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The Spirit of Brown in Parents Involved and Beyond

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THE SPIRIT OF *BROWN* IN *PARENTS INVOLVED* AND BEYOND

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"[T]he purpose of the Equal Protection Clause is to ensure that people are treated as individuals rather than based on the color of their skin."

—Chief Justice John G. Roberts, Jr.‡

I. INTRODUCTION

The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[1] immediately prompted a legal and social debate on whether this decision is consistent with the Court's landmark 1954 decision in *Brown v. Board of Education*.[2] Legal scholars continue to duel on the meaning of realizing and preserving the "Spirit of *Brown*" in today's increasingly racially diverse society. In the days after the decision was issued, the nation's op-ed columns were flooded with features from both sides, such as: *A Blow to* Brown*; The Supreme Court Enables the Resegregation of Schools by Race*;[3] Brown*'s Legacy Lives, but Barely*;[4] *Resegregation Now*;[5] *Don't Mourn* Brown v.

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‡ Transcript of Oral Argument at 47–48, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

1. 127 S. Ct. 2738 (2007), *rev'g* 426 F.3d 1162 (9th Cir. 2005) (en banc).

2. 347 U.S. 483 (1954).

3. Editorial, *A Blow to* Brown*; The Supreme Court Enables the Resegregation of Schools by Race*, WASH. POST, June 29, 2007 at A20.

4. Charles J. Ogletree, Jr., Op-Ed., Brown*'s Legacy Lives, but Barely*, BOSTON GLOBE, June 29, 2007, at A17.

5. Editorial, *Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28.

Board of Education;[6] *The Court Returns to* Brown.[7]

This heated debate is evident in the decision itself, wherein an emotionally divided Court attempted to resolve weighty issues regarding the role of race in the nation's public elementary and secondary schools. *Parents Involved* and its companion case, *McFarland ex. rel. McFarland v. Jefferson County Public Schools*,[8] presented the ideal vehicle for proponents on both sides of the debate over the constitutionality of the use of race in student assignment plans in elementary and secondary[9] public schools.

The school districts in both Seattle, Washington, and Louisville, Kentucky, used race as a factor in determining whether a student could attend the school of his or her choice.[10] In Seattle, students were classified as being either "nonwhite" or "white."[11] In Louisville, the corresponding classifications were "black" or "other."[12] The shared underlying motive for these "voluntary integration"[13] plans was to increase racial and ethnic diversity in the public schools.[14] The key debates in the Court rested first on whether voluntary integration programs were subject to strict scrutiny, and then on whether race could be used as a factor at all for determining student assignments to public schools.

One side, led by Chief Justice Roberts writing for the plurality of the Court, declared emphatically that *Brown* compels public elementary and secondary schools to stop using race altogether in their assignment programs, even for the purpose of racially integrating the schools.[15] The dissent, led by Justice Breyer, countered that *Brown*'s legacy calls for

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6. Juan Williams, Op-Ed., *Don't Mourn* Brown v. Board of Education, N.Y. TIMES, June 29, 2007, at A29.

7. George F. Will, Editorial, *The Court Returns to* Brown, WASH. POST, July 5, 2007, at A17.

8. 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).

9. The terms "primary and secondary," "elementary and secondary," and "K-12" will be used interchangeably to indicate grade levels from kindergarten through twelfth grade.

10. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2747–50 (2007).

11. *Id.* at 2746.

12. *Id.*

13. The term "voluntary integration," as used widely by the legal literature on this topic, indicates general efforts by school districts, based on their own policy rationales, to intermingle the races in their schools so as to avoid racially isolated schools within the districts. The term "affirmative action" encompasses a broader array of race-conscious programs in public contracting, employment, and in all levels of education.

14. *Parents Involved*, 127 S. Ct. at 2755.

15. *Id.* at 2768 ("[T]he 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." (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01(1955)) (internal citation omitted).

racial diversity and integration in public education at all levels, and that local school officials should be entrusted to carry out this process.[16] As the swing vote, Justice Kennedy agreed with the Chief Justice to the extent that the districts' plans failed to survive strict scrutiny because of the individualized discriminatory nature of the plans,[17] but maintained that local school officials may still engage in generalized race-conscious decisions to integrate students through narrowly-tailored means.[18] Consequently, "[f]ifty-three years after *Brown*, [*Parents Involved*] forces another public discussion about the proper role of race-conscious decisionmaking in America's public schools. . . . [A] heated debate still exists over the meaning of just a handful of words . . . in Section 1 of the Fourteenth Amendment."[19]

This Article argues that *Parents Involved* reaffirmed *Brown*'s spirit of racial neutrality and paves the way to realizing *Brown*'s legacy of eliminating state-imposed racial line-drawing. PART II provides a brief historical context behind the Court's landmark *Brown* decision. Building on its historical heritage, PART III shows that the spirit and purpose of *Brown* was to achieve racial neutrality in government decisionmaking, not racial integration *per se*. PART IV considers the impact of *Parents Involved* in carrying out *Brown*'s legacy in elementary and secondary public schools. In particular, there is no "benign-use" exception to racial neutrality, and any race-neutral measures employed by school districts remain subject to judicial presumptions favoring equality. The most enduring legacy of *Brown* is that school districts must not group children into racial categories, especially as racial lines are becoming increasingly blurred by today's social and geographic mobility.

II. *BROWN*'s Historical Heritage

Chief Justice Roberts acknowledged that the "heritage" of *Brown* compels government officials to abide by the principle of color-blindness—that laws may not classify our citizens according to race.[20] As the Chief Justice recognized, *Brown* stood for equality, not because it guaranteed African Americans and other minorities access to certain privileges based on their racial minority status, but because it forbade the

16. *Id.* at 2800 ("[The districts'] plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education* long ago promised-efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake." (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Breyer, J., dissenting))).

17. *Id.* at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment).

18. *Id.*

19. Comment, Parents Involved in Community Schools v. Seattle School District No. 1*; Voluntary Racial Integration in Public Schools*, 121 HARV. L. REV. 98, 103 (2007).

20. *Parents Involved*, 127 S. Ct. at 2767.

states from treating any individuals or groups differently based solely on their race. Critics of *Parents Involved* argue that *Brown* stood for egalitarian ideals requiring the state to actively integrate blacks into American society, and specifically for the goal of racially integrating the nation's public schools.[21] But in fact, *Brown* embodies the same ideals that were proclaimed in the Declaration of Independence, of individual civil rights and liberties free from government infringement. *Brown*'s spirit is the American dream of equality in the eyes of government.

A. *America's Promise of Equality*

The American guarantee of individual rights is grounded on equality, with the Declaration of Independence as its ultimate expression.[22] As the precursor to the Constitution, the Declaration of Independence described the individual's rights as "unalienable," including "life, liberty, and the pursuit of happiness."[23] These rights are based upon the "self-evident" principle that "all men are created equal"[24] in the eyes of the law. Although simply stated, these principles of equality proved difficult to realize, especially as America was plagued by the "original sin" of slavery from its founding.[25]

Two events in American history stand out as pivotal points toward the preservation of the Declaration's "unalienable rights" for each citizen.[26] America's first century as a nation saw the abolitionist movement, then in the second century, the fight for securing equal opportunity regardless of race.[27] Although presented with two distinctly different tasks, the underlying goal of preserving civil rights for each American remained a consistent theme during both movements.[28] Equal-rights advocates, from the nineteenth-century abolitionists to the twentieth-century Civil Rights leaders, shared a common vision that each individual held certain civil rights and that the purpose of government is to

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21. Bryant Smith, *Far Enough Back Where We Started: Race Perception from* Brown *to* Meredith, 37 J.L. & EDUC. 297, 301 (2008) ("The spirit of *Brown* contains a promise to provide every child with the opportunity to attend a satisfactory public school. A diversified educational experience falls under the umbrella of 'satisfactory.'"); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 152 (2007) ("To detach the underlying goal—school integration—from the arguments made in advance of that goal is to distort history.").

22. *See* CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD 26–27 (1996).

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

24. *Id.*

25. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 20 (2005).

26. BOLICK, *supra* note 22, at 24.

27. *Id.*; *see also* Michael C. Dorf, *The Supreme Court's Split Over Public School Integration: Who Really Betrayed* Brown*'s Legacy?*, FINDLAW, July 2, 2007, http://writ.news.findlaw.com/dorf/ 20070702.html.

28. BOLICK, *supra* note 22, at 24.

secure these rights through enforcement of a rule of law.[29]

The foundation of this shared vision was the constitutional framework that guarantees limitations on the state's power to encroach upon individual liberties.[30] Although the state functions as the guarantor of civil rights, the state has a "tremendous propensity for abuse"[31] because it enjoys a monopoly over the legal use of coercion and force. Therefore, the "architects of civil rights were keen to stress . . . that government possesses only those powers explicitly ceded to it by the people."[32] The principal mission of securing equality "has been to restrict the power of government"[33] to infringe on individual liberties guaranteed by the Constitution.[34]

The American promise of equality had visionaries throughout the nation's history who fought vigorously to realize its promise. As Professor Amar notes, "[d]uring the 1770s, soaring rhetoric of liberty and earnest debate about the sources of legitimate [constitutional] authority pulled many Americans toward abolition."[35] Many pre-Union states outlawed slavery, and "systems of gradual emancipation began to emerge,"[36] although the Constitution itself simply failed to address the problem of slavery.[37] From the onset of the Civil War, Abraham Lincoln

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29. RICHARD KLUGER, SIMPLE JUSTICE 36 (1994) (The abolitionist movement in the 1830s was like a "crusade almost quasi-religious in its liturgy. . . . [Slavery] was plainly wrong because it violated the most basic, inalienable, and self-evident right in the American credo—that of personal liberty."); WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 67 (1984) ("Douglass's conceptualization of Reconstruction, like that of his black abolitionist and Radical Republican cohorts, embraced full political, civil, and economic equality for the freedpeople."); BOLICK, *supra* note 22, at 36–37 (Martin Luther King, Jr. "asked not for special treatment or retribution, but only for the basic rights and opportunities that all Americans cherish. 'Our goal is freedom,' he declared. 'I believe we will win it because the goal of the nation is freedom.'").

30. *See* AMAR, *supra* note 25, at 10 ("No liberty was more central than the people's liberty to govern themselves under rules of their own choice; and the Preamble [to the Constitution] promised to secure this and other 'Blessings of Liberty' not just to the Founding generation, but also, emphatically, to 'our Posterity.'").

31. BOLICK, *supra* note 22, at 27.

32. *Id.*; *see also* AMAR, *supra* note 25, at 11 (explaining that the Preamble was a clear recognition of "popular rights," emphasizing which rights "'the people' 'retain' and 'reserve' and may 'resume' and 'reassume'" as against the sovereign).

33. BOLICK, *supra* note 22, at 27.

34. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 98 (1992) ("The Civil War amendments [13th, 14th, and 15th Amendments]—on slavery, citizenship, voting, equal protection, due process, and privileges and immunities—were designed to decrease the scope of state power to confer ordinary common law liberties selectively on some while denying them to others."); *see also id.* at 94 ("Under Jim Crow, big government fell into the hands of the wrong people, who were able to perpetuate their stranglehold over local communities and businesses by means of a pervasive combination of public and private force.").

35. AMAR, *supra* note 25, at 20.

36. *Id.*

37. Despite the Declaration's glowing assertion of the principles of human equality, the

made his position against slavery very clear—"[i]f slavery is not wrong, nothing is wrong."[38]

To be sure, the problem of the decades-old institution of slavery could not be immediately resolved with the Union's victory in the Civil War and the passage of the Civil War Amendments. In order realistically to transition former slaves to freemen,[39] Congress took active remedial measures to integrate them into American society. The Freedmen's Bureau, created in 1865, "was empowered to distribute clothing, food, and fuel to destitute freedmen and overs[aw] 'all subjects' relating to their condition in the South."[40] While charging the Bureau with unprecedented responsibilities, Congress clearly saw these as a "temporary expedient" with an initial life span of only one year.[41] Although the Freedmen's Bureau distributed benefits to newly freed black citizens,[42] the Bureau's purpose was strictly remedial so that newly emancipated freedmen might enjoy the right of all citizens "to have full and equal benefit of all laws and proceedings concerning personal liberty . . . without respect to race or color, or previous condition of slavery."[43]

The thirty-ninth Congress enacted the Civil Rights Act of 1875, banning racial discrimination in public accommodations.[44] Leading up to its enactment, proponents of the Act echoed the Constitution's fundamental guarantee of individual liberties. They declared that a "free government demands the abolition of all distinctions founded on color and

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Constitutional Convention had largely managed to ignore the looming issue of slavery. *See* KLUGER, *supra* note 29, at 34–35 ("In the fundamental conflict between human rights and property rights that was implicit in the slave question, the men who cast the mold of basic national policy did not hesitate to select the latter. They saw no choice—or would not, at any rate, admit to any for fear of the consequences. And so they passed the conflict on to other generations.").

38. Letter from President Abraham Lincoln to A.G. Hodges (Apr. 4, 1864) (on file with the Library of Congress); *see also* AMAR, *supra* note 25, at 352 n.1 ("Though Lincoln penned these words after 1858—in 1864, to be precise—he immediately added that 'I can not remember when I did not so think, and feel.'").

39. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 37 (1990) ("Black migrants who hoped to find urban employment [after the Civil War] often encountered severe disappointment."); *id.* at 67 ("[W]hite public opinion [in 1865 Mississippi] could not conceive of the negro having any rights at all.").

40. *Id.* at 31.

41. *Id.*

42. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 397 (1978) (opinion of Marshall, J.) ("The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes.").

43. Freedmen's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176–77 (1866).

44. Civil Rights Act of 1875, ch. 114, §1, 18 Stat. 335, 336 (1875) ("[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.").

race."[45] Senator Sumner, a key abolitionist figure in Congress, and strong proponent of the Civil Rights Act, emphasized that "[the law] makes no discrimination on account of color."[46]

The Act was struck down in 1883 by the Supreme Court in the *Civil Rights Cases*,[47] but its goal of eliminating state-enforced racial distinctions was finally realized in *Brown* nearly eighty years after the Act's initial enactment.[48] Congress in 1875, like the early abolitionists, already understood this ought to be the law of the land, declaring that "[t]he time has come when all distinctions that grew out of slavery ought to disappear."[49]

B. Brown *Stems from America's Founding Principles of Equality*

Brown flows directly from the nation's founding vision of individual equality. As a response to the states' pervasive infringement of individual rights and liberties through Jim Crow legislation, *Brown* repudiated the concept that the government could separate individuals based on race as long as they were given "equal" facilities and benefits.

Even after the enactment of the Fourteenth Amendment, which declared no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,"[50] the Southern states enacted a series of Jim Crow laws to segregate public facilities between black and white individuals.[51] In 1896, the Supreme Court in *Plessy v. Ferguson*[52] held that states could exercise their "police power" to require racially segregated public facilities when these facilities were found to be func-

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45. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1008 (1995) (quoting 2 CONG. REC. 4083 (May 20, 1874) (statement of Sen. Pratt)).

46. *Id.* at 1009 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 385 (Jan. 15, 1872)).

47. The Civil Rights Cases, 109 U.S. 3, 17 (1883) (The Court explained that the Act was over-inclusive because it regulated both private racial discrimination and state-mandated segregation. "[I]t is proper to state that civil rights, such as are guarantied [sic] by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.").

48. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

49. McConnell, *supra* note 45, at 1008 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 3190, 3193 (May 8, 1872) (statement of Sen. Sherman)).

50. U.S. CONST. amend. XIV, §1.

51. EPSTEIN, *supra* note 34, at 91–92.

52. 163 U.S. 537 (1896).

tionally and tangibly equivalent.[53] Applying this "separate but equal" doctrine, the Court in *Plessy* upheld a Louisiana statute that required all railway companies to provide equal but separate accommodations for the "white and colored races."[54] Infamously characterizing as an "underlying fallacy" the assumption that "the enforced separation of the two races stamps the colored race with a badge of inferiority,"[55] *Plessy* embraced, and thus perpetuated, a broad measure of deference to state legislatures' ability to regulate on the basis of race.[56] The *Plessy* Court gave its imprimatur to legally enforced segregation. As a result, the Jim Crow regime had a virtual carte blanche to impose both social and economic barriers "to keep blacks segregated, politically powerless, and economically servile."[57] The Deep South in the 1950s has even been described as having "an uncanny resemblance to the legal Apartheid of South Africa", as Jim Crow legislation disenfranchised blacks politically and socially separated them from the public sphere.[58]

The anti-segregation movement leading up to *Brown* was a series of direct responses to states' ability to enact and enforce racial regulations such as the Jim Crow laws.[59] The unifying mission of the civil rights leaders at that time was simple—to stop states' ability to classify individuals on the basis of race. As Justice Harlan described in his lone dissent in *Plessy*, "[i]n respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."[60] He famously coined the saying that "[o]ur Constitution is color-blind", as our Constitution "neither knows nor tolerates classes among citizens" and that "[t]he law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."[61] Although Harlan was the sole dissenter in *Plessy*, the idea of the "colorblind con-

53. *Id.* at 544 (Justice Billings Brown writing for the majority opined that the Equal Protection Clause was not intended to ensure "commingling of the two races.").

54. *Id.* at 540, 543.

55. *Plessy*, 163 U.S. at 551.

56. EPSTEIN, *supra* note 34, at 92 (*Plessy*'s "blanket authorization of wide-scale state regulation under the police power thus dictated" the segregationist agenda for the next seventy years until *Brown*.).

57. BOLICK, *supra* note 22, at 32.

58. Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation From* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217, 220 (2007).

59. EPSTEIN, *supra* note 34, at 93 ("The response to Jim Crow was equally clear and authoritative: any practice, public or private, that drew distinctions between whites and blacks in social, economic, or political life fell outside the pale.").

60. *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting).

61. *Id.* at 559.

stitution" was not new. As the Justice himself acknowledged, the same ideas were advocated by the Reconstruction Congress following the Civil War.[62] He explains that the Thirteenth, Fourteenth and Fifteenth Amendments "removed the race line from our governmental systems."[63]

It would be another half century before Justice Harlan's "colorblind constitution" view would prevail when the Supreme Court in *Brown* struck down the "separate but equal" doctrine.[64] The *Brown* Court acknowledged the invidious effect of separating individuals solely because of their race.[65] It recognized that the constitutional guarantee of "equality under the law" is a declaration "that all persons, whether colored or white, shall stand equal before the laws of the States."[66] The Court proclaimed that "[s]eparate educational facilities are inherently unequal" and struck down the states' ability to draw racial lines,[67] recognizing that "'[t]he impact [of segregation] is greater when it has the sanction of the law."[68] Although *Brown* applied specifically to the context of public education, the Court embraced the inevitable broader societal implications of its decision by repudiating the Jim Crow laws in the South, and its former holding in *Plessy v. Ferguson*.[69] The *Brown* Court had effectively struck down state-imposed segregation in all public facilities with one sweeping stroke.

The *Brown* plaintiffs explicitly argued for a "colorblind" constitution. Robert L. Carter, as counsel for the plaintiffs, said during oral argument,

> no state can use race, and race alone, as a basis upon which to ground any legislative, any lawful constitutional authority and, particularly this Court has indicated in a number of opinions that this is so because it is not felt that race is a reasonable basis upon which to ground acts; it is not a real differentiation, and it is not relevant and, in fact, this Court has indicated that race is arbitrary and an irrational standard. . . .[70]

Thurgood Marshall, the other plaintiffs' counsel, contended that

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62. *Id.* at 555.

63. *Id.*

64. Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

65. *Id.* at 492–95.

66. *Id.* at 490 n.5 (quoting Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880)).

67. *Id.* at 495.

68. *Id.* at 494.

69. *Id.* at 491–92 (The Court discusses the "separate but equal" doctrine generally, noting that in none of its past "cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff."). The Court also relied on Strauder v. West Virginia, 100 U.S. 303, 307–08 (1879), which noted the Fourteenth Amendment was "primarily designed, that no discrimination shall be made against [the colored race] by law because of their color."

70. *BROWN V. BOARD*: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 11, 15 (Leon Friedman ed., 2004).

> [t]he only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis [other than race] they want to assign them on.[71]

In response to Justice Frankfurter's question, "You mean, if we reverse, it will not entitle every mother to have her child go to a nonsegregated school in Clarendon County?" Marshall answered, "No, sir," explaining that:

> [t]he school board, I assume, would find some other method of distributing the children, a recognizable method, by drawing district lines. . . . I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.[72]

With *Brown*, the Court set the precedent for outlawing state-sanctioned racial segregation in "virtually all aspects of American life,"[73] not a standard by which government officials may pursue non-remedial, voluntary programs of racial integration.

III. THE UNDERLYING SPIRIT OF *BROWN* WAS RACIAL NEUTRALITY, NOT RACIAL INTEGRATION

A. Brown *Mandated Strict-Scrutiny Review of all Racial Line-Drawing by the Government*

The role of public education in American society is contentiously debated, fueling the divisiveness in carrying out *Brown*'s legacy. One view is that public schools serve a civic mission by providing an early forum where students may learn to become "better citizens,"[74] while another holds that the primary mission of public education is strictly academic where student progress is measured by standardized test scores.[75] If public schools exist for a civic mission, racial integration programs stand on a surer footing because school districts may rely on

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71. *Id.* at 36, 47.

72. *Id.* at 47–48.

73. Robert L. Carter, *An Evaluation of Legal Approaches to Equal Educational Opportunity*, *in* ONE HUNDRED YEARS OF THE FOURTEENTH AMENDMENT: IMPLICATIONS FOR THE FUTURE 93, 99 (Jules B. Gerard ed., 1973).

74. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 143 (2007) ("Indeed, for a long time, the socializing or civic mission of schools was considered by many to be just as important as the academic mission.").

75. *Id.* (citing to recent reform programs such as "[b]attles over school funding, charter schools, vouchers, the No Child Left Behind Act, and access to preschool" as evidence of the emphasis placed on test scores as guideposts in determining the success of schools).

their proffered "social benefits" in helping to break down stereotypes and prevent prejudice among America's students.[76] On the other hand, if public schools exist primarily for their academic mission, any social benefits of integration become wholly irrelevant, and offer no support for adopting integration programs.

Which approach is consistent with the meaning and spirit of *Brown*? Did *Brown* consider the civic mission of public schools in its decision to ban racial segregation, or was *Brown* decided solely on the basis that race-based segregation of public facilities plainly violates the Equal Protection Clause? The Justices in *Parents Involved* were themselves sharply torn on this question. Justice Thomas in his concurrence sides with the academic-mission camp, while the dissenting Justices side with the civic-mission camp. The Chief Justice avoids siding with either camp, contending that the sociological or academic effect of diversity is not a debate in which the Court needs to resolve because the Seattle and Louisville plans were not narrowly tailored, thus failing strict scrutiny.[77] Regardless of their views on the underlying mission of the public schools, a majority of the Court indisputably applied strict scrutiny against voluntary integration programs, with equal force as against the segregationist plans of the *Brown* era.[78]

In applying strict scrutiny, the Court recognized that local school districts may not be given deference when they attempt to use race as a determinative factor in student assignments.[79] Measures voluntarily undertaken by public school districts to effect racial integration are pre-

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76. *Id.* at 143–44 ("The consensus among social scientists seems to be that integration leads to some moderate achievement gains for black students and does not harm white students, which is hardly a ringing endorsement for integration as a method to boost test scores. The defense of integration has always been on surer footing when one also considers its social benefits.").

77. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2755 (2007) ("The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.").

78. *See* Section IV.A. *infra*; *Parents Involved*, 127 S. Ct. at 2752 ("racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.") (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003)). Even the proponents of voluntary integration recognize that such programs must pass muster under strict scrutiny. *See, e.g.*, Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed To Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 715 (2007) ("Strict scrutiny applies regardless of whether the racial classifications are invidious or benign and 'is not dependent on the race of those burdened or benefited by a particular classification.'") (quoting *Gratz*, 539 U.S. at 270 (2003)).

79. *Parents Involved*, 127 S. Ct. at 2766 (noting that deference to local school boards in making racial classifications "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified."); *see also id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that

sumptively unconstitutional, whether used to advance either a civic or academic mission.[80] Beyond its proper limit of remedying de jure segregation, achieving racial balance in K-12 schools is not a sufficiently compelling government interest to justify race-based decision making.

As in *Parents Involved*, *Brown* prohibited the states from any line-drawing based on race, whether reasonable or unreasonable. Under *Plessy*, courts gave deference to state legislatures to draw lines "equally" between the races, whereas the *Brown* Court struck down this practice altogether and finally "removed the race line in all government systems."[81] Under its newly-adopted color-blind jurisprudence, the Court did not inquire into the reasonableness of a race-based policy. Rather, all racial classifications were deemed presumptively unconstitutional. When it came to matters of race, the Court no longer deferred to legislative policy-making. And the Court no longer considered whether a racial classification would achieve beneficial effects such as promoting public safety or the general welfare. The Court simply took race off the table altogether. This point was underscored in the next term, when the Court in *Brown II*,[82] re-emphasized that the ultimate objective in eliminating *de jure* segregation is to "achieve a system of determining admission to the public schools on a nonracial basis."[83]

The series of per curiam decisions immediately following *Brown* exhibit the hard-line approach taken by the Court to uniformly eliminate the use of racial classifications by government. As Professor Van Alstyne observes, "virtually every other race-related decision by the

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race-based programs are presumptively unconstitutional because the government bears the burden of justifying its use of individual racial classifications).

80. Social science is largely inconclusive on whether racial integration programs actually foster "social benefits" in American schools, and results to support either camp have been criticized as unreliable. *See, e.g.*, *id.* at 2776 (Thomas, J., concurring) ("In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.") (noting the amicus briefs that "mirror this divergence of opinion"); *see also* Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 629 (2006) ("Social science is grounded in probability, not deductive logic. Social scientists provide evidence of an effect only by ruling out the possibility that there is *no* effect."); Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (acknowledging the reality that social science findings can be so easily revised or repudiated, Prof. Cahn noted that "since the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today's sanguine asseveration may be cancelled by tomorrow's new revelation—or new technical fad.").

81. *Plessy*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting); *see also* Kevin H. Smith, *The Jurisprudential Impact of* Brown v. Board of Education, 81 N.D. L. REV. 115, 116 (2005) ("In the years immediately following *Brown*, the Court's new understanding of the negative psychological impact of state-mandated segregation was used by federal and state courts to strike down numerous forms of state-mandated segregation that previously had been permitted under *Plessy*'s 'separate but equal' doctrine.").

82. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

83. *Id.* at 300–01.

Supreme Court appeared to convey this same message" that "the Civil War Amendments altogether 'removed the race line from our governmental systems.'"[84] The post-*Brown per curiam* decisions summarily dispatched segregation laws including public accommodations in athletic contests,[85] municipal golf courses,[86] and beaches and bathhouses.[87] In each instance where the Court struck down a race-related statute, "the fulcrum of judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove. The object was thus to disestablish particular, existing uses of race, not to establish new ones."[88] This was true even in "highly controversial [cases where the] judicial decree[ ] impaired racially identifiable schools, redrafted attendance lines, or mandated busing."[89]

This color-blind approach was consistently reaffirmed in the Court's equal protection jurisprudence between 1955 and 1976.[90] In striking down a statute banning interracial marriage, the Court stated, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[91] In the voting booth, declaring that the state may not designate candidates' race on ballots, "[t]he vice . . . [is] not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls."[92] In the context of public contracting, the Court explained that to grant racial preferences "would encourage discriminatory hiring to give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system."[93]

B. *Racial Balancing, Except To Remedy State-Mandated Segregation, Remains Patently Unconstitutional*

Brown's color-blind concept was met with much resistance throughout the segregated South. All-white schools refused to desegre-

84. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783 (1979) (quoting Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting)); *see also id.* at 783 n.24 and cases cited therein.

85. State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959), *aff'g per curiam* 168 F. Supp. 149 (E.D. La. 1958).

86. Holmes v. City of Atlanta, 350 U.S. 879 (1955), *vacating per curiam* 223 F.2d 93 (5th Cir. 1955).

87. Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955), *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955).

88. Van Alstyne, *supra* note 84, at 784 (emphasis in original).

89. *See id.* at 783–84 & n.25 and cases cited therein.

90. *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1074 (Cal. 2000).

91. Loving v. Virginia, 388 U.S. 1, 10 (1967).

92. Anderson v. Martin, 375 U.S. 399, 402 (1964).

93. Hughes v. Superior Court, 339 U.S. 460, 463 (1950).

gate, leading to "more than a decade of defiance and token compliance."[94] Discrimination remained the norm, and intervention was necessary in order to enforce *Brown*'s ultimate goal of racial neutrality in governmental systems. Remedial measures actively integrated African Americans into civil society.[95] But these efforts were designed to remedy decades of state-mandated segregation. Just as the Freedmen's Bureau was enacted to remedy the decades of slavery imposed on African Americans,[96] post-*Brown* remedies sought to undo the harms of Jim Crow segregation. As such, *Brown II*'s mandate for integration functioned as a narrow remedy in direct response to widespread public resistance to desegregation.

Courts continued to intervene to ensure that desegregation was being carried out "with all deliberate speed,"[97] but these efforts remained focused on curing vestiges of past *de jure* segregation. In 1968, the Supreme Court in *Green v. County School Board of New Kent County*[98] added a new chapter to its desegregation jurisprudence when it charged school districts with an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[99] With *Green*, the Court embarked on a decade of the most intrusive federal court oversight of America's public schools during the 1970s.[100] One commentator observed that "[w]ith the *Green* decision, the Supreme Court seems to have gone significantly beyond the letter and spirit of the law elucidated in *Brown*."[101] At the same time, however, there is some indication that the *Green* Court was compelled to take drastic remedial measures to counteract inequities in the desegregation programs themselves.[102] Rather than re-assigning both white and black students to achieve desegregated schools, districts instead had placed the burden of desegregation squarely on the shoulders of black students.[103] Black children courageous enough to "break with tradition to obtain a position in a white

94. Ryan, *supra* note 74, at 152.

95. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955) (ordering districts to desegregate with "all deliberate speed," and charged district courts with crafting appropriate remedies and overseeing the implementation).

96. *See* Section II.A. *supra.*

97. *Brown II*, 349 U.S. at 301.

98. 391 U.S. 430 (1968).

99. *Id.* at 437–38.

100. *See* Caldas & Bankston, *supra* note 58, at 231 (explaining that school boards had to demonstrate that they have desegregated each of the distinct areas of school operations, including faculty, staff, transportation, extracurricular activities and facilities.).

101. *Id.*

102. Carter, *supra* note 73, at 100.

103. *Id.*

school" could do so.[104] This policy was flawed because black children and their parents were left to carry the burden virtually alone.[105] Recognizing such flaws, the Court in *Green* instructed the district to devise a plan that "promises realistically to work *now*."[106] But although *Green* expanded the authority and duties vested in the school districts, with regard to the way in which they were to desegregate, the Court nonetheless emphasized that desegregation plans must promise "immediate progress toward disestablishing *state-imposed segregation*."[107]

Following *Green*, the Court issued several pivotal decisions to clarify the extent of school districts' duty to remedy discrimination. In *Swann v. Charlotte-Mecklenburg Board of Education*,[108] while the Court upheld several desegregation remedies, it also stated that a school district's duty under *Green* is terminated once the school is considered "unitary."[109] A few years later, the Court in *Milliken v. Bradley*[110] struck down a local government's cross-district busing program implemented to racially integrate schools within a metropolitan area. *Brown II* and its progeny of cases, including *Green*, *Swann*, and *Milliken*, did not grant the states a broad ability to implement non-remedial racial integration programs. Rather, these cases were very careful to apply remedies designed to counteract state-imposed segregation, *without* extending to the states the ability to achieve racial balancing as an end in itself. The controlling principle was that "the scope of the remedy is determined by the nature and extent of the constitutional violation," namely state-sanctioned segregation.[111]

In the 1980s and 1990s, affirmative action programs aimed at promoting racial diversity or proportional racial representation were developed in public contracting, employment, and higher education. In particular, colleges and universities created race-based programs to increase minority enrollment. But even as these programs grew in number, the Court continued to apply strict scrutiny to those plans.[112] Simply having good intentions for categorizing citizens according to their race

104. *Id.*

105. *Id.*

106. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (emphasis in original).

107. *Id.* (emphasis added).

108. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

109. *Id.* at 31.

110. Milliken v. Bradley, 418 U.S. 717, 757 (1974).

111. *Id.* at 744.

112. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) ("It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.'").

was not enough to establish a compelling state interest.[113]

In 2003, the Supreme Court in *Grutter v. Bollinger*[114] recognized another compelling interest: the achievement of a diverse student body at an elite law school.[115] But such "diversity" was much broader than mere "racial diversity."[116] In *Grutter*, the law school's limited consideration of race in admissions was permissible because it considered "a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body" such as a student's socioeconomic background, extracurricular activities, and special interests.[117] The Court found that, by considering race as one of many factors that would contribute to a broadly diverse student body, the law school was not simply assuring "some specified percentage of a particular group merely because of its race or ethnic origin."[118] While a multifaceted notion of diversity in an elite professional school may constitute a compelling interest,[119] simple racial balancing would not.[120] Even in the fact situation presented by *Grutter*, the Court reiterated, "outright racial balancing . . . is patently unconstitutional."[121]

C. Parents Involved *Goes Back to* Brown*'s Racial Neutrality*

Less than five years after *Grutter*'s decision regarding the role of race in law school admissions, the Supreme Court confronted the same issues in the context of elementary and secondary schools. *Parents Involved* reaffirmed the Court's prohibition against racial balancing, and shaped the impact of *Brown* on the future of voluntary racial integration programs.

After *Parents Involved*, school officials are prohibited from

113. *Adarand*, 515 U.S. at 226.

114. 539 U.S. 306 (2003).

115. *Id.* at 343–44.

116. *Id.* at 324–25.

117. *Id.* at 338–39.

118. *Id.* at 329 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

119. There has been much criticism that the *Grutter* Court deviated from *Brown*'s strict scrutiny review of race-based policies. *See, e.g.*, Douglas G. Smith, *Originalism and the Affirmative Action Decisions*, 55 CASE W. RES. L. REV. 1, 42 (2004) ("There is [ ] a fundamental tension between the Court's ruling in *Grutter* and its decision in *Brown*. The Court in *Brown* held that racial discrimination in public education was prohibited. It did not give any 'deference' to the state's decision to maintain a segregated school system. Indeed, it did not give any credence to the state's reasoning in maintaining such a system at all . . . . This straightforward approach contrasts sharply with the approach taken by the majority in *Grutter*."); Gail Heriot, Op-Ed., *U.S. Supreme Court Affirmative Action Rulings; Supreme Court Decision Upholds Principle of Racial Preferences*, SAN DIEGO UNION-TRIB., at G1 (June 29, 2003) ("Grutter is a huge loss for those who favor race neutrality."); *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) ("The majority today refuses to be faithful to the settled principle of strict review [for all racial classifications].").

120. *Grutter*, 539 U.S. at 324–25.

121. *Id.* at 330.

assigning individual students on the basis of their race. This is consistent with *Brown*'s elimination of state-sanctioned segregation. As the Chief Justice declared for the *Parents Involved* plurality, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[122] pointing out the Court's "repeated recognition that '[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.'"[123] Justice Kennedy provided the fifth vote in agreement, stating that "[r]eduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake."[124] As Justice Kennedy notes, there is a "presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals."[125]

Without any evidence of past or existing *de jure* segregation, racial balancing *per se* is not a compelling governmental interest. The Court has always insisted upon "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[126] In *Parents Involved*, the Chief Justice noted that "the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"[127] As Justice Thomas further explained, "racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend these [school districts'] programs is to ignore the meaning of the word and the nature of the cases before us."[128] There was no "resegregation" going on in the Seattle and Jefferson County school districts, merely racial imbalances resulting from voluntary housing patterns, which are strictly outside the province of school districts to remedy through race-based means.[129]

The *de-jure/de-facto* distinction delimits the powers of the judiciary in the fashioning of race-based remedies, and "serves as a limit on the exercise of a power that reaches to the very verge of constitutional

122. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).

123. *Id.* at 2757 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

124. *Id.* at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

125. *Id.* at 2794.

126. *Id.* at 2795 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).

127. *Id.* at 2752 (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)).

128. *Id.* at 2769–70 (Thomas, J., concurring).

129. *Id.* at 2769.

authority."[130] Justice Kennedy cautioned that this distinction "ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government's systematic classification of each individual by race."[131] Paralleling *Brown*, the *Parents Involved* Court held that a school district may not consider an individual student's race in assigning that student to a particular school.

IV. The Role of *Parents Involved* In Realizing America's Promise of Equality

A. Parents Involved *Determined that There is No "Benign-Use" Exception to the Equal Protection Clause*

The *Parents Involved* Court was faced with the question of whether the "benign" or good faith intent behind a race-conscious policy should free that governmental program from the usually fatal application of strict scrutiny. In other words, because a school's race-based assignments are no longer perniciously motivated to maintain a racial caste system against one particular racial minority group, but rather designed to "integrate" the races, should the courts allow more deference to local schools to carry out these policies? The Court answered with a decisive "no," thereby realigning itself to *Brown*'s ultimate goal of eliminating racial lines in all governmental systems.

One of *Brown*'s groundbreaking impacts on American society is that it began the dismantling of a state-sanctioned system of racial hierarchy in which African Americans were considered second-class citizens.[132] *Brown* recognized that state-mandated racial segregation imposes a stigmatic harm on black schoolchildren, which the Court defined as "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[133] This categorical observation, however, has been stretched beyond its original intent of outlawing state-sanctioned racial segregation.[134] Federal courts at every level have analogized this stigma to a wide array of state actions that they perceive as creating a sense of inferiority, including affirmative action programs in upper-level education and contracting.[135] *Parents Involved* was no exception, as the Justices

130. *Id.* at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

131. *Id.*

132. Smith, *supra* note 21, at 298.

133. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

134. Smith, *supra* note 21, at 299.

135. Smith, *supra* note 81, at 120–23 (Other cases in which courts have recognized a psychological stigmatic harm as a result of state programs regarding: "law school affirmative action admissions programs, denial of admission of an all-black high school to a state athletic

continued to spar on the relevance, impact, and the very definition of *Brown*'s stigmatic harm as it applies to voluntary integration in K-12 public schools.

The dissenting Justices, citing various legal scholars and commentators, presented a vigorous defense of voluntary integration.[136] They contended that today's school officials are acting in good faith with a pure motive to bring the races together rather than to keep the races apart as was the case in *Brown*.[137] According to their view, although the districts' voluntary integration programs were influenced by race, "[n]ot every decision influenced by race is equally objectionable," and "exclusive and inclusive" uses of race should not be treated the same.[138] The dissenting Justices contended that "[c]ontext matters when reviewing race-based governmental action."[139] They further argued that the Seattle and Louisville plans "differ dramatically" from those in which "race-conscious limits stigmatize or exclude; the limits at issue [here] do not pit the races against each other or otherwise significantly exacerbate racial tensions" as they did in *Brown*.[140] Therefore, they contend that since the school districts' present day race-conscious programs are not motivated by the ill intent to further stigmatic harms through the maintenance of a racial caste system, these programs should be upheld. "The context here is one of racial limits that seek, not to keep the races apart, but to bring them together," and as such, the Court should treat these inclusive programs with more deference and permissibility.[141]

In sharp contrast, Justice Thomas found that "as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional."[142] In this, Justice Thomas has remained steadfast to his stringent views of dismantling the role of race in public education.[143]

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association, suspension from school of a student with behavioral and emotional problems, segregation from the general student body of students with AIDS, the constitutionality of a city-mandated road closure at the border between a white neighborhood and a black neighborhood, treatment of a trust intended to benefit only white people, the constitutionality of a rule prohibiting co-educational teams in high school contact sports, treatment of minority principals when schools close as a result of a plan to end desegregation, racial discrimination as a form of unfair labor practice, employment discrimination, housing discrimination, denial of supplemental social security income benefits to patients of public mental hospitals, treatment of children benefiting from aid to families with dependent children, and a state statute criminalizing miscegenation.") (internal citations omitted).

136. *See, e.g.*, *Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting); *id.* at 2800–37 (Breyer, J., dissenting).

137. *Id.* at 2800.

138. *Id.* at 2817 (quoting Grutter v. Bollinger, 539 U.S. 306, 326–327 (2003)).

139. *Id.* at 2818 (quoting *Grutter*, 539 U.S. at 327).

140. *Id.*

141. *Id.*

142. *Id.* at 2770–71 (Thomas, J., concurring).

143. *See Grutter*, 539 U.S. at 349–51 (Thomas, J., concurring in part and dissenting in part);

"The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[144] He adamantly contended that what the dissenters call "benign" racial integration is not actually benign after all.[145] Justice Thomas defines racial stigma more broadly to include the effects of *any* use of race by the government in granting or denying public benefits. Reasserting his concurrence in *Adarand Constructors, Inc. v. Pena*, Justice Thomas reminded the dissenters, "every time the government uses racial criteria to 'bring the races together' someone gets excluded, and the person excluded suffers an injury solely because of his or her race."[146] Under this view, the simple fact that the government is using race is offensive, as it causes stigmatic harms on either one racial group or another, regardless of the government's purported "pure motives."[147]

1. STIGMATIC HARMS ARE INHERENTLY SUBJECTIVE AND MAY NOT GUIDE THE COURT'S EQUAL PROTECTION JURISPRUDENCE

As the foregoing colloquy among the *Parents Involved* Justices demonstrates, the concept of "stigmatic harm" is inherently subjective and indeterminate, and thus cannot serve as the basis of determining the legitimacy of a governmental action. What one would consider a stigma does not ring true for another,[148] and stigmatic harms may change depending on popular perceptions of societal acceptance.[149] This practi-

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Gratz v. Bollinger, 539 U.S. 244, 281 (2003) (Thomas, J., concurring); Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring).

144. *Parents Involved*, 127 S. Ct. at 2770 (Thomas, J., concurring) (quoting *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part)).

145. *Id.* at 2775 (Thomas, J., concurring).

146. *Id.* (Thomas, J., concurring) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)) (internal citations omitted).

147. *Id.* at 2770 (Thomas, J., concurring).

148. Lauren E. Winters, *Colorblind Context: Redefining Race-Conscious Policies in Primary and Secondary Education*, 86 OR. L. REV. 679, 693 (2007) (While districts engaged in racial integration to achieve "diversity benefits" in their schools, "[m]any Americans began to believe that affirmative action meant preferential treatment for racial and ethnic minorities who were less qualified than their white counterparts.").

149. Today's debates regarding race-relations in America reflect a variety of differing viewpoints on which groups actually "benefit" from affirmative action policies. The "Bill Cosby position" is "that blacks not rest on victimhood but take 'full responsibility for [their] lives.'" Barack Obama has publicly rejected Rev. Jeremiah Wright's racial comments as "wrong" and "divisive." At the same time, "[m]ost working- and middle-class [white] Americans don't feel privileged by race." "Segments have entrenched anger, too—over forced busing, welfare, and

cal difficulty of assessing the stigmatic impact of race-based policies on a racially diverse society is directly illustrated by the Court's own divisiveness on the issue.

The dissenting Justices cite to a series of race-based programs that were struck down by the Court because they were deemed to impose a "racial stigma" upon members of one racial group.[150] In fact, Judge Kozinski, concurring in the Ninth Circuit's decision upholding Seattle's racial integration programs, noted that although the denial of a student's application to attend the school of his choice "may be disappointing, [ ] it carries no racial stigma and says nothing at all about that individual's aptitude or ability."[151] He further colorfully noted that a racial integration program designed by the local community is "a plan that gives the American melting pot a healthy stir without benefiting or burdening any particular group."[152]

Taking a step back to view the larger ramifications of race-based governmental decisionmaking, however, yields a much clearer picture. The very fact that a student is denied the school of his choice based on his race results in racial stigma. As Judge Kozinski correctly observed, the school's decision to exclude the student from admission said "nothing at all about that individual's aptitude or ability." Rather, it says everything about the student's race—specifically, that he was not of the race his preferred school wanted or valued. Racial stigma not only occurs when the government intends to subjugate one race below another; it occurs as a natural byproduct of any racial line drawing by the government. As the *Parents Involved* Court explained, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[153]

Nearly thirty years ago, Professor Van Alstyne perceptively noted the overall danger of allowing the government to use race in its decision-

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racial preferences." Editorial, *Not so Black and White*, CHRISTIAN SCIENCE MONITOR, Mar. 28, 2008, at 8, *available at* http://www.csmonitor.com/2008/0320/p08s01-comv.html (last visited February 7, 2009).

150. *Parents Involved*, 127 S. Ct. at 2818–19 (Breyer, J., dissenting) (citing Strauder v. West Virginia, 100 U.S. 303 (1880); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Batson v. Kentucky, 476 U.S. 79 (1986); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Shaw v. Reno, 509 U.S. 630 (1993); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Johnson v. California, 543 U.S. 499 (2005)).

151. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring), *rev'd* 127 S. Ct. 2738 (2007).

152. *Id.* at 1196.

153. *Parents Involved*, 127 S. Ct. at 2767 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

making. He observed that "[i]n the past, the consequences of admitting race-based laws as a proper constitutional foundation for regulating and allocating have been overwhelmingly dismal."[154] He further explained, "[r]ace-based laws have so generally tended to yield by-products and side effects so vastly more divisive and wretched than the benefits that were supposed to be forthcoming, moreover, that a Court originally not predisposed to veto racial experiments subsequently reversed itself [*Brown*'s overturning of *Plessy*]—despite the popular anger and resentment that were certain to follow."[155]

Brown would never countenance subjecting constitutional liberties to the whim of indeterminate and subjective notions of stigmatic harms. As the Court noted in *Adarand*,[156] "[a] free people whose institutions are founded upon the doctrine of equality, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons."[157]

Deference to governmental officials to enact race-based policies is unwarranted under strict scrutiny review, regardless of whether a court believes those policies may create subjective perceptions of "stigma."[158] The *Parents Involved* Court agreed, affirming the application of nondeferential strict scrutiny on all governmental racial classifications, whatever the underlying motive.[159] As Justice Thomas explained, "[p]urportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking"—and both are subject to the highest level of strict scrutiny.[160] As one commentator has pointed out, "[t]o squeeze human beings of varying talents, interests, and backgrounds into an undifferentiated category of race is to submerge what should matter most about us under what should matter least."[161] This is the fundamental reason that any racial line-drawing by government must be subjected to strict scrutiny, irrespective of the wide array

154. Van Alstyne, *supra* note 84, at 778.

155. *Id.*

156. 515 U.S. 200 (1995).

157. *Id.* at 227 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

158. *See* Robert Carter & Thurgood Marshall, *The Meaning and Significance of the Supreme Court Decree* (1955), *reprinted in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 157, 160 (Mark V. Tushnet ed., 2001) (praising *Brown* for its "important shifting" of the burden of proof onto government).

159. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751–52 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.") (citing Johnson v. California, 543 U.S. 499, 505–06 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

160. *Parents Involved*, 127 S. Ct. at 2774 (Thomas, J., concurring).

161. J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 163–64 (2007).

of intended or unintended "stigmatic harms" that may result from such policies.

2. RACE-BASED POLICIES DESIGNED TO PREVENT STIGMATIC HARMS ARE NOT BENIGN USES OF RACE

Race-based governmental decisionmaking is inherently prejudicial, inevitably embodying societal stereotypes and biases. Racial stereotypes and biases are offensive when acted upon by private individuals, but they are especially offensive and dangerous when employed by the government.[162] The Jim Crow era was an especially heinous chapter of American history because our government itself institutionalized and perpetuated private racial prejudices. "The whole sad saga of the early African American experience teaches that racial decisions by the state remain unique in their capacity to demean."[163] Even in the aftermath of Jim Crow, the Supreme Court felt a need to caution the government about yielding to popularly held racial attitudes when it warned that "[p]ublic officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."[164] In eliminating school segregation, *Brown* endorsed the concept of individual autonomy free from state-imposed racial categories.

The constitutional presumption against governmental racial line-drawing stands as firmly today as it did in *Brown*, regardless of a purported "benign" purpose by the government. In the 1984 case of *Palmore v. Sidoti*,[165] the Court reversed a lower court's decision granting child custody to the father on the basis that the child's Caucasian mother was remarried to an African American man, and that it would not be in the "best interests of the child" to be raised in a home with multiracial parents.[166] Indeed, the reality at that time was that widely held private prejudices might in fact have adversely affected the child's interests, and the lower court's decision was well-intended in trying to protect the

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162. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." (citing Pers. Adm'r. of Mass. v. Feeney, 442 U.S. 256, 272 (1979))); *Johnson*, 543 U.S. at 507 ("[R]acial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*' . . . . By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'") (quoting Shaw v. Reno, 509 U.S. 630, 643–48 (1993)).

163. Wilkinson, *supra* note 161, at 163.

164. *Palmore*, 466 U.S. at 433 (1984) (quoting Palmer v. Thompson, 403 U.S. 217, 260–61 (1971) (White, J., dissenting)).

165. 466 U.S. 429 (1984).

166. *Id.* at 430–31.

child from the psychological harms that could result from these prejudices. Addressing this concern in specific terms, the Court noted

> [i]t would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.[167]

In that regard, the lower court could be said to have acted reasonably and, according to the judicial record, was genuinely motivated by the "benign" purpose of safeguarding the best interests of the child. Nonetheless, the Supreme Court unequivocally declared, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[168] Private racial prejudice cannot justify state-mandated racial classifications. State-sanctioned racial line-drawing is dangerous and inherently prejudicial, regardless of whatever benign or well-intended motives are underlying them.[169]

As demonstrated by the variety of amicus briefs filed on behalf of both sides in *Parents Involved*,[170] the psychological, emotional, and mental harms that result when government engages in racial line -drawing are numerous and often unintended by policymakers. Even when race-conscious policies intend to help all groups rather than harm anyone in particular, they invariably leave damaging race-related side effects.[171]

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167. *Id.* at 433.

168. *Id.*

169. *See, e.g.*, Johnson v. California, 543 U.S. 499, 502 (2005) (The Court applied strict scrutiny to a state policy of racially segregating prison inmates, even though its purpose was to prevent violence caused by racial gangs).

170. There were a total of sixty amicus briefs filed in *Parents Involved*, including race-based organizations such as the Asian American Legal Foundation, Asian American Justice Center, Asian American Legal Defense and Education Fund, Black Women Lawyers' Association of Chicago, Latino Organizations, and NAACP Legal Defense Fund. Supreme Court Docket No. 05-908, http://www.supremecourtus.gov/docket/05-908.htm (last visited Feb. 8 2009).

171. *See, e.g.*, Brief of the Asian American Legal Foundation as Amici Curiae in Support of Petitioners at 16, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 and 05-915) ("While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused obvious harm. . . . 'Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends.'" (quoting *Group Preferences and the Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Lee Cheng, Secretary of the Asian American Legal Foundation))); Brief of Various School Children from Lynn, Massachusetts, Who Are Parties in Comfort v. Lynn School Committee as Amici Curiae in Support of Petitioners at 9, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 and 05-915) ("Using race-based student assignments

B. *Justice Kennedy's Race-Neutral Alternatives Must Still Pass Muster Under the Court's Equal Protection Clause Jurisprudence*

Justice Kennedy's concurrence in *Parents Involved* provided the fifth vote necessary to strike down the school districts' assignment plans, on the grounds that they were not sufficiently narrowly tailored to satisfy strict scrutiny. Rather than taking the strong color-blind stance held by the plurality, however, Justice Kennedy left the door ajar for race-consciousness to creep into public school assignments under limited circumstances. Justice Kennedy reasoned that the assignment plans before the Court failed strict scrutiny for two reasons: (1) the districts did not first consider "facially race-neutral means" and (2) they did not undergo a "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[172] In Justice Kennedy's view, either of these two approaches could have made the plans sufficiently narrowly tailored to satisfy strict scrutiny.

Justice Kennedy's second approach "would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools."[173] Thus, while agreeing with the plurality that school districts may not differentiate individual students based on race when drawing attendance zones, Justice Kennedy did not foreclose the use of generalized, race-conscious methods.[174] According to the Justice, this means that if race-conscious measures are to be used at all, then they must be used "without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[175]

Justice Kennedy is more descriptive of his first approach and provides guidelines of race-neutral measures that districts may employ in order to prevent racial isolation in their schools. These include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."[176] He stresses that in implementing these measures, the districts must not assign "to each student a personal designation according to a

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to achieve diversity based purely on race assumes that a child will contribute in a certain way to the classroom, without any examination of the individual child.").

172. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2793 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

173. *Id.*

174. *Id.* at 2792.

175. *Id.*

176. *Id.*

crude system of individual racial classifications."[177] As support for the constitutionality of these race-neutral alternatives, Justice Kennedy cites to the Court's precedent with regard to gerrymandering and the state's ability to draw electoral boundaries.[178] He reasons that these facially neutral measures should be employed "with candor and with confidence" without constitutional problems.[179]

Some proponents of voluntary integration may have overstated the constitutional permissibility of Justice Kennedy's facially race-neutral alternatives.[180] As Justice Kennedy points out, facially neutral measures require "a more searching inquiry" before strict scrutiny applies, but courts are nonetheless ultimately bound by the most exacting level of judicial review.[181] If facially neutral measures are being used simply as a pretext for racial discrimination by the state, then strict scrutiny applies with equal force.[182] Notably, in *Columbus Board of Education v. Penick*,[183] the Court struck down a school district's race-neutral policy of using "optional attendance zones, discontiguous attendance areas, and boundary changes; and the selection of sites for new school construction" because they were "intentionally segregative" and "had the foreseeable and anticipated effect of maintaining the racial separation of the schools."[184]

While racially disproportionate effects of a facially race-neutral policy can be shown with empirical data, proving that the purpose behind the policy was actually a "pretext for racial discrimination" is more difficult. For example, in the context of allegedly racially-motivated, but factually race-neutral, decisions by a zoning board, the Court has required a showing that the challenged actions would not have occurred in the absence of a racially discriminatory purpose—i.e., discriminatory motivation must not only be established, but shown to be

177. *Id.*

178. *See id.* ("[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . . Electoral district lines are 'facially race neutral' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" (quoting Bush v. Vera, 517 U.S. 952, 958 (1996))).

179. *Id.*

180. *See, e.g.*, Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AM. L. 385, 419 (2008) (Justice Kennedy's "clear formulation of the appropriate instances in which courts may find that a state agency has met its burden of showing a compelling governmental interest provides future courts with the ability to uphold race-preference challenges beyond the context of higher education."); *see also* Kaufman, *supra* note 78, at 734–40 (identifying the race-neutral alternatives in achieving racial diversity under *Grutter*).

181. *See Parents Involved*, 127 S. Ct. at 2792 (quoting *Bush*, 517 U.S. at 958).

182. *See, e.g., id.*; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

183. 443 U.S. 449 (1979).

184. *Id.* at 461–62.

the "but-for" cause of the board's actions."[185]

In cases involving gerrymandering of voter districts, the Court has been somewhat more stringent in its review of facially neutral policies affecting racial balancing. In these cases, for a constitutional challenge to succeed, racially discriminatory intent need not be the "but-for" cause of the creation of the boundaries in question, but must be shown to be the authorities' "predominant motivation"— i.e., in order for the district boundaries to be invalidated, any non-racial motivations must be shown to have been subordinate to racial ones.[186] If Justice Kennedy's analogy of school district line-drawing with voter district line-drawing is taken as the relevant standard, school districts therefore may not employ facially race-neutral measures when they are predominately motivated by racial balancing.[187]

Predictably, courts will need to engage in their own line-drawing in determining which race-neutral alternatives are predominately racially motivated, and which are not. To be sure, Justice Kennedy's opinion invites further litigation regarding the manner and extent to which school districts may implement race-conscious policies to achieve non-remedial integration in their schools.

V. CONCLUSION: REALIZING *BROWN*'S SPIRIT OF RACIAL NEUTRALITY BEYOND *PARENTS INVOLVED*

"To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."[188]

Parents Involved provides increased hope for realizing *Brown*'s ultimate goal of racial neutrality in our public school system. Although the severely divided opinion leaves much room for further interpretation, the majority of the Court in *Parents Involved* made three points clear: voluntary integration plans, like any governmental racial classifications, are subject to strict scrutiny,[189] school districts may not classify individ-

185. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

186. *See Bush*, 517 U.S. at 958 ("Strict scrutiny applies where 'redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles,' or where 'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines,' and 'the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'") (internal citations omitted).

187. *See also* Johnson v. California, 543 U.S. 499, 512 (2005) ("[I]n the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race.").

188. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

189. *See* Section III.A. *supra*.

ual students according to state-defined racial groups,[190] and race-neutral alternatives are still subject to the strictures of the Court's equal protection jurisprudence.[191]

In present-day America, racial lines are continuously blurring and diversity has become a multifaceted concept composed of ethnic, social, and economic factors. Moreover, the racial and ethnic diversity of America is drastically evolving to encompass a multiplicity of groups and sub-groups of different cultures, traditions, and ethnicities. With continuing immigration and globalization, Americans may no longer be identified by government-imposed labels of identity. Second-generation immigrant Americans identify themselves differently than their first-generation counterparts, just as those born in the "millennia generation" exhibit different characteristics and values than those in the "baby-boomer generation." Americans today are living in a drastically different society, racially and culturally, than in the time of the dual black-or-white system of segregation, yet *Brown*'s spirit of racial neutrality is all the more compelling today. To allow the government to categorize American citizens into arbitrarily defined racial groups for purposes of differential treatment would be an insult to the spirit of *Brown* and a repudiation of our society's progress towards true diversity.

190. *See* Section IV.A. *supra.*
191. *See* Section IV.B. *supra.*