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# Sleight of Hand or the Old Bait & Switch?: Article III and the Politics of Self-Policing by the Court in *Parents Involved*

ZANITA E. FENTON†

The arrogance of the Supreme Court continues to exceed itself. The Court has manipulated precedent and ignored the fact that its ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>1</sup> oversteps its constitutional authority. The Court's unique interpretations of even its most recent decisions in the area of education give new credence to old perceptions that the Court interprets doctrine in outcome determinate ways.<sup>2</sup> This is especially so after the Court's unfortunate choice to adjudicate the election law case of *Bush v. Gore*.<sup>3</sup> Separation of powers may allow for overlap in the functions of the three branches of government,<sup>4</sup> but the Court seems to have the weakest check to rebuke any overreaching of its own authority.<sup>5</sup>

The Court has the authority to interpret the Constitution and to have that interpretation given deference. In both *Marbury v. Madison*<sup>6</sup> and

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1. 127 S. Ct. 2738 (2007).

2. See Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 113 (2001) (musing that *Bush v. Gore* has prompted the revitalization of Critical Legal Studies).

3. 531 U.S. 98 (2000); see also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407 (2001) ("It is no secret that the Supreme Court's decision in *Bush v. Gore* has shaken the faith of many legal academics in the Supreme Court and in the system of judicial review.").

4. See generally THE FEDERALIST NOS. 47–48 (James Madison) (discussing separation of powers).

5. See *infra* notes 59–64 and accompanying text.

6. 5 U.S. (1 Cranch) 137 (1803). Ever since *Marbury v. Madison*, the Supreme Court has asserted the power of judicial review, applying the Constitution to cases. No part of the Constitution expressly authorizes judicial review, but the Framers did contemplate the idea. Alexander Hamilton wrote,

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST NO. 78, at 379–80 (Alexander Hamilton) (Terence Ball ed., 2003). Nonetheless, Article VI of the Constitution requires all public officials in the other branches of government to "be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3. The

*Cooper v. Aaron*,<sup>7</sup> the cases explicitly establishing such authority, the historical contexts were ones where a Constitutional crisis was eminent and where Court proclamation was necessary to avert that crises to maintain our democratic form of government.<sup>8</sup> The situation in *Parents Involved*, however, is markedly different. In fact, despite the Court's overriding of the popular will in *Parents Involved*,<sup>9</sup> deference to the Court is so ingrained as to minimize any possibility of crises.

Factually, *Cooper* was necessary to ensure that the entitlement of Black children to an equal education was enforced by the states.<sup>10</sup> Doctrinally, it solidified the required deference to the courts on matters of constitutional interpretation.<sup>11</sup> Ironically, the doctrinal propositions in

other branches of government have almost always respected the Court's interpretations, even when disagreeing with them, on the premise that the Court's interpretations of the Constitution have been in good faith. See Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 388-92 (2003) (discussing the relevancy of the oath of office to the constitutional interpretations of each branch).

7. 358 U.S. 1 (1958).

8. Checks on the Court's power have been relatively rare, precipitating instances of "Constitutional Crises." See, e.g., *id.* at 4 (noting the refusal of Arkansas to comply with *Brown v. Board of Education*); Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 576, 581-82 (J. Richardson ed., 1897) (detailing Andrew Jackson's veto of the act to recharter the Bank of the United States in 1832); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, *supra*, at 5, 8-10 (detailing Lincoln's disagreement with *Dred Scott v. Sandford*, as expressed in his first inaugural address); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1823 (2008) (discussing Thomas Jefferson's pardons of individuals convicted under the Alien and Sedition Acts); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 348-80 (discussing Franklin D. Roosevelt's "court packing" plan to ensure passage of New Deal legislation). You might even consider the defiant refusal of President Andrew Jackson to enforce the pro-Cherokee ruling of the Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Perhaps no Constitutional Crisis materialized in this instance because the Presidential defiance maintained the racial hierarchy and status quo in much the same way that the Court overturning the plans in *Parents Involved* maintains racial and class-based hierarchies and the status quo. Cf. Zanita E. Fenton, *The Paradox of Hierarchy—Or Why We Always Choose the Tools of the Master's House*, 31 N.Y.U. REV. L. & SOC. CHANGE 627, 634-36 (2007) (discussing this idea's implication in *Grutter v. Bollinger* and *Gratz v. Bollinger*).

9. When the "popular will" of the people, as represented in a properly elected legislative body, is overturned by judicial action, it is referred to as the "countermajoritarian difficulty." See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (Yale Univ. Press 2d ed. 1986) (1962).

10. The Court held that, since Article VI made the U.S. Constitution the supreme law of the land, and because *Marbury* gave the Supreme Court the power of judicial review, then the precedent set forth in *Brown v. Board of Education* is the supreme law of the land, and is therefore binding on all the states, regardless of contradicting state laws. *Cooper*, 358 U.S. at 18.

11. See *id.* ("Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison* that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been

this context, set the stage for the current Court's bloating of its own authority and enabled the Court to ignore, reinterpret, or mutilate its own precedents<sup>12</sup> in overruling the democratically achieved education legislation by the Seattle School District in *Parents Involved*.<sup>13</sup>

The arrogance of the Court, insisting on non-defiance of its education decisions after *Cooper*, initially assisted civil-rights lawyers and activists in their efforts to desegregate and achieve equal, quality education for all school children.<sup>14</sup> That same arrogance now enables the Court to insist on adherence to its decisions even when it does not follow its own precedents and oversteps the spirit of the constitutionally designed division of roles among the branches.<sup>15</sup>

The Court, in *San Antonio Independent School District v. Rodriguez*, defined the structural parameters of education law, holding that education is not a fundamental right and insisting that its regulation was for local governments to determine.<sup>16</sup> Both of these doctrinal points

respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." (emphasis added) (citation omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 225 (1994); Gary Lawson, *Interpretative Equality as a Structural Imperative* (Or "Pucker Up and Settle This!"), 20 CONST. COMMENT. 379, 379–80 (2003).

12. In *Parents Involved*, Justice Breyer dissented:

The Court's decision undermines other basic institutional principles as well. What has happened to *stare decisis*? The history of the plans before us, their educational importance, their highly limited use of race—all these and more—make clear that the compelling interest here is stronger than in *Grutter*. The plans here are more narrowly tailored than the law school admissions program there at issue. Hence, applying *Grutter*'s strict test, their lawfulness follows *a fortiori*. To hold to the contrary is to transform that test from "strict" to "fatal in fact"—the very opposite of what *Grutter* said. And what has happened to *Swann*? To *McDaniel*? To *Crawford*? To *Harris*? To *School Committee of Boston*? To *Seattle School Dist. No. 1*? After decades of vibrant life, they would all, under the plurality's logic, be written out of the law.

*Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2835 (2007) (Breyer, J., dissenting).

13. The Court in *Cooper* took the proposition in *Marbury* to the next level, not only assigning the authority to the Court to interpret the Constitution in deciding cases, but further suggesting that the Court is the ultimate authority on the meaning of the Constitution. Taken to its logical extremes, *Cooper* would enable the Court to exceed or ignore any limits on its own authority. Given the overall structure of the Constitution, it is unlikely that this was the intention of the Founders.

14. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 529–30 (1980).

15. See Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 647 (2005) ("Cooper simply generates a self-referential paradox that is utterly unhelpful. If one believes that the meaning of a constitutional provision is delegated by the Constitution to the political branches of government, then *Cooper* is not only wrong, but political deference to *Cooper* would itself be unconstitutional, as it would violate the doctrine of separation of powers by vesting policymaking power in the wrong branch of government.").

16. 411 U.S. 1, 35, 40 (1973). *Milliken v. Bradley*, a case that was decided one year after

demonstrate how the Court has done a constitutional disservice in *Parents Involved*. The first because, though it was decided that education was not a fundamental right, the range of decisions before and after *Rodriguez* acknowledged its import in exercising First Amendment freedoms, as well as the privileges and obligations of citizenship. The second because the Court's established structure respected vertical separation of power,<sup>17</sup> which was then disregarded by implication in *Parents Involved*.

On the importance of education to citizenship and democracy, the Court, in *Brown v. Board of Education*, points out that, "[t]oday, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship."<sup>18</sup> Justice Marshall, in dissent in *Rodriguez*, quotes *Wisconsin v. Yoder*<sup>19</sup> to connect education to citizenship: "[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system."<sup>20</sup> Justice Marshall continued, "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."<sup>21</sup>

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*Rodriguez*, further clarified that local control of education was at the school-district level, not the state-wide level, patterns of residential segregation notwithstanding. 418 U.S. 717, 746–52 (1974). The Justices in *Parents Involved* spend some time discussing *Milliken*, which ensured that intra-district remedies would not survive. *E.g.*, *Parents Involved*, 127 S. Ct. at 2759 (plurality opinion); see also Sean F. Reardon et al., *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989–1995*, 37 DEMOGRAPHY 351, 361 (2000) ("Suburbanization in itself, however, does not explain all of the increase in the share of segregation due to segregation between districts. Increases in between-district segregation are probably caused, at least in part, by persistent inequality in access to housing markets, particularly suburban housing markets."). Justice Breyer also makes a similar point in his *Parents Involved* dissent:

Beyond those minimum requirements [established in *Brown*], the Court left much of the determination of how to achieve integration to the judgment of local communities. Thus, in respect to race-conscious desegregation measures that the Constitution permitted, but did not require (measures similar to those at issue here), this Court unanimously stated:

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

*Parents Involved*, 127 S. Ct. at 2801 (Breyer, J., dissenting) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

17. See *infra* notes 41–43 and accompanying text.

18. 347 U.S. 483, 493 (1954).

19. 406 U.S. 205 (1972).

20. 411 U.S. at 112 (Marshall, J., dissenting) (quoting *Yoder*, 406 U.S. at 221).

21. *Id.* (quoting *Yoder*, 406 U.S. at 221). Justice Marshall goes on to connect education to First Amendment rights by quoting *Sweezy v. New Hampshire*, discussing the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding," 354 U.S. 234, 250

More recently, in *Grutter v. Bollinger*, the Court acknowledges “the overriding importance of preparing students for work and citizenship,”<sup>22</sup> citing *Plyler v. Doe*,<sup>23</sup> as well as *Brown*. *Grutter* goes on to state that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective”<sup>24</sup> and “[e]ffective 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>25</sup> These arguments in *Grutter* were so prominent that one might have thought it was going to overrule *Rodriguez* and affirm that education is indeed a fundamental right; but that thought proved to be too hopeful.

The acknowledgments in these cases may not have been sufficient to establish a fundamental right to an education, but certainly should have been sufficient to assert a compelling governmental interest in *Parents Involved* and survive strict scrutiny.<sup>26</sup> As discussed in *Grutter*: “Strict scrutiny is not ‘strict in theory, but fatal in fact.’ Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”<sup>27</sup> Nonetheless, Chief Justice Roberts, for the plurality in *Parents Involved*, determined that the asserted interest in diversity was not compelling.

Justice Roberts decided that, in the *Grutter* holding, the adjective

(1957), and *Keyishian v. Board of Regents*, calling the classroom the “marketplace of ideas,” 385 U.S. 589, 603 (1967). *Rodriguez*, 411 U.S. at 112 (Marshall, J., dissenting).

22. 539 U.S. 306, 331 (2003) (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

23. 457 U.S. 202.

24. *Grutter*, 539 U.S. at 331–32 (alteration in original).

25. *Id.* at 332.

26. See Spann, *supra* note 15, at 640–41; cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995) (overruling the use of intermediate, rather than strict, scrutiny in affirmative action).

The problem is not that the Supreme Court always invalidates affirmative action programs. Rather, the problem is that the Court thinks it can tell the difference between an affirmative action program that is constitutional and one that is unconstitutional.

Any affirmative action program that the white majority voluntarily adopts through the political process should be upheld under the Constitution because there is no reason to distrust the political process with respect to benign affirmative action. But that is precisely the argument that the Supreme Court rejected in *Adarand*, holding that even benign affirmative action was subject to strict equal protection scrutiny.

Spann, *supra* note 15, at 640–41; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2817 (2007) (Breyer, J., dissenting) (“Context matters when reviewing race-based governmental actions under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government decisionmaker for the use of race in that particular context.” (alteration in original) (citation omitted) (quoting *Grutter*, 539 U.S. at 326)).

27. 539 U.S. at 326–27 (citing *Adarand*, 515 U.S. at 237).

was more important than the noun. That is, the holding in *Grutter* could only be understood to support diversity in *higher* education, not just education.<sup>28</sup> By this stance, the Court necessarily ignores the realities of the paths to higher education and the situations of real people. It is ludicrous to imagine, in a current society segregated by both race and class,<sup>29</sup> that diversity in higher education could ever be meaningfully attained without significant attention to the early and middle stages of educational opportunity.<sup>30</sup>

*Grutter* and its companion case of *Gratz v. Bollinger*<sup>31</sup> are regarded as cases providing benefit to a very narrow class of individuals<sup>32</sup> and

28. See *Parents Involved*, 127 S. Ct. at 2754 (“In upholding the admission plan in *Grutter*, . . . this Court relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedom of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’” (quoting *Grutter*, 539 U.S. at 329)). Roberts’s reading of *Grutter*, a case that on its own does little to advance the goals of affirmative action, is such a great manipulation of the holding as to amount to a complete disregard of it as precedent. At least, in *Seminole Tribe v. Florida*, Justice Rehnquist was up-front with his disregard of precedent: “[W]e always have treated *stare decisis* as a principle of policy, and not as an inexorable command . . . [T]his Court has never felt constrained to follow precedent.” 517 U.S. 44, 63 (1996) (Rehnquist, C.J.) (citations and internal quotation marks omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

29. See, e.g., GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT AT HARVARD UNIV., RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 15 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf) (“Growing segregation of black and Latino students from white students is a basic educational trend. But there is another large and more encouraging development—the emergence of multiracial schools on a large scale. . . . Whites are by far the students least likely to attend such schools—only about an eight (12 percent) of whites do.”); Reardon, *supra* note 16, at 359 (“[T]he largest single contributor to total metropolitan segregation is segregation of white students from members of other groups between city and suburban districts.”).

30. Justice Breyer’s dissent in *Parents Involved*, supports this position:

Finally, I recognize that the Court seeks to distinguish *Grutter* from these cases by claiming that *Grutter* arose in “‘the context of higher education.’” But that is not a meaningful legal distinction. . . . I do not believe the Constitution could possibly find “compelling” the provision of a racially diverse education for a 23-year-old law student but not for a 13-year-old high school pupil. . . . [O]ne cannot find a relevant distinction in the fact that these school districts did not examine the merits of applications “individual[ly].” The context here does not involve admission by merit; a child’s academic, artistic, and athletic “merits” are not at all relevant to the child’s placement. These are not affirmative action plans, and hence “individualized scrutiny” is simply beside the point.

*Parents Involved*, 127 S. Ct. at 2829 (Breyer, J., dissenting) (fourth alteration in original) (citations omitted).

31. 539 U.S. 244 (2003).

32. See Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 192–93 (2004) (“The small-scale affirmative action programs adopted by law schools produced few material gains for most people in communities of color. We knew that in most elite schools, diversity programs admit relatively small numbers of students. We acknowledged that diversity-oriented programs concealed the racial bias of ostensibly race-neutral standards. And from experience within our own institutions, we were painfully aware that the diversity rationale

providing hope for the achievement of equal opportunity in education while simultaneously minimizing any realistic possibilities of such.<sup>33</sup> *Parents Involved* heightens this structural dynamic. Rather than facilitating equal educational opportunity, *Parents Involved* creates greater barriers to it.<sup>34</sup> Professor Derrick Bell's assessment in his seminal article, *Brown v. Board of Education and the Interest-Convergence Dilemma*, was as appropriate now as when it was written in 1980<sup>35</sup>: "[T]he Court has increasingly erected barriers to achieving the forms of racial balance relief it earlier had approved."<sup>36</sup>

Not only did Justice Roberts indicate that diversity was not a compelling governmental interest in primary school education, but he also found that the scheme of the Seattle School Districts was not narrowly tailored to meet it. In making these arguments, Justice Roberts has the apparent audacity to equate the legislation and factual context in *Parents Involved* to that at the time of *Brown*.<sup>37</sup> Historically, the contexts are

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permitted institutions to claim that they were 'for affirmative action,' without having to make a commitment to eliminating the legacy of past discrimination." (footnotes omitted)). There are also indications that this decision was only intended to assist individuals as a secondary proposition. See, e.g., Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 117 (2003) (describing *Grutter* and *Gratz* as "the latest and perhaps most significant evidence that race-based affirmative action was at risk until the business community, the military brass, and educational leaders rallied in its defense").

33. Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 249 (2004) ("In a sense, *Grutter* and *Gratz* may present the worst of both worlds for racial minorities. They leave open the possibility that affirmative action will sometimes be constitutionally permissible, thereby preventing racial minorities from becoming too unruly. But under the prevailing standards, truly beneficial affirmative action programs will rarely be upheld in reality. That is not a bad strategy for continued racial oppression."). See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (investigating how much social change the judiciary can create).

34. See *Parents Involved*, 127 S. Ct. at 2833 (Breyer, J., dissenting) ("At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes."). It seems that similar fears of the administration of law on a case-by-case basis are precisely what animated the result in *Brown*, given the trajectory of cases like *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950).

35. See Bell, *supra* note 14, at 526 ("[R]ecent decisions, most notably by the Supreme Court, indicate that the convergence of black and white interests that led to *Brown* in 1954 and influenced the character of its enforcement has begun to fade.").

36. *Id.* at 527.

37. See *Parents Involved*, 127 S. Ct. at 2768 (plurality opinion) ("Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way 'to achieve a system of determining admission to the public schools on a nonracial basis' is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." (citation omitted) (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955))). Earlier in his opinion, Chief Justice Roberts suggests that Justice Harlan's invocation of a "color-blind"



remarkably different,<sup>38</sup> yet this decision ensures they will remain the same.<sup>39</sup>

Justice Roberts's understanding of narrow tailoring is in disagreement not only with the four Justices in dissent, but also with multiple lower court judges.<sup>40</sup> The breadth of disagreement on this point is an indication that the political process is better suited than the Court to

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Constitution is the standard to which we should hold all uses of race. *Id.* at 2758 n.14. This reading of how and why schools are segregated is blind to the structural inequalities, previously supported by enforcement of law, that have enabled residential and educational segregation to continue. Justice Stevens responds in dissent as follows:

There is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education*. . . . The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.

*Id.* at 2797-98 (Stevens, J., dissenting) (citation and footnote omitted). Justice Thomas, in concurrence, also takes issue with this point.

For at least two reasons, however, it is wrong to place the remediation of segregation on the same plane as the remediation of racial imbalance. First, as demonstrated above, the two concepts are distinct. Although racial imbalance can result from *de jure* segregation, it does not necessarily, and the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation.

*Id.* at 2773 (Thomas, J., concurring). Even Justice Kennedy is not willing to join in the opinion that forecloses benign uses of race in equal protection. *See id.* at 2791-93 (Kennedy, J., concurring in part and concurring in the judgment).

38. *See generally* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) (discussing the struggle behind *Brown*).

39. *See* Roithmayr, *supra* note 32, at 203 ("In the public school finance feedback loop, non-white neighborhoods with poor tax bases produce under-funded schools. In turn, underfunded schools produce non-white neighborhoods with poor tax bases, because poorer schools produce graduates with less income and wealth. Likewise, white neighborhoods with good tax bases produce schools with good funding, which in turn produce a good tax base. In addition, because property with good schools costs more than property without, non-white residents are less able to move to a neighborhood with good schools.").

40. A panel of the Ninth Circuit Court of Appeals reversed the district court, ruling on the federal constitutional question. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 964, 969, 988-89 (9th Cir. 2004), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738. (determining that, while achieving racial diversity and avoiding racial isolation are compelling governmental interests, Seattle's use of the racial tiebreaker was not narrowly tailored). The Ninth Circuit Court of Appeals granted rehearing en banc and overruled the panel decision, affirming the district court's holding that Seattle's plan was narrowly tailored to serve a compelling governmental interest. *Parents Involved*, 426 F.3d 1162, 1192-93 (en banc), *rev'd*, 127 S. Ct. 2738 (2007); *see also* Spann, *supra* note 33, at 242 ("In [*Grutter* and *Gratz*], the Supreme Court has adopted a position that is truly curious. It has rejected the polar extremes of prohibiting all consideration of race, or of allowing the express pursuit of racial balance. Instead, it has in effect adopted the position that race can be considered as long as five members of the Court do not think that race has been given too much weight. It is striking that the Justices would conclude that the Supreme Court was institutionally more competent than the policymaking arms of American culture to decide on appropriate uses of race, given the Court's historical record on the issue." (footnote omitted)).

handle this matter.<sup>41</sup>

In an area where democracy has such obvious import,<sup>42</sup> it is unfortunate that the Court does not give greater deference to the legislative process by a body to which the Court itself (in keeping with Section 5 of the Fourteenth Amendment) explicitly accorded authority to determine matters in education: local government.<sup>43</sup> In fact, "Section 5 of the Fourteenth Amendment establishes that questions about the policy prudence and the constitutional validity of affirmative action are questions that, in *Marbury* terms, are 'in their nature political.'"<sup>44</sup> Unfortunately, the Court's choice to counter the majoritarian political process is most pronounced in the area of education and similar areas prone to societal discrimination.<sup>45</sup>

Professor Girardeau Spann has been the most consistent in asserting that the political process is more appropriate to determine the boundaries of affirmative action.<sup>46</sup>

Section 1 of the Fourteenth Amendment contained the substantive equal protection guarantee, and Section 5 authorized Congress to enforce the provisions of Section 1 precisely so that the Supreme Court would not invalidate such remedial efforts on constitutional grounds. The Fourteenth Amendment, therefore, was designed to authorize *political* remedies for racial discrimination, and to give federal remedies primacy over state "Black Codes" that had officially legislated the inferiority of blacks. Nothing in the history of the Fourteenth Amendment can plausibly be read to authorize the Supreme Court to invalidate state or federal political enactments that are designed to *enhance* the status of racial minorities. Rather, Section 5 of the Fourteenth Amendment establishes that questions about the policy prudence and the constitutional validity of affirmative action

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41. See *Parents Involved*, 127 S. Ct. at 2833 (Breyer, J., dissenting) ("I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems.").

42. See *supra* notes 17–25.

43. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973).

44. Spann, *supra* note 15, at 637 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); cf. *Marbury*, 5 U.S. (1 Cranch) at 166 ("[T]o act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.").

45. See Spann, *supra* note 33, at 232.

46. See, e.g., Girardeau A. Spann, *Affirmative Inaction*, 50 How. L.J. 611, 658 (2007) ("When the Supreme Court applied strict scrutiny to the minority set-aside plan in *Adarand*, the Court effectively invalidated a legislative program that had been adopted by Congress pursuant to section five of the Fourteenth Amendment. Rather than defer to the judgment of the representative branches, the *Adarand* Court instead *overruled* an earlier Supreme Court decision in *Metro Broadcasting v. FCC*, which had expressly recognized that Congress possessed special affirmative action powers emanating from section five of the Fourteenth Amendment." (footnotes omitted)).

are questions that, in *Marbury* terms, are “in their nature political.”<sup>47</sup>

If we consider the historical treatment of Congress’s Section 5 power to enforce the provisions and spirit of the Fourteenth Amendment,<sup>48</sup> it has never fulfilled its promise as case law has been inconsistent with the legislature’s ability to interpret Section 1 to provide greater protection for individual rights.<sup>49</sup>

In general, the Court only seems to care about separation of powers in certain circumstances. It has no problem acting as referee in conflicts between Congress and the Executive;<sup>50</sup> it steps in to define the limits of authority for the other branches;<sup>51</sup> it forcefully establishes and defends its own authority and province,<sup>52</sup> and is especially protective of its own province in determining positive uses of the Fourteenth Amendment.<sup>53</sup> In the area of education, it not only has established a hierarchical structure for interpretation,<sup>54</sup> but also a hierarchy of who determines any

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47. Spann, *supra* note 15, at 637 (footnotes omitted).

48. The Fourteenth Amendment to the Constitution was one of the post-civil war Reconstruction Amendments intended to ensure rights for former slaves. It provided a broad definition of citizenship, superseding the *Dred Scott* ruling, which excluded Blacks from citizenship and its benefits. See *Saenz v. Roe*, 526 U.S. 489, 502 n.15 (1999).

49. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726–28 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80–83 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441, 456–73 (2000).

50. See, e.g., *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding a unicameral congressional veto to be unconstitutional as violating both the bicameralism principles and the presentment provisions of Article II); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (striking down the Gramm-Rudman-Hollings Act as an unconstitutional usurpation of executive power by Congress); *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that the line-item veto as granted in the Line Item Veto Act of 1996 impermissibly gave the President the power to unilaterally amend or repeal parts of statutes, violating the Presentment Clause of the Constitution).

51. See, e.g., *United States v. Nixon*, 418 U.S. 683, 712 (1974) (holding that the President cannot use executive privilege as an excuse to withhold evidence that is “demonstrably relevant in a criminal trial”); *Powell v. McCormack*, 395 U.S. 486, 489 (1969) (determining that judicial review was appropriate in deciding whether Congress could exclude a person duly elected pursuant to the U.S. Constitution from serving in Congress); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (limiting the power of the President to seize private property in the absence of either specifically enumerated authority in Constitution or statutory authority conferred by Congress); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (establishing executive supremacy in foreign affairs and national security).

52. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

53. See, e.g., *Hibbs*, 538 U.S. at 726–28.

54. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2798–99 (2007) (Stevens, J., dissenting) (discussing the Court’s interpretation of scrutiny); Spann, *supra* note 15, at 639 (“The Court has continued to invalidate affirmative action programs adopted by the political branches whenever those programs do not comport with the Court’s own conception of sound racial policy.”).

solutions.<sup>55</sup> By burying itself in a set of rules the Court itself created, the Court is able to hide in the illusion of maintaining limits on its own power, yet it refuses to see its own hand in disturbing the balance of power even as it seems willing to destabilize its own doctrines to enforce this hierarchy.<sup>56</sup>

Popularly elected officials should settle questions when there is no certainty, not the Supreme Court.<sup>57</sup> In fact, the two branches other than the judicial should interpret the Constitution more expansively than does the Court.<sup>58</sup> *Cooper* is defended as a means of settling questions that need to be settled.<sup>59</sup> *Parents Involved* does not enjoy that same status because it confuses more than it settles.<sup>60</sup>

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55. This applies not only to this case, but also to education and affirmative-action decisions generally. See Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931, 1931 (2007) ("[F]ederal courts often appear to apply a more deferential form of strict scrutiny to the federal government's use of race.").

56. See *supra* notes 14–27.

57. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (discussing the problems with judicial review of the Constitution).

58. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978) ("But the force and meaning of this revised view of the legal status of judicially underenforced constitutional norms can best be assessed by considering what . . . will change in our legal system if we adopt it. The most direct consequence of adopting this revised view is the perception that government officials have a legal obligation to obey [the] underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins.").

59. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997). The limitations on this view are suggested by the mere fact that it is up to the judiciary to decide that which needs to be settled. On the margins, this gives the judiciary too much unintended power. *Parents Involved* is one such case. Cf. *Cooper v. Aaron*, 358 U.S. 1, 22 (1958) (Frankfurter, J., concurring) ("Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution? For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society."); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) ("[W]e must understand that the Constitution is and must be understood to be superior to ordinary constitutional law. This distinction must be respected. . . . To do otherwise, as Lincoln said, is to submit to government by judiciary.").

60. Cf. Meese, *supra* note 59, at 984 ("Perhaps the most well-known instance of this denial occurred during the most important crisis in our political history. In 1857, in the *Dred Scott* case, the Supreme Court struck down the Missouri Compromise by declaring that Congress could not prevent the extension of slavery into the territories and that blacks could not be citizens and thus eligible to enjoy the constitutional privileges of citizenship. This was a constitutional decision, for the Court said that the right of whites to possess slaves was a property right affirmed in the Constitution." (footnote omitted)).

It is notable that one of the most famous criticisms of *Cooper* is that of former U.S. Attorney General and conservative scholar, Edwin Meese, in *The Law of the Constitution*:

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.<sup>61</sup>

There is much irony in taking a position from the left criticizing legislation by the Court.<sup>62</sup> But the fact is that there is no franchise on constitutional interpretations and criticisms. The Court's positions on issues seem directly correlated to the predominant ideological stance on the Court,<sup>63</sup> especially as the Court recently has become more conservative.<sup>64</sup> Where the objectives are more in line with conservative ideology, the current Court is much more willing to step outside of its own clear authority to satisfy a particular outcome. A ready example of this trend is *Bush v. Gore*.<sup>65</sup>

*Bush v. Gore* is an especially apt comparison with *Parents*

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61. *Id.* at 985. Of course, only in a footnote does Mr. Meese concede that the outcome and holding in *Cooper* were correct: "I emphasize that my criticism is aimed at the dictum of *Cooper*, not the holding, with which I am in complete accord. Furthermore, in my judgment, officials in Arkansas and other states with segregated school systems should have changed those systems to conform with *Brown*." *Id.* at 987 n.25.

62. It is typically understood to be a conservative value to prefer a limited role for the judiciary. See, e.g., Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 648 (1990) ("Conservative constitutionalists tend to support two basic principles of constitutional interpretation: first, that interpreters should defer whenever possible to the originally intended meaning of the Constitution's drafters, and second, that judges should defer, whenever possible, to the will of legislators."); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 634-37 (1994) (noting that judicial restraint is central to judicial conservatism); cf. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 24-45 (1999) (promoting a minimalist judiciary). But see Alexander & Schauer, *supra* note 59, at 1362 (defending judicial supremacy in constitutional interpretation).

63. Take, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and the cases leading up to it. Some Justices in *Casey* were even willing to change its standard of review to "undue burden," a more permissive standard to allow state restrictions on individual freedoms. See *id.* at 874 (joint opinion of O'Connor, Kennedy & Souter, JJ.). Yet, in the education cases, the Court will not permit state fashioned remedies that do not explicitly comport with the Court's own. The ability of the Court to pick and choose when it politically promotes the ideals of federalism gives one pause about the proper extent of *Cooper*. See Winkler, *supra* note 55, at 1946-48.

64. See Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 880-86 (2006) (attempting to define the amorphous contours of conservative ideology in relation to federalism as a value).

65. 531 U.S. 98 (2000).

*Involved*. In *Bush v. Gore*, the majority artfully avoided questions of federalism,<sup>66</sup> separation of powers,<sup>67</sup> and prudential standing.<sup>68</sup> It interpreted Article II so as to permit the Supreme Court to take the matter from the state courts;<sup>69</sup> simultaneously, it ignored the "safe harbor" provision in 3 U.S.C. § 5, which would have allowed jurisdiction by Congress to determine any disputes in elections.<sup>70</sup> The Court made an equal-protection ruling that just as easily could have been supported by alternative proposition.<sup>71</sup> Most importantly, it took jurisdiction in a case that compromised the appearance of impartiality of the Court in political matters and reduced public confidence in the Constitution and rule of law. This decision was counter to the majoritarian political process.<sup>72</sup> *Parents Involved* follows the blueprint of the Court from *Bush v. Gore* in

66. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 452–86 (2002) (examining an exhaustive range of federalism decisions by the Rehnquist Court and determining that the Court often proves more substantively conservative, especially in the face of deference to state processes that would shield liberal outcomes).

67. See *supra* notes 46–47 and accompanying text.

68. Prudential standing is the "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Prudential standing may not be specifically delineated in the Constitution but is necessary to maintain the spirit of the ideals of separation of powers.

69. See *Bush*, 531 U.S. at 103 (per curiam) ("The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5 . . ."); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 679 (2001) (speculating as to whether there was a defensible basis for the *Bush v. Gore* decision or if the majority was prompted by a preference for a Bush Presidency).

70. The "safe harbor" provision, 3 U.S.C. § 5 (2000), allowed states to appoint their electors without interference from Congress if done by a specified deadline. In 2000, the "safe harbor" deadline was December 12, just one day after the case was argued before the Court. *Bush*, 531 U.S. at 121 (per curiam).

71. Critics of the decision pointed out that stopping the manual recount did not protect a voter's equal-protection interests any more than actually doing the count. See, e.g., Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1728 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 766 (2001). But see Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1243–51 (2002) (arguing that Court made the proper decision in *Bush v. Gore*).

72. *Bush v. Gore* is defended as having been necessary to save the country from crisis. See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS*, 137–147 (2001). But see Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 975 (2001) ("When institutions must become involved in majoritarian political decisions such as the selection of a President, it may be better to rely largely on the political branches than on the judiciary for several reasons."). If there was no need to prevent a crisis, there was not a *Cooper*-like situation and no need to test the bounds of the authority of the Court. Some authors note that the decision was not unanimously decided, "but by a 5-4 vote, with the majority consisting entirely of the Court's most conservative justices." Sunstein, *supra* note 71, at 758. Self-policing by the Court to not take the case would have been more appropriate. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 295–300 (2002); Garrett, *supra*, at 975; Peter M. Shane, *Disappearing Democracy: How Bush v. Gore*

that it does not give deference to separation of powers, not even vertically as established by the Court itself,<sup>73</sup> and especially not horizontal considerations explicit in the Fourteenth Amendment.<sup>74</sup> Its ruling was counter to the majoritarian political process that, but for inertia, would be cause for civil unrest. However, unshielded from the glare on the national stage, the Court in *Bush v. Gore*, unlike in *Parents Involved*, was completely aware of its manipulations, as it states forthrightly that the decision had no precedential value.<sup>75</sup>

No one pretends that navigating separation of powers is easy, but, given the nature of checks on the Court, the Court must be aware as to when it is exceeding its constitutional bounds.<sup>76</sup> Propositions from *Cooper* are correct that there are times when it is the role of the court to settle important social and political questions, but these times ought to be exceptional. It is the role of the Court to create a structure in which the legislative branches may operate, but not to usurp the political prerogatives of Congress. As there is a need for the law to be flexible and

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*Undermined the Federal Right To Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 578–84 (2001).

73. See *supra* text accompanying notes 16–17.

74. See *supra* text accompanying notes 46–47.

75. See *Bush*, 531 U.S. at 109 (per curiam) (“The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”). Instead of self-policing, the Court in *Bush v. Gore* gives self-justifications:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

*Id.* at 111.

76. Recently, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice O’Connor notes the need for standards in determining how the Court should navigate close separation of powers questions and suggests using the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

*Mathews* dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute procedural safeguards.”

*Hamdi*, 542 U.S. at 529 (plurality opinion) (citation omitted) (quoting *Mathews*, 424 U.S. at 335). Unfortunately, this test is messy and unlikely to be workable in all situations. Furthermore, this test is almost as manipulable as none other.

for precedents to change, the Court should prefer an honest overruling rather than manipulations that confuse and can only be designed to achieve a particular end.