Grutter* is explicit in its endorsement and use of deference. Justice Powell's opinion in *Bakke* also has an element of deference as well.<sup>188</sup> Yet, in *Parents Involved*, the Court quickly rejects deference in the K–12 inquiry, as contrary to standard equal-protection jurisprudence.<sup>189</sup> Left unexplained, however, is why the Roberts Court now rejects the values of local control and deference to educators over educational policy.

### CONCLUSION

This Essay argues that the Roberts Court is signaling a very different approach to both *Brown* and the Equal Protection Clause than the Rehnquist Court. Its exclusive focus on individual treatment demonstrates a one-dimensional approach to an incredibly complex problem. The Court is apparently asking us all to behave as George Costanza did in a *Seinfeld* episode, when he had hired an African American exterminator to demonstrate his racial sensitivity to his new African American boss. When asked whether his friend Jerry was white, here's how George responded: "Jerry [*Seinfeld*]? Yes, I suppose he is white. You know, I never really thought about it. I don't see people in terms of color."<sup>190</sup> While the line elicits its desired laughter (George's feigned ignorance is obviously false), this is how the *Parents Involved* plurality wants the government to treat us—as if we have no color, no race—

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185. See, e.g., *id.* at 744 ("This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through their elected representatives.").

186. See *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004) ("It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law."), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

187. Michelle Adams calls this "*Grutter*-style deference" to distinguish it from "federalism-based deference" found in school-desegregation jurisprudence. See Adams, *supra* note 68, at 960.

188. Justice Powell reasoned in *Bakke* that the "good faith" of the university would be "presumed." See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.).

189. See *supra* text accompanying note 70.

190. *Seinfeld: The Diplomat Club* (NBC television broadcast May 4, 1995).

when it is painfully obvious that we do. This approach differs significantly from the Rehnquist Court. That Court took a much more nuanced look at race and recognized the harms of segregation, the benefits of integration, the value of local control, in addition to the value of individual treatment. The difference strongly suggests that the Roberts Court will eventually shift equal-protection jurisprudence in more fundamental ways than the Rehnquist Court.