THE ONLY WAY: ROBERTS' STAND ON THE PREVENTION OF RACIAL DISCRIMINATION

Jennie Bauman*

I. INTRODUCTION

Chief Justice Roberts concluded a recent opinion with these words: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[1] Although a plurality, *Parents Involved in Community Schools v. Seattle School District No. 1* is the newest opinion in a line of cases demonstrating the Court's gradual aversion to affirmative action and to using race as a criterion for determining school placements. The opinion is not a complete departure from previously-decided cases, but it is a strong statement by the Roberts Court. The Court determined that racially-charged school admissions plans were not narrowly tailored.[2] Four Justices, led by Chief Justice Roberts, took an even greater stand, demonstrating their abhorrence of affirmative action. They determined that there is no per se compelling interest in preventing racial discrimination in schools.[3] Rather, such compelling interest can only exist in limited situations.[4] *Parents Involved* does not completely overrule *Brown v. Board of Education* and its progeny, but it does show that the Court will limit the holding of *Brown* and not continually expand it. It will affect states by limiting their power in segregating, integrating, and taking affirmative action in their administrative decisions in the realm of education. But its importance does not stop there; the implications of this case are far-reaching. Like other racial discrimination cases have demonstrated in the past, this case may be implemented in a virtually endless number of ways in the future. It may very well be the newest signpost in the continuing death of affirmative

*J.D. Candidate, Baylor University School of Law, 2009; B.A. History & B.A. Chemistry, Texas A&M University, 2005. The author would like to thank Dr. Robert Bauman, Professor David Guinn, and Matthew Cole for the support and help they provided in the writing of this Note.

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

[2] *Id.* at 2755.

[3] *Id.* at 2769 (Thomas, J., concurring).

[4] *Id.* at 2752–53 (majority opinion).

action not only in education but in other areas such as employment, housing, and voting rights.

This Note traces the history of Supreme Court decisions on racial discrimination. It discusses the changing American stance on issues from *Brown* through the newer affirmative action opinions. Then it describes the *Parents Involved* opinion, the viewpoints of each of the nine Justices, and the significance of this monumental opinion and its implications in the American society of the twenty-first century.

II. BACKGROUND AND HISTORY: THE COURT'S EVOLVING OPINIONS ON RACIAL DISCRIMINATION IN AMERICAN SCHOOLS

Since 1954, *Brown v. Board of Education* has been hailed as one of "the most important political, social, and legal event[s] in America's twentieth-century history"[5] and "one of the most celebrated civil rights cases in American history."[6] That case marked the beginning of the implementation of a growing American thought—that racial discrimination is categorically against American values.[7] In the continuing implementation of this general idea, the Court has had to answer difficult social questions about not only "separate but equal" but also, more recently, affirmative action. Notably, the landmark racial integration cases as well as the affirmative action cases are all in the context of education. These ideas typically then translate to other areas of American society.[8]

Discouraging discrimination is an important goal, but the upswing of racial integration has, perhaps, reached its zenith and has begun a slight descent. And, just as integration began in an education case, recent school discrimination cases show the Court's reluctance to infinitely extend the racial discrimination line. The Court has become increasingly aware of problems with unbridled racial integration—when such integration is forced, it feeds the problem that the Court was trying to remedy in the first

[5] J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 6 (1979).

[6] Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988).

[7] Yousef T. Jabareen, *Law, Minority, and Transformation: A Critique and Rethinking of Civil Rights Doctrines*, 46 SANTA CLARA L. REV. 513, 564 (2006) ("[*Brown*] has opened the doors to integrated schools, integrated public accommodations, and established the principle of antidiscrimination as an integral part of American norms.").

[8] *See infra* note 10.

place. Although not without precedent, *Parents Involved* is a step away from the universal racial integration attempts that were implemented in *Brown* and is a step toward disallowing strictly racial affirmative action.

A. Racial Integration Begins with Brown v. Board of Education

The Court's racial integration movement began in full force in *Brown v. Board of Education*, marking the beginning of forced integration in American schools. However, the effects of the *Brown* opinion were not limited to simply education—*Brown* stood for the idea that racial discrimination would no longer be tolerated anywhere in America.[9] And, it was extended to other areas such as racial gerrymandering, employment, and equal housing opportunities.[10] In the next fifty years, the Court would further explain the constitutional perspective on racial discrimination, and many of the fundamental decisions were about educational segregation. It is clear from years of jurisprudence that the Court allows racial classifications and actions upon those classifications. However, such racial classifications and actions have only been allowed when they are necessary to remedy a past or present constitutional violation, such as separate but equal.[11] This has given rise in recent years to affirmative action. Far from the unanimity of *Brown*, subsequent affirmative action cases have sharply divided the Court, and often decisions are dependent on the Court's composition.[12]

The American culture in 1954 was racially and radically charged. The population and schools felt that charge, and eventually the Court had to feel it as well. The Court was thrown squarely into the controversy by *Brown v. Board of Education*, which was a consolidated case. In *Brown I*, the Court

[9] *See* Arthur Chaskalson, *Brown v. Board of Education: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503, 504 (2005).

[10] *See* Shaw v. Reno, 509 U.S. 630, 656 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters. . . ."); Franks v. Bowman Transp. Co., 424 U.S. 747, 780 (1976) (upholding a retroactive award of seniority to a class of African-American truck drivers who had been discriminated against); Hills v. Gautreaux, 425 U.S. 284, 297 (1976) (delineating federal courts' authority to remedy constitutional violations in Chicago housing market); Katzenbach v. Morgan, 384 U.S. 641, 646 (1966) (striking down a New York literacy requirement as inconsistent with Voting Rights Act of 1965 and Fourteenth Amendment).

[11] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752 (2007).

[12] *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003) (5-4 decision); Gratz v. Bollinger, 539 U.S. 244 (2003) (5-4 decision decided the same day as *Grutter*).

determined that racial discrimination was inherently wrong and that providing "separate but equal schools" for black and white children was inherently discriminatory. Separate-but-equal schools violated the Equal Protection Clause because they did not afford the same opportunities for black and white children. Soon after that decision, the Court determined in *Brown II* that American schools had to comply with the Court's decision and racially integrate their school in a reasonable amount of time. The decision was met with some reticence by the states.[13] Even the Burger Court twenty years later was ordering schools to come up with constitutional desegregation plans.[14]

And because schools did not have a good idea of what a reasonable amount of time was, the Court took another case to define it. The issue in *Swann v. Charlotte-Mecklenburg Board of Education* was the bussing of children to a white or black school in order to integrate the schools.[15] The Court determined that bussing was not in violation of the Equal Protection Clause.[16] The Court stated, "When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments."[17] Although the Court did not decide that the city in that case had to racially balance each school, such considerations were a starting point for the district court's consideration.[18]

The Court did not establish a rule against one-race schools in that case or in any case since *Brown*. In fact, the Court expressly noted in *Swann* that it was not addressing de facto desegregation. That is, it was not addressing the "myriad factors of human existence which can cause discrimination in a multitude of ways."[19] Instead, the Court was addressing when the violation is de jure, rather than de facto. And in those cases, the school district was required to maximize desegregation as much as

[13] *See* Cooper v. Aaron, 358 U.S. 1, 19–20 (1958) (ordering Arkansas to comply with *Brown*).

[14] *See* Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 440 (1976).

[15] 402 U.S. 1, 22 (1971).

[16] *Id.* at 12.

[17] *Id.* at 28.

[18] *Id.* at 25 ("Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.").

[19] *Id.* at 22.

possible.[20] The Court affirmed this idea five years later in *Pasadena v. Spangler* by pointing out that a policy that outlawed schools having a majority of minority students was not constitutional.[21] Such a policy did not take into account de facto discrimination.

Despite this clear de jure and de facto distinction, since the 1950s school districts strove beyond environments that were not discriminating in themselves, towards those that even appeared to be nondiscriminatory. In order to create the illusion of racial integration, school districts began to apply policies to promote access to schools for historically challenged socioeconomic groups. The schools began to practice affirmative action.

B. Recent Opinions on Affirmative Action

The Court's aversion to affirmative action stems from the idea that race-based plans burden nonminority persons while benefiting minority persons who may not have ever suffered any discrimination themselves. Always professing to be policies of nondiscrimination, affirmative action policies make decisions based on race and therefore are themselves discriminatory. As the great Justice Harlan wrote in his dissenting opinion in *Plessy v. Ferguson*, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[22]

One thread runs clearly through all of the Court's affirmative action decisions—racial diversity in education is a compelling state interest. The Court recognizes a "national commitment to the safeguarding of [academic freedoms]."[23] Especially in the context of university and graduate-level programs, diversity is one of those essential academic freedoms. For example, the Court explained in *Sweatt v. Painter*:

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[20] Some say that *Swann* erased the boundary between de facto and de jure discrimination since the Court reached out to housing segregation. L. Darnell Weeden, *Back to the Future: Should* Grutter*'s Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?*, 26 BERKELEY J. EMP. & LAB. L. 511, 516 ("Although *Swan* [sic] is generally understood as providing a remedial justification for the school integration plan in a de jure segregation state, there is no doubt that the Supreme Court would have approved a voluntary school plan designed to promote integration where de facto segregation exists." (citing *Swann*, 402 U.S. at 16)).

[21] 427 U.S. 424, 438 (1976).

[22] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[23] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., plurality opinion) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[24]

This interplay and exchange of views in the "marketplace of ideas" depends on the diversity of the student body, which in turn depends on the inclusion of people of all races as members of that body.[25]

The Court seemed clear in *Grutter v. Bollinger* and *Gratz v. Bollinger* that affirmative action programs should be allowed in the context of higher education when such plans used race only as a plus factor and not as the single deciding factor, following Justice Powell's idea in *Regents of the University of California v. Bakke*.[26] The cases were decided on the same day. And both cases were 5-4 decisions with O'Connor being the swing vote.[27] *Gratz* invalidated the University of Michigan's admission system. The system automatically gave twenty points (one-fifth of the points needed to gain admission) to each "underrepresented minority" applicant based solely on their race.[28] Applying strict scrutiny and determining that educational diversity could be a compelling state interest in some contexts, the Court determined that the plan was not narrowly tailored.[29] An automatic point system that awarded points solely on a racial basis violated the Equal Protection Clause because it did not take into account an individual student's characteristics.[30]

Grutter, on the other hand, involved the University of Michigan Law School's admission plan that used race as a plus factor in the law school's

[24] 339 U.S. 629, 634 (1950).

[25] *See Bakke*, 438 U.S. at 314–15 (Powell, J., plurality opinion); *see also* Healy v. James, 408 U.S. 169, 180 (1972); *Keyishian*, 385 U.S. at 603.

[26] Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (citing *Bakke*, 438 U.S. at 315–17 (Powell, J., plurality opinion)); Gratz v. Bollinger, 539 U.S. 244, 271 (2003) (citing *Bakke*, 438 U.S. at 317 (1978) (Powell, J., plurality opinion) (stating that racial quotas were not allowed but race could be a "plus" factor in educational admissions programs)).

[27] *See supra* text accompanying note 12.

[28] *Gratz*, 539 U.S. at 256.

[29] *Id.* at 270.

[30] *Id.* at 271–72.

holistic review of each applicant's file.[31] The law school admissions focused on all of the ways that an individual would contribute to a diverse educational body—including the student's ethnicity.[32] The Court applied strict scrutiny.[33] The Court determined that the law school had a compelling interest in having a diverse student body since diversity promoted cross-racial understanding, helped to break down stereotypes, better prepared students for a diverse workforce in society, and helped them become better professionals.[34] The Court, following in the footsteps of *Brown*, determined that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential" for "maintaining the fabric of society."[35]

The difference between *Grutter* and other affirmative action cases was that the *Grutter* plan was narrowly tailored.[36] The Court held that in order to be narrowly tailored, a plan that uses race as a factor cannot use a quota system.[37] That is, race can never be used as the sole deciding factor between two candidates.[38] Rather, when using race as a plus factor, the Court stated that Equal Protection required that a university admissions program must remain flexible enough to ensure that each applicant would be evaluated as an individual and not in a way that would make an applicant's race or ethnicity the defining feature of his or her application.[39]

[31] *Grutter*, 539 U.S. at 334.

[32] *Id.*

[33] *Id.* at 326.

[34] *Id.* at 330.

[35] *Id.* at 331–32.

[36] *Compare id.* at 334, *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding unconstitutional federal agency contracting designed to provide highway contracts to disadvantaged businesses); Shaw v. Reno, 509 U.S. 630 (1993) (holding unconstitutional a redistricting plan that was based on race); Richmond v. Croson, 488 U.S. 469 (1989) (holding unconstitutional subcontractor contracts that used minority percentages); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding unconstitutional a school board's use of race in preferential treatment of layoffs).

[37] *Grutter*, 539 U.S. at 335–36 (distinguishing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–17 (1978) (Powell, J., plurality opinion), in which Justice Powell said the Harvard admissions system was not the "functional equivalent of a quota" because the admissions counsel had not set minimum goals of minority enrollment).

[38] *Id.* at 335–36.

[39] *Id.* at 336–37.

The affirmative action allowed in *Grutter* has guided not only a plethora of school districts, but also employers' affirmative action.[40] In fact, "major American businesses" filed amicus briefs to support the affirmative action program of the school in *Grutter*, demonstrating the importance of the educational decision in the context of employment.[41]

III. THE COURT'S NEWEST VIEW: *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1*

One of the surprising things about *Parents Involved* was that the Court granted certiorari at all. Almost identical cases had been appealed and rejected in 2005, when Justice O'Connor was still on the Court. And even with the placement of Justice Alito, the Court still took its time in granting certiorari, reviewing each case multiple times before deciding to hear it.[42] Once they made that decision, the Justices were faced with a difficult question that would have broad social implications.

The case was about two school systems on opposite ends of the country—one in Washington, the other in Kentucky—that both used race as a factor to assign elementary and high school children to schools. The question posed in the consolidated case was which road the Court would now follow—would it continue to allow a version of affirmative action or would it determine that all school plans that assigned schoolchildren to schools based, in part at least, on their race were unconstitutional? Many feared that since O'Connor, the swing vote in *Grutter* and *Gratz*, had been replaced by Justice Alito in 2006, affirmative action would no longer be constitutional at all.[43] This worry was compounded by Alito's historically conservative record as a judge on the Third Circuit in racial discrimination

[40] Jessica Bulman-Pozen, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1410 (2006).

[41] *Grutter*, 539 U.S. at 330–31(citing Amicus Briefs of 3M et al. and General Motors Corp.); *see also* Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 2 n.3 (2005) ("No major American corporation—indeed, virtually no major American institution of any kind—filed a brief in opposition to affirmative action.").

[42] The justices considered the Seattle case six times and the Jefferson County case seven times before accepting them for review. Linda Greenhouse, *Court To Weigh Race As a Factor in School Rolls*, N.Y. TIMES, June 6, 2006, at A1.

[43] *See* Jeffrey Rosen, *The Way We Live Now*, N.Y. TIMES, Sept. 24, 2006, (Magazine), at 6 ("[S]ome liberals worry (and conservatives hope) that the end of affirmative action may once again be imminent.").

cases.[44] These fears proved well-founded.[45] The Court, with its new membership of Justice Alito and Chief Justice Roberts, determined that the school districts' plans were unconstitutional because they used race as a deciding factor in determining school placement.[46]

A. The Seattle, Washington Case

The city of Seattle had never had a court order that it had segregated school districts. But, sensing an unequal balance of races in Seattle schools, the School District adopted a Plan in 1998 to promote racial balancing in the public school system.[47] The Plan did not use race as a sole factor in determining where a child was placed in the public school system, but race was used as a "tiebreaking" factor in some situations.[48]

The Plan allowed students entering high school in the ninth grade to rank their preferred high schools.[49] The District preferred to give students their preference of school, but sometimes a school would be "oversubscribed"—too many children preferred that school.[50] In such cases, the District employed a series of tiebreakers.[51] The first tiebreaker was that a student with a sibling who attended their preferred school would be placed in the sibling's school.[52] The third tiebreaker was proximity of the school to the student's home.[53] But it was the second tiebreaker that drew the Court's attention; the second tiebreaker was the child's race.[54]

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[44] *See, e.g.*, Brinson v. Vaughn, 398 F.3d 225, 233 (3d Cir. 2005) (Alito, J., majority opinion) (stating that racial discrimination could exist in a criminal case even when the victim, the perpetrator, and the witnesses were all black); Williams v. Price, 343 F.3d 223, 239 (3d Cir. 2003) (Alito, J., majority opinion) (allowing testimony in habeas appeal that a juror had made a racially discriminatory comment).

[45] *See* Greenhouse, *supra* note 42, at A1 ("What has changed is the Supreme Court itself, with the retirement in January of Justice O'Connor and her replacement by Justice Samuel A. Alito Jr.").

[46] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2755 (2007).

[47] *Id.* at 2746.

[48] *Id.* at 2747.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

The District had established optimal levels of diversity.[55] The District classified students by their race by a simple scale: a child was either "white" or "nonwhite."[56] If a school was not within ten percentage points of the overall white/nonwhite racial balance, then the school was considered "integration positive."[57] Students were selected for integration positive schools by placing students whose race would "serve to bring the school into balance" into the integration positive schools.[58] For the 2000–2001 school year, there were five oversubscribed Seattle schools.[59] Three of these schools were integration positive, and the District employed the racial tiebreaker in many cases.[60] More nonwhite students were sent to these schools than would have been if the racial tiebreakers were not used.[61]

Parents Involved in Community Schools was a nonprofit organization comprised of parents whose children were assigned to schools based solely on their race.[62] The organization brought suit against the School District in the Western District of Washington, claiming violations of the Equal Protection Clause and state and federal Civil Rights Acts.[63] The district court granted summary judgment for the School District, determining that the Plan was narrowly tailored to achieve a compelling state interest of racial integration.[64] Subsequently, the Ninth Circuit withdrew its opinion and certified the state law question to the Washington Supreme Court. The state high court held that state law did not apply when the plan was racially neutral.[65] Once again, the Ninth Circuit reversed the district court, determining that the Plan was not narrowly tailored to achieve a compelling

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 2747.

[62] *Id.* at 2748.

[63] The plaintiffs claimed violations of the Equal Protection Clause, Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, and the Washington Civil Rights Act (Wash. Rev. Code § 49.60.400(1)). Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1226–27 (W.D. Wash. 2001).

[64] *Id.* at 1240.

[65] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 294 F.3d 1085, 1087 (9th Cir. 2002) (certifying question); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 72 P.3d 151, 166 (Wash. 2003) (answering certified question).

state interest.[66] The District appealed, and the Supreme Court granted certiorari.[67]

B. The Jefferson County, Kentucky Case

Jefferson County, Kentucky, unlike Seattle, had a history of segregated schools and had previously been under a desegregation decree.[68] In 2000, a district court had determined that the County no longer maintained segregated schools and dissolved the desegregation decree.[69] A year later, the county adopted its own student assignment plan.[70] The plan required non-magnet schools to have black enrollment of 15%–50%.[71] If a student was either entering or transferring into the county, their parents could indicate the elementary school of their choice.[72] Some children's parents did not indicate a school preference. In those cases, the decision of which school to assign the child to was "based on available space within the schools and the racial guidelines in the District's current student assignment plan."[73] A student that would contribute to a racial imbalance in one school would be placed in a different school.[74]

In 2002, Joshua McDonald was denied admission to an elementary school because his acceptance would have an adverse effect on the school's desegregation compliance.[75] His mother sued Jefferson County in the Western District of Kentucky claiming violations of the Equal Protection Clause.[76] Applying strict scrutiny, the district court determined that the county's plan was narrowly tailored to achieve the state's compelling

[66] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 980 (9th Cir. 2004).

[67] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 547 U.S. 1177, 1177 (2006).

[68] *See* Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, 489 F.2d 925 (6th Cir. 1973) (determining that Jefferson County maintained segregated schools); Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 762–64 (W.D. Ky. 1999) (dissolving the desegregation decree in part).

[69] Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000).

[70] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2749 (2007).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 2750.

[75] *Id.*

[76] McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 834 (W.D. Ky. 2004) (mem. op.).

interest of maintaining racially diverse schools.[77] The Sixth Circuit affirmed with no written opinion, and the United States Supreme Court granted certiorari and consolidated the case with the Seattle case.[78]

C. The Opinion of the Court

The Court decided in a plurality opinion that neither of the plans was constitutional. Five Justices (Roberts, Alito, Scalia, Thomas, and Kennedy) agreed that there was no compelling interest and that the plans were not narrowly tailored. The Court easily determined that strict scrutiny was the appropriate standard for the consolidated cases because it was a racial discrimination case.[79]

The plans did not survive strict scrutiny because they did not promote compelling state interests. But unlike the decisions in *Grutter* and *Gratz*, the Court did not determine that racial diversity in education was a compelling state interest.[80] The Court, for the first time, noted that there have only been two recognized racial state interests that are compelling: remedying the effects of past intentional discrimination and diversity in higher education.[81] Neither school was currently under a desegregation decree at the time the plans were adopted. The Court quoted *Grutter*, explaining that preventing racial discrimination may be a compelling state interest when it is part of a "broader assessment of diversity, and not simply an effort to achieve racial balance, which . . . would be 'patently unconstitutional.'"[82] The Court further distinguished *Grutter* because that case focused on diversity in the context of higher education. Higher education has a special niche in the study of constitutional law because of "the expansive freedoms of speech and thought associated with the university environment."[83] The Court has declined to extend these special

[77] *Id.* at 850, 862.

[78] McFarland v. Jefferson County Pub. Schs., 416 F.3d 513, 514 (6th Cir. 2005).

[79] *Parents Involved*, 127 S. Ct. at 2751 (citing Johnson v. California, 543 U.S. 499, 505–06 (2005)).

[80] *See* Gratz v. Bollinger, 539 U.S. 244, 246 (2003); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.").

[81] *Parents Involved*, 127 S. Ct. at 2752–53 (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992); *Grutter*, 539 U.S. at 328).

[82] *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 330).

[83] *Id.* at 2754 (citing *Grutter*, 539 U.S. at 329).

applications in the context of elementary and secondary schools, and it has determined that in those contexts diversity is not a compelling state interest.[84]

Furthermore, the Court reasoned that the purpose of the plans could not be to promote diversity, noting that if a school was half white and half nonwhite, it would be diverse according to the district's definition.[85] But, if the school was 30% Asian-American, 25% African-American, 25% Latino, and 20% white students, this would not be diverse according to the District's Plan because it would not fall within the prescribed percentages.[86]

The Court also determined that the plans were not narrowly tailored.[87] That would require a "serious, good faith consideration of workable race-neutral alternatives."[88] The Court determined that in these cases, other means would have been effective to achieve the state's goals. First, the Court noted that there was only a minimal impact of the racial classifications on school enrollment that "cast doubt on the necessity of using racial classifications." [89] In Seattle, over one third of the times that the racial tiebreaker was used, the student was placed in the same school in which he would have been placed had the racial tiebreaker not been used.[90] In Jefferson County, only five percent of students did not get their first or second school choice.[91]

D. Four Justices Strongly Dislike Affirmative Action

Four Justices (Roberts, Scalia, Alito, and Thomas) determined that while racial diversity and racial balancing were not compelling ends in themselves for the sake of racial integration, there may be a compelling state interest in the educational benefits that racial diversity provides.[92] The schools argued that there were various test scores and statistics that showed

[84] *Id.*
[85] *Id.* at 2759.
[86] *Id.* at 2754.
[87] *Id.* at 2755.
[88] *Id.* at 2760 (quoting *Grutter*, 539 U.S. at 339).
[89] *Id.*
[90] *Id.* at 2759–60.
[91] *Id.* at 2760.
[92] *Id.* at 2758–59.

that the racial diversity was beneficial to students.[93] But, the Justices emphasized that racial balancing is not a compelling end in itself:

> Allowing racial balancing as a compelling end in itself would "effectively assure that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision making such irrelevant factors as a human being's race' will never be achieved." An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture."[94]

Justice Thomas separately pointed out that educational means to justify racial balancing are not needed for African-American students to succeed.[95] Further, the four Justice plurality opined that the goal of racial balancing had no logical stopping point, and many unconstitutional provisions could be justified by the abstract goal of promoting racial balancing.[96] Such a slippery slope should not be encouraged.

However, the Justices still contended that the plans were not narrowly tailored to achieve this interest of racial diversity. There was no reason to believe that a balance of 31%–51% was based on the schools' desire to achieve an education benefit. Instead the optimal levels of racial balance were based on racial diversity numbers and demographics of the school districts.

Roberts pointed out that historical segregation could not be used in this case to prove the state's compelling interest for the simple fact that there is no history of racial segregation in Seattle.[97] And, the desegregation decree had already been completed in Jefferson County when its plan was implemented.[98] Nor was there any compelling interest as there was in

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[93] *Id.* at 2755.

[94] *Id.* at 2758 (citing City of Richmond v. Croson Co., 488 U.S. 469 (1989) (O'Connor, J., plurality opinion); Metro Broad., Inc. v. FCC, 497 U.S. 547, 614 (1990) (alterations in original) (citations omitted)).

[95] *Parents Involved*, 127 S. Ct. at 2776 (Thomas, J., concurring).

[96] *Id.* at 2758 (majority opinion).

[97] *Id.* at 2752.

[98] *Id.*

Grutter because this was not an instance of higher education—the plans in these cases dealt with elementary and high school education. Roberts clearly decided "[t]he present cases are not governed by *Grutter*."[99] The Court discussed in great length, arguing against Breyer's dissent, that the Equal Protection Clause does not protect groups of people; rather, it protects individuals.[100] The opinion ends with a resounding statement that shows that Roberts is committed to ending racial discrimination—and that he will not budge on this firm belief. Chief Justice Roberts ended the opinion with a call to racial equality, harking back to America before *Brown*:

> What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? . . . What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?
>
> . . . .
>
> 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 . . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[101]

E. Justice Kennedy's Concurrence

Kennedy, the swing vote of the plurality decision, believed that the school districts did have a compelling interest in promoting racial diversity in their schools by enacting the Plans: "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[102] Kennedy followed the Court's prior decisions of *Bakke* and *Grutter*; he did not join the four Justices who believed that the school

[99] *Id.* at 2754.

[100] *Id.* at 2765 (Thomas, J. concurring) (quoting *Bakke*, 438 U.S. at 289 (Powell, J., plurality opinion)).

[101] *Id.* at 2767–68.

[102] *Id.* at 2789 (Kennedy, J., concurring).

districts did not have a compelling interest.[103] Rather, he sharply criticized the plurality opinion as being "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[104]

However, Kennedy agreed with the four Justices that neither the Washington plan nor the Kentucky plan was narrowly tailored to achieve that interest in promoting racial diversity.[105] He pointed out that Washington's classification of a student as "white" or "nonwhite" did not promote racial diversity because there are many racial minorities not represented in such black and white categories.[106]

Kennedy was concerned with the broad language that had denied Joshua the school of his choice in Jefferson County, and he pointed out that even in this limited instance the county could not describe how it had implemented its goal in a narrowly tailored fashion.[107] Kennedy suggested that the plan could be narrowly tailored if the schools had considered race as only one of several factors as the school did in *Grutter* or if the school district lines had been drawn in a more racially diverse way as electoral districting lines are drawn.[108]

F. Justice Breyer's Dissent

Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg.[109] He wrote in astonishment that, in his view, the Court was abandoning *Brown* and its progeny.[110] He applauded both of the school districts for their efforts in comporting with *Brown*.[111] He decided that the purpose of the Plans was to continue *Brown*'s legacy.[112] Breyer also agreed with the majority's use of a strict standard, although he did not call it strict scrutiny.[113] He believed that "racial integration" is a compelling state

[103] *Id.*
[104] *Id.* at 2791.
[105] *Id.* at 2790.
[106] *Id.* at 2790–91.
[107] *Id.* at 2790.
[108] *Id.* at 2794.
[109] *Id.* at 2800 (Breyer, J., dissenting).
[110] *Id.*
[111] *Id.* at 2802.
[112] *Id.* at 2837.
[113] *Id.* at 2819.

interest for three reasons: (1) the state has a historical and remedial interest in righting the past wrongs of segregation; (2) there is an education interest as studies demonstrate that children learn better in racially integrated environments; and (3) there is a democratic interest in exposing children at an early age to racial diversity because they will be exposed to it for the rest of their lives.[114]

Further, Breyer believes that the Plans in these cases were narrowly tailored to achieve that interest. He distinguished *Grutter* and other decisions in which racial balancing plans and policies were upheld, pointing out that those cases did not involve any element of choice.[115] In Seattle, on the other hand, "*Choice* . . . is the 'predominant factor' in these plans. *Race* is not."[116] About eighty percent of the school placement decisions were not based on race at all; they were based on choice.[117] Breyer criticizes the majority's use of the 30/25/25/20 racially integrated hypothetical, stating that it was conjured up by the Court and should not be determinative of the Plan's fate.[118]

Breyer was especially concerned with the effect that this decision would have on school districts in the future. The Court promoted racial integration for decades and now it did not allow a plan that purported to promote racial integration.[119] This showed, according to Breyer, that there was no stability. School districts, cities, counties, and states would not now know what they could do to construct an appropriate and constitutional school assignment plan.[120]

IV. A LOOK AT THE FUTURE—*PARENTS INVOLVED* APPLIED

The significance of the *Parents Involved* opinion should not be overlooked. The opinion shows that the majority of the Court is reticent in extending previous affirmative action cases to elementary schools; affirmative action, while it may prove to be important in some contexts, has a limited application in the future. The opinion also demonstrates the

[114] *Id.* at 2820–22.

[115] *Id.* at 2824.

[116] *Id.* at 2825 (quoting Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (emphasis original)).

[117] *Id.*

[118] Of course, this ignores the purpose of narrowly tailored, which calls for the Court to decide if any other conceivable plan would be more narrowly tailored than the instant plan.

[119] *Parents Involved,* 127 S. Ct. at 2836 (Breyer, J. dissenting).

[120] *Id.* at 2835–36.

determination of the Roberts Court to stick to conservative ideals, even when it costs the majority. Although Roberts, Scalia, Thomas, and Alito could have agreed to a narrower holding and commanded a majority of the Court, they decided to take a stronger stance. It is this stance—the unwillingness to give an inch of their ideals—that makes *Parents Involved* an important opinion.

A. The Significance of Parents Involved

The importance of *Parents Involved* is to not only affirm the *Gratz* and *Grutter* negative views of affirmative action, but also to expand and strengthen that dislike. Its significance is not only what it did but also what it did not do. The Court could have won Kennedy over and thus made the decision a majority opinion in all respects. But it did not. *Parents Involved* did not determine, as the Court had in both Michigan cases, that racial diversity was a compelling state interest in the context of education. Instead, not reserving judgment, the Court determined that racial diversity was only a compelling interest for educational decisions in two limited circumstances: higher education and past segregation.[121] Furthermore, the Court criticized the school districts' proffered interest as one that would "justify the imposition of racial proportionality throughout American society."[122] The case could have been decided easily on the narrowly tailored issue without addressing, or more liberally considering, the compelling interest issue. The Court would have reached the same outcome for the school districts in these cases, and Roberts would have pulled Kennedy to the majority. But Roberts departed from his normal love for incremental change by taking a stand. He may have lost the majority, but his unwillingness to compromise demonstrates a possible new direction for the Court.[123]

[121] *Id.* at 2752–53 (majority opinion).

[122] *Id.* at 2757.

[123] Roberts' stand shows that this is his Court and not Kennedy's even though Kennedy has replaced O'Connor as the swing vote in many cases. In 2007, twenty-four of sixty-eight cases were 5-4 decisions. In all of them Kennedy was in the majority. Roberts did not allow Kennedy to dictate his will in this case. Roberts nobly stood by principles and reaffirmed the Court's tradition that children should not be judged based on the color of their skin.

Perhaps it is no surprise that Roberts took such a stance on racial discrimination—he has a history of dislike for racial discrimination.[124] While former Chief Justice Rehnquist has been criticized as being insensitive toward racial discrimination, Roberts has strong views opposing it.[125] For example, Roberts stated in 2006, "It's a sordid business, this divvying us up by race."[126]

Importantly, *Parents Involved* also demonstrated a conservative view on preventing racial discrimination. The majority of the Court limited the times when preventing racial discrimination is a compelling state interest. Rather than merely stating generally that prevention of racial discrimination was a compelling state interest, the Court narrowly determined that such prevention was only a compelling state interest in two cases.[127] This shows the Court's aversion to allowing affirmative action programs that deal solely with the basis of race; it limits the Court's past holdings to a more conservative viewpoint. Now, the uncertain legacy of the Michigan cases has been affirmed by the Roberts' Court, and it has been moved to an even more conservative viewpoint.[128] This and the Roberts Court's other 2007 decisions are "major steps to the right." They are "major conservative triumphs."[129]

One possible explanation for this conservative stance is the temporal distance between America today and America in 1950. African-Americans of today have not faced the horrid discrimination that those of their race experienced early in the twentieth century. There is at least some support

[124] League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2663 (2006) (Roberts, J., dissenting) ("It's a sordid business, this divvying us up by race.").

[125] As a law clerk for Justice Robert Jackson in the early 1950s—when the Court was considering the historic *Brown v. Board of Education* school desegregation case—Rehnquist wrote a memo defending the infamous 1896 decision, *Plessy v. Ferguson*, which established the separate-but-equal doctrine. Rehnquist noted, "That decision was right and should be reaffirmed." However, there is some dispute about whether or not these views were Rehnquist's. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 195–96 (1979).

[126] *League of United Latin Am. Citizens*, 126 S. Ct. at 2663 (Roberts, J., dissenting).

[127] *Id.* at 2752–53.

[128] *See* Girardeau A. Spann, *The Dark Side of* Grutter, 21 CONST. COMMENT. 221, 226–27 (2004) ("The precedential value of *Grutter* is uncertain because . . . Justice O'Connor has become the swing vote on the issue of affirmative action.").

[129] Erwin Chemerinsky, *An Overview of the October 2006 Supreme Court Term*, 23 TOURO L. REV. 731, 735 (2008).

for this thought in *Bakke* and other opinions that emphasize the problems with affirmative action—that employers and schools applying policies of affirmative action are treating people as a class or group rather than as individuals. *Grutter* itself addresses the issue by disallowing plans that are not narrowly tailored—plans that do not address systemic discrimination.[130] The America of the twenty-first century is not the same America as the racially-charged environment it was fifty years ago, and the Court seems to be recognizing this fact with its growing intolerance of affirmative action. As Justice Scalia noted over a decade ago:

> At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time.[131]

Scalia believed, even in 1992, that America was close to the time that righting past wrongs was absurd.[132] *Parents Involved* marks the Court's opinion that perhaps that time has come. Roberts has commandingly limited the state's interest to two narrow categories: racial diversity to the context of higher education and remedying past wrong. *Parents Involved* itself recognizes that this past wrong could not be surmised; rather, it has to be proved from past desegregation orders.[133]

Discrimination, as Chief Justice Roberts realizes, does not merely exist when one person is given separate-but-equal education. Discrimination exists when determinations are made simply on the basis of the color of a person's skin. *Parents Involved* is not only a broad policy statement but a grounding of the Fourteenth Amendment. As pointed out by J. Harvie Wilkinson III, a Fourth Circuit judge:

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[130] *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

[131] Freeman v. Pitts, 503 U.S. 467, 506 (1992) (Scalia, J., concurring); s*ee also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring).

[132] *Freeman*, 503 U.S. at 506.

[133] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752 (2007) (pointing out that the Seattle school district could not be remedying the past effects of racial discrimination because there had been no history of segregation in the county and noting that the Jefferson County school district had already remedied its segregation in the past).

> The Roberts rejoinder is effective because it is grounded in text, not judicial policy or predictive calculus. To wit the Fourteenth Amendment: "nor shall any State [Seattle and Louisville] . . . deny to any person [any schoolchild] within its jurisdiction the equal protection of the laws [the right to be treated equally—without regard to race—by the state]."[134]

Roberts follows the rhetoric of great African-Americans such as Martin Luther King, Jr., who dreamt of a world in which his children would "not be judged by the color of their skin but by the content of their character,"[135] and of Frederick Douglass, who declared:

> American people have always been anxious to know what they shall do with us . . . . Do nothing with us! Your doing with us has already played the mischief with us . . . . All I ask is, give [the black man] a chance to stand on his own . . . ![136]

Now, Roberts follows in the footsteps of these great men by clearly, eloquently, and passionately affirming their ideas a generation later with rhetoric of his own: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[137] Hopefully the Roberts Court has set precedent that will further turn their rhetoric to reality.

B. Implementation of Parents Involved *Since the Decision*

Since June 2007 when *Parents Involved* was decided, many lawsuits have been filed across the country, attempting to invalidate school placement plans like those involved in Seattle and Jefferson County. In one such opinion, *Fisher v. United States*, a district court in Arizona held a

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[134] J. Harvie Wilkinson III, *The Supreme Court, 2006 Term: Comment: The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 161 (2007) (citing U.S. CONST. amend. XIV, § 1) (alterations in original).

[135] MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 104 (James Washington ed., HarperCollins 1992).

[136] *See* Grutter v. Bollinger, 539 U.S. 306, 349–50 (Thomas, J., concurring in part and dissenting in part) (first omission in original) (quoting Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts (Jan. 26, 1865), *in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).

[137] *Parents Involved*, 127 S. Ct. at 2768.

school's plan unconstitutional in light of *Parents Involved* because, like Seattle's plan, it did not permit racial imbalances below a certain level.[138] In addition, the Court applied the limiting two-part test set out in *Parents Involved* to determine that the plan did not support a compelling state interest—the plan did not remedy a vestige of intentional segregation nor was it in the context of higher education.[139]

In another lower court decision, *Hart v. Community School Board*, the District Court for the Eastern District of New York dissolved a 1974 remedial order.[140] The court, quoting *Parents Involved* at length, explained that the recent Supreme Court opinion did not make the desegregation order of 1974 unconstitutional. The court specially noted that *Parents Involved* expressed a desire for no more discrimination. The school in *Hart* rid itself of all vestiges of discrimination, and the court dissolved the order.[141]

Additionally, just like *Brown* and other racial discrimination cases, the ramifications and applications of *Parents Involved* reach further than the context of school assignment plans. Since the opinion was issued, the Court's reasoning has been applied in sports, employment, public accommodation, health care, and criminal justice.[142]

V. CONCLUSION

Roberts took a strong stand in his first authored racial discrimination case. Although the opinion itself distinguishes *Grutter* and states that integration is important in the realm of higher education, at least some say *Parents Involved* signals "a significant adverse shift in racial desegregation policy and a continued erosion of support for integration in this country which will undoubtedly have a negative impact on higher education as

[138] Fisher v. United States, No. CV 74-90 TUC DCB, CV 74-204 TUC DCB, 2007 U.S. Dist. LEXIS 61679, at *33–34 (D. Ariz. Aug. 21, 2007).

[139] *Id.* at *40.

[140] Hart v. Cmty. Sch. Bd., 536 F. Supp. 2d 274, 284 (E.D.N.Y. 2008).

[141] *Id.* at 281.

[142] *See* Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008) (public accommodation); Equity in Athletics v. Dep't of Educ., 504 F. Supp. 2d 88, 106–07 (W.D. Va. 2007) (mem. op.) (discrimination in athletic program); Brief of Petitioner-Appellant at 42, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343) (discrimination in death penalty for rapists); Brief of Plaintiff-Respondent at 44–45, Coral Constr., Inc. v. City & County of San Francisco, No. S152934 (Cal. Oct. 19, 2007) (employment discrimination); Renee M. Landers, 29 HAMLINE J. PUB. L. & POL'Y 1, 14–19 (2007) (opining on *Parents Involved*'s application to affirmative action programs in health care).

well."[143] This strong stance on racial integration shows that the Court will not continue to allow affirmative action in every context. The Constitution will not allow students to be judged based solely on the color of their skin, even if it is in a different context than *Brown* originally meant it. Although racial discrimination will likely continue in this country for years to come, *Parents Involved* shows there is hope that it will someday end.

[143] Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 696–97 (2008).