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Colorblind Context: Redefining Race-Conscious Policies in Primary and Secondary Education

The 2007 Supreme Court term began a new era of judicial conservatism that may eliminate or restrict federal prophylactic measures aimed at protecting the victims of discrimination and the disenfranchised. On June 28, 2007, the Supreme Court addressed whether student body diversity was a compelling interest that justified the exclusive use of race to exclude children from attending the public schools of their choice.[1] In *Parents Involved in Community Schools v. School District No. 1*, and its companion case *Meredith v. Jefferson County Board of Education*, the five-to-four majority, in a plurality opinion, answered in the negative and struck down voluntary practices and policies aimed at eliminating racial segregation and isolation in public primary and secondary schools.[2]

The Court held that the exclusive use of race to make public school assignments violated the Equal Protection Clause of the Fourteenth Amendment.[3] Although the Court voted to strike down the school assignment plans as unconstitutional, the case

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1 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007).

2 *See id.* at 2768 (opinion of Roberts, C.J.).

3 *Id.* ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

revealed deep ideological differences among the Justices concerning the interpretation and application of federal law. Chief Justice Roberts, joined by Justices Alito, Scalia, and Thomas, held that the voluntary, race-conscious school plans were constitutionally flawed because race was outcome determinative in deciding which students could attend which schools.[4]

Justice Kennedy agreed with the outcome; however, he refused to join Chief Justice Roberts's opinion because he wanted to make it clear that public school officials could use race to achieve a diverse student body.[5] In his concurring opinion, Justice Kennedy warned opponents that the *Parents* decision should not be read to foreclose the benign use of race to reduce or eliminate racial segregation or isolation in public primary and secondary schools.[6] Instead, Justice Kennedy found that the school plans were constitutionally flawed because of the mechanical use of race to make the student assignments.[7]

Justices Breyer, Stevens, Ginsburg, and Souter dissented.[8] Writing for the minority, Justice Breyer asserted that the school plans were narrowly tailored because public school officials were using race to reduce the effects of segregated housing patterns that cause racial isolation among public schoolchildren.[9] Justice Breyer accused the *Parents* majority of failing to follow prior Supreme Court precedent that allowed public school officials to use race to achieve the benefits of an integrated learning environment.[10] He contended that equal protection jurisprudence does not forbid the government from using race

[4] *Id.*

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

[6] *See id.* at 2799; *see also* Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) (finding that public school officials may exclude "some minority students from schools of their choice" to maintain an integrated student body (quoting Parent Ass'n of Andrew Jackson High Sch., v. Ambach 738 F.2d 574, 577 (2d Cir. 1984)), *superseded on other grounds by* Zervos v. Verizon N.Y., Inc., 252 F.3d 163 (2d Cir. 2001)); Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 717–21 (2d Cir. 1979) (holding that the state has a compelling interest in ensuring that schools are relatively integrated), *appeal after remand*, 738 F.2d 574 (2d Cir. 1984).

[7] *Parents*, 127 S. Ct. at 2797 (Kennedy, J., concurring).

[8] *Id.* at 2797 (Stevens, J., dissenting); *id.* at 2800 (Breyer, J., dissenting).

[9] *Id.* at 2800–06.

[10] *Id.* at 2800–01, 2836–37.

exclusively in the decision-making process; instead, it prohibits the government from using race as a tool for oppression, for segregation, or for providing access to limited governmental resources.[11] He further stated that the majority had illogically denied public school officials of achieving interests that the majority recognized as compelling.[12]

The *Parents* case reflects the thirty-year ascendancy of judicial conservatives to the Court. During his confirmation hearing, Chief Justice Roberts described himself as "an umpire merely calling balls and strikes."[13] As evidenced by his opinion in *Parents*, however, the strike zone has become smaller and tighter when it comes to the voluntary use of race in the field of public education.[14]

The current group of conservative Justices led by Chief Justice Roberts has reshaped the ability of public school officials to use race as a desegregation tool without overruling *Grutter v. Bollinger*, which permits universities to use "race to achieve student body diversity."[15] In *Parents*, Chief Justice Roberts held that *Grutter* did not apply to noncompetitive, race-conscious public school assignment plans because *Grutter* addressed whether student body diversity was a compelling state interest that can justify the use of race in "'*the context of higher education*.'"[16]

This Article examines the ideological differences among the current Court over the interpretation and application of federal law, and the effect these differences have on unsettling prior

11 *See id.* at 2800, 2834–35.

12 *Id.* at 2811, 2825.

13 *See* Geoffrey R. Stone, *A Narrow View of the Law*, CHI. TRIB., Feb. 6, 2007, at C17 (describing Chief Justice Roberts's understanding of how the Court should decide issues involving constitutional law). *See generally Hearing on Roberts Nomination Before the Senate Judiciary Committee*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States), *available at* http://www.nytimes.com/2005/09/12/politics/politicsspecial1/12text-roberts.html ("Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.").

14 *Cf.* Brown v. Bd. of Educ., 347 U.S. 483, 495 & n.13 (1954) (holding that "in the field of public education the doctrine of 'separate but equal' has no place" and requiring school districts to eliminate "existing segregated systems" based on the racial classification of public schoolchildren).

15 Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

16 *Parents*, 127 S. Ct. at 2754 (quoting *Grutter*, 539 U.S. at 328) (emphasis added).

Supreme Court precedent. Part I reviews the precedent that led to the Court's conclusion that race-conscious admissions policies in the context of higher education did not violate the Equal Protection Clause of the Fourteenth Amendment. Part II examines the circuit court cases that held the diversity-based benefits identified in the context of higher education justified the exclusive use of race to eliminate racial isolation and segregation in primary and secondary schools. Part III contends that the ideological differences among the current Court created a four-four-one split that still permits the flexible use of race to integrate public schools. Part IV concludes that, in the aftermath of *Parents*, local governments can reduce racial isolation and segregation in public schools and avoid strict scrutiny by making school assignments based on socioeconomic status ("SES") factors because SES assignment plans neither burden a fundamental right nor use racial classifications to determine whether children can attend the schools of their choice.

I
RACE-CONSCIOUS ADMISSIONS POLICIES IN THE CONTEXT OF HIGHER EDUCATION

In *Grutter v. Bollinger*, the Supreme Court held that "student body diversity [was] a compelling state interest that . . . justif[ied] the use of race in university admissions."[17] In 2003, when the Court issued its opinion in *Grutter*, more than twenty-five years had passed since the *Regents of the University of California v. Bakke* decision in which the Supreme Court addressed whether the use of racial classifications in public education violated the Equal Protection Clause of the Fourteenth Amendment.[18] The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[19] The Equal Protection Clause of the Fourteenth Amendment ensures that states and state entities will treat similarly situated people the same.[20] Because the racial classification of individuals is

17 *Grutter*, 539 U.S. at 325.

18 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287–320 (1978).

19 U.S. CONST. amend. XIV, § 2.

20 *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

presumptively invalid, equal protection challenges alleging discrimination on the basis of race are subject to strict scrutiny.[21] Strict scrutiny requires the government to show a compelling interest that justifies the narrowly tailored use of race in the decision-making process.[22]

In determining whether the race-conscious admissions policy violated federal law, the *Bakke* Court had to decide whether the Equal Protection Clause of the Fourteenth Amendment guaranteed an applicant's right to a color-blind admissions process, or whether a university could reserve a specific number of seats for minority applicants.[23] In a plurality opinion, the *Bakke* Court held that the university's race-conscious admissions policy violated federal law.[24] Justice Stevens, along with Chief Justice Burger and Justices Rehnquist and Stewart, concluded that the university's race conscious admissions policy violated Title VI of the Civil Rights Act of 1964,[25] which prohibits any program that receives federal funds from discriminating against any person on the basis of race, color, or national origin.[26] Justices Brennan, White, Marshall, and Blackmun concluded that a university may consider an applicant's race as a factor in deciding whether to admit the applicant if "the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."[27]

In *Bakke*, Justice Powell concluded that the university's minority set-aside program violated the Equal Protection Clause of the Fourteenth Amendment because the university was using racial classifications to provide preferential treatment to minority applicants.[28] Justice Powell also concluded that a

21 *See Grutter*, 539 U.S. at 326 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

22 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

23 *Cf. Grutter*, 539 U.S. at 322 ("In the landmark *Bakke* case, [the Court] reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups.").

24 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978) (opinion of Powell, J.).

25 42 U.S.C. § 2000d (2006).

26 *Bakke*, 438 U.S. at 421 (opinion of Stevens, J.).

27 *Id.* at 326 n.1 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

28 *Id.* at 319–20 (opinion of Powell, J.) (explaining that the fatal flaw with the preferential program is that "it tells applicants who are not Negro, Asian, or

university's race-conscious admissions policy would not violate the Equal Protection Clause of the Fourteenth Amendment if the admissions process did not insulate racial or ethnic minorities from "comparison with all other candidates for the available seats."[29]

A. The Permissible Use of Race in Denying Applicants Admissions to the Public Universities of Their Choice

The *Bakke* decision led to a division among the circuit courts over the scope and effect of the use of race-conscious measures to attain a diverse student body.[30] Lower courts had difficulty identifying the effect and scope of the *Bakke* decision because six Justices wrote separate opinions concerning whether and when universities could consider an applicant's race as part of the admissions process.[31] In analyzing whether a university's race-conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, the circuit courts considered whether *Bakke* applied only if the university proved that it had denied applicants admission to the university based on their race, or whether *Bakke* permitted the narrowly tailored use of race absent proof that race was being used to remedy state-sanctioned discrimination.[32]

The Fifth Circuit believed that *Bakke* and subsequent cases addressing the use of race and affirmative action permitted the government to use race *only* if the policy remedied past,

Chicano that they are totally excluded from a specific percentage of the seats in an entering class").

29 *Id.* at 317 (explaining that the an admissions program that considers race a plus factor ensures that the university considers "the particular qualifications of each applicant, and . . . place[s] them on the same footing for consideration, although not necessarily according [each applicant's qualifications] the same weight").

30 Grutter v. Bollinger, 539 U.S. 306, 322 (2003); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 221 (1995) ("The Court's failure to produce a majority opinion in *Bakke* . . . [and its subsequent affirmative action cases has] left unresolved the proper analysis for remedial race-based government action.").

31 *See Grutter*, 539 U.S. at 322.

32 *Compare* United States v. Paradise, 480 U.S. 149, 167 (1987) (explaining that the government may use racial classifications to remedy past and present state-sanctioned discrimination), *with Bakke*, 438 U.S. at 326 n.1 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) (limiting the use of racial classifications to remedy "the lingering effects of past discrimination").

intentional discriminatory practices.[33] In contrast, the Sixth and Ninth Circuits believed that *Bakke* allowed public universities to treat applicants differently because of race to attain the benefits of a diverse student body.[34]

Relying on the fact that Justice Powell was the only Justice in *Bakke* who found that student body diversity was a compelling state interest, the Fifth Circuit rejected the argument that *Bakke* was binding precedent permitting the nonremedial use of race to achieve student body diversity.[35] For example, in *Hopwood v. Texas*, the Fifth Circuit addressed whether the University of Texas Law School violated the Equal Protection Clause of the Fourteenth Amendment when it considered an applicant's race in deciding whom it would admit into the law school program.[36]

In *Hopwood*, several nonminority applicants sued the University of Texas Law School for discrimination and asked the district court to enjoin the law school from considering an applicant's race in the admissions process.[37] The Fifth Circuit held that the law school could "'not use race as a factor in deciding which applicants to admit'" because there was insufficient evidence to support a finding of intentional discrimination on the part of the law school.[38]

Consistent with Supreme Court precedent holding that "the government cannot use racial preferences to remedy general and societal discrimination,"[39] the Fifth Circuit prohibited the University of Texas Law School from considering race in the admissions process "'to combat the perceived effects of a hostile

33 *See, e.g.*, Hopwood v. Texas (*Hopwood II*), 78 F.3d 932, 948–49 (5th Cir. 1996), *cert. denied,* 518 U.S. 1033 (1996).

34 *Grutter*, 539 U.S. at 321; Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1199–1201 (9th Cir. 2000), *aff'd*, 392 F.3d 367 (2004).

35 Hopwood v. Texas (*Hopwood III*), 236 F.3d 256, 275 n.66 (5th Cir. 2000) (disagreeing with the Ninth Circuit's holding that "Justice Powell's diversity rationale [was] binding Supreme Court precedent"); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." (citing *Bakke*, 438 U.S. at 311–315)).

36 *Hopwood II*, 78 F.3d at 934.

37 *Hopwood III*, 236 F.3d at 261.

38 *Id.* at 273 (quoting *Hopwood II*, 78 F.3d at 962).

39 *Id.* (citing *Wygant*, 476 U.S. 267).

environment at the law school, . . . to alleviate the law school's poor reputation in the minority community, or . . . to eliminate any present effects of past discrimination by actors other than the law school.'"[40]

In *Hopwood*, the Fifth Circuit found that the law school's race-conscious admissions process was inconsistent with "the central purpose of the Equal Protection Clause," which is to prevent states and state entities from "'discriminating [against individuals] on the basis of race.'"[41] Thus, the Fifth Circuit reasoned that using race to determine who would be admitted to the law school was contrary to the policies underlying the Equal Protection Clause because it made race relevant in the decision-making process.[42]

Conversely, in *Grutter v. Bollinger*, the Sixth Circuit refused to follow the Fifth Circuit's reasoning and held that *Bakke* permitted the narrowly tailored use of race to achieve student body diversity, even though the university was not attempting to eliminate the present effects of past discrimination.[43] In *Grutter*, the plaintiff, a white female applicant, sued the University of Michigan Law School alleging that the law school violated the Equal Protection Clause of the Fourteenth Amendment because it considered race in deciding which applicants to admit into the program.[44]

The Sixth Circuit reversed the district court's judgment in favor of the plaintiff holding that student body diversity was a compelling interest, and that the policies and practices of the law school were narrowly tailored to achieve the institutionally asserted interest.[45] The Sixth Circuit found that the law school's policies and practices did not violate *Bakke* because the use of "[r]ace and ethnicity, along with a range of other factors, are potential 'plus' factors in a particular applicant's file, but they do not insulate an under-represented minority applicant from competition or act to foreclose competition from non-minority

40 *Id.* (quoting *Hopwood II*, 78 F.3d at 962).

41 *Hopwood II*, 78 F.3d at 939 (quoting Shaw v. Reno, 509 U.S. 630, 642 (1993)); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976).

42 *See Hopwood II*, 78 F.3d at 940–48.

43 *See* Grutter v. Bollinger, 288 F.3d 732, 752 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

44 *Id*. at 735.

45 *See id.* at 743, 749–50.

applicants."[46] In *Grutter*, the Sixth Circuit reasoned that the law school's admissions process ensured that it weighed fairly and competitively each applicant's qualifications.[47]

Unlike the Fifth Circuit, the Sixth Circuit reasoned that Justice Powell's opinion in *Bakke* was binding precedent because it was the narrowest rationale for supporting the judgment that the university's race-conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[48] Likewise, the Ninth Circuit found that *Bakke* was binding precedent allowing public universities to consider race in selecting applicants so long as minority applicants were not immune from competing with nonminority applicants for admission to the University of Washington Law School.[49]

In *Grutter*, the Supreme Court granted certiorari to resolve the split among the circuits over the use of racial classifications in the context of higher education.[50] The *Grutter* Court affirmed the Sixth Circuit's holding that neither the Equal Protection Clause of the Fourteenth Amendment nor the Court's post-*Bakke* cases on state-sanctioned, raced-based affirmative action prevented public universities from considering race in the admissions process.[51] Applying strict scrutiny, the Supreme Court reviewed the University of Michigan Law School's race-conscious admissions plan to "examin[e] the importance and the sincerity of the reasons advanced by [the law school] for the use of race" in the context of higher education.[52]

Acknowledging that the use of racial classifications in the decision-making process raises special fears that they are motivated by an invidious purpose, the Court applies strict scrutiny whenever the plaintiff alleges discrimination based on

46 *Id.* at 746.

47 *See id.* at 746–47.

48 *Id.* at 739–41; *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 325–26 (1978) (opinion of Brennan, White, Marshall, and Blackmum, JJ.) ("Mr. Justice Powell agrees that some uses of race in university admissions are permissible and, therefore, he joins us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.").

49 *See* Smith v. Univ. of Wash., 233 F.3d 1188, 1199–1201 (9th Cir. 2000).

50 Grutter v. Bollinger, 539 U.S. 306, 322 (2003).

51 *See id.* at 343–44.

52 *Id.* at 327.

race.[53] Despite this heightened standard of review for cases involving racial classifications, the *Grutter* Court recognized that context matters when deciding whether the specific use of racial classifications are unconstitutional.[54] The *Grutter* Court stated that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all [uses] are invalidated by it."[55]

In *Grutter*, the Supreme Court identified three compelling interests that justified the narrowly tailored use of race in the context of higher education: "break[ing] down racial stereotypes";[56] preparing students to work in "'an increasingly diverse workforce and society'";[57] and providing the "training ground for a large number of [the] Nation's leaders."[58]

The Court found that University of Michigan Law School's admissions process was narrowly tailored to achieve those interests because the admissions process allowed the University of Michigan Law School to meet its stated goal of creating a student body that was able to make unique contributions to the law school environment, the University of Michigan Law School did not have a quota system or insulate applicants solely on the basis of race, and the admissions process did not unduly burden nonminority applicants.[59]

In contrast, in *Gratz v. Bollinger*, the companion case to *Grutter*, the Supreme Court held that the University of

53 *Id.* at 326 ("'Absent searching judicial inquiry into the justification for such race-based measures,' [the Court] has no way to determine what 'classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989))); *see also* Johnson v. California, 543 U.S. 499, 505–06 (2005) (explaining that the use of racial classifications "raise[s] special fears that they are motivated by an invidious purpose").

54 *Grutter*, 539 U.S. at 327 (explaining that the purpose of the judicial inquiry is "carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in a particular context").

55 *Id.* 326–27.

56 *Id.* at 330.

57 *Id.* (quoting Brief of the American Educational Research Ass'n et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398292).

58 *Id.*

59 *Id.* at 341; *see also* Gratz v. Bollinger, 539 U.S. 244, 274–75 (2003) (invalidating the undergraduate school's race-conscious admissions plan because the bonus points for the applicant's race meant that nonminority applicants were unduly harmed).

Michigan's undergraduate race-conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment because of the mechanical use of race in determining which applicants to admit.[60] In *Gratz*, the Supreme Court addressed the same issue that was presented in *Grutter*: whether student body diversity justified the narrowly tailored use of race in the admissions process.[61] But, under the *Gratz* system, every applicant automatically received an additional twenty points if the applicant was from an underrepresented minority group.[62]

The additional points ensured that the university admitted every minority applicant so long as the applicant met the minimum requirements for admission.[63] This system made race a decisive factor rather than a "plus factor," which means that the student's race or ethnicity is one factor among many in deciding which applicants should be admitted to the university.[64] The Court held that the *Gratz* system was unconstitutional because it "automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."[65]

As applied, the *Gratz* admissions process violated the Equal Protection Clause of the Fourteenth Amendment because the admissions process ignored the applicant's individual characteristics.[66] Instead, the *Gratz* admissions process focused exclusively on the applicant's race or ethnicity.[67] Thus, the *Gratz* admissions process unduly harmed nonminority applicants because race was outcome determinative in deciding whether a particular applicant would be admitted to the university.[68]

In both *Grutter* and *Gratz*, the Supreme Court held that it would defer to the university's "educational judgment that

60 *See Gratz*, 539 U.S. at 274–76.

61 *See id.* at 270.

62 *Id.* at 255.

63 *Id.* at 273.

64 *Id.* at 271–72.

65 *Id.* at 270.

66 *Cf.* Grutter v. Bollinger, 539 U.S. 306, 315–16 (2003) (explaining that the law school's admissions policy allowed for individual review of each applicant's qualifications instead of relying on the applicant's race).

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

68 *Id.* at 272.

diversity is essential to its educational mission."[69] The Court reserved judicial scrutiny to determine whether the university's admission policy was narrowly tailored to achieve the university's educational mission.[70]

Under *Grutter* and *Gratz*, universities must now satisfy the following five narrowly tailored factors. First, they must show that their admissions process does not use quotas to fill a specific number of seats.[71] Second, universities must show that they engage in an individualized, holistic review that compares the entire pool of applicants with each other.[72] Third, universities must demonstrate that the admissions process does not "unduly harm members of any racial group."[73] Fourth, universities must show that they considered other workable race-neutral alternatives before adopting a race-conscious admissions policy.[74] Finally, universities must demonstrate that they periodically review the admissions process to determine whether the use of race is still required to achieve a diverse student body.[75]

In reaching its conclusion that an admissions process that satisfies the five factors is constitutionally permissible, the *Grutter* majority rejected assertions that Supreme Court precedent prohibited the nonremedial use of race.[76] The *Grutter* Court endorsed Justice Powell's view in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[77]

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

70 *See id.* at 333.

71 *See id.* at 335–36.

72 *See id.* at 337.

73 *See id.* at 341.

74 *See id.* at 339.

75 *See id.* at 342–43.

76 *See id.* at 328 (stating that neither *Bakke* nor Supreme Court cases decided after *Bakke* support the proposition that "remedying past discrimination is the only permissible justification for race-based governmental action"); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

77 *See Grutter*, 539 U.S. at 325.

B. Following the Principles of Stare Decisis, Justice O'Connor Validates the Use of Race in the Context of Higher Education

Disappointing conservatives who hoped that the Court would abolish all state-sanctioned, race-based affirmative action programs, Justice O'Connor, in her *Grutter* opinion, stated that *Bakke* only prohibited the exclusive use of race to achieve student body diversity.[78] In *Grutter*, Justice O'Connor invoked the principles of stare decisis to determine whether the Court's post-*Bakke* affirmative action cases prohibited the nonremedial use of race in the context of higher education.[79]

Under the doctrine of stare decisis, the Court is required to follow earlier judicial results except in the rare instances in which the rule of law is outdated, unduly burdens affected litigants, or "'a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five [concurring] Justices.'"[80] The policy underlying the doctrine is threefold: first, it ensures judicial efficiency; second, it ensures judicial consistency; and finally, it ensures judicial integrity.[81] The Court, however, may find that the facts of the prior cases are not analogous to the current situation, which allows the Court to reach a different result in the present case without overruling the prior case.[82] Thus, the Court may refuse to follow its prior precedent if the Court concludes that it is legally or factually inapposite.[83]

Before deciding whether student body diversity was a compelling state interest, Justice O'Connor had to determine whether the post-*Bakke* Supreme Court cases prohibited nonremedial, race-based affirmative action programs.[84] In her

78 *See id.* at 328 ("We first wish to dispel the notion that the Law School's argument [that public institutions may consider race in the decision-making process] has been foreclosed, either expressly or implicitly, by [the Court's] affirmative-action cases decided since *Bakke*."); *see also Wygant*, 476 U.S. at 267, 286 (O'Connor, J., concurring) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–315 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

79 *See Grutter*, 539 U.S. at 326.

80 *Id.* at 325 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

81 *See* 2A FEDERAL PROCEDURE LAWYERS EDITION: APPEAL, CERTIORARI, AND REVIEW § 3:790 (2003).

82 *See id.*

83 *See id.*

84 *Compare* Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 283–84 (1986) (holding that the use of race in selecting which public school teachers to terminate

Grutter opinion, Justice O'Connor used a two-step test in deciding whether post-*Bakke* affirmative action cases prohibited public universities from considering an applicant's race as part of the admissions process: first, Justice O'Connor examined whether universities had relied on Justice Powell's diversity analysis in *Bakke* to design and implement race-conscious admissions policies; and, second, whether prohibiting universities who had come to rely on Justice Powell's analysis in *Bakke* would cause undue hardship on the ability of those universities to attain the benefits of an integrated student body.[85]

In reaching her conclusion in *Grutter* that public universities may consider an applicant's race as part of the admissions process, Justice O'Connor recognized that "public and private universities across the Nation [had] modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."[86] She further recognized that the Court would undermine institutional efforts "'to select those students who [would] contribute the most to the "robust exchange of ideas"'" if the Court eliminated the consideration of race from the admissions process.[87]

Justice O'Connor's analysis in *Grutter* used the principles of stare decisis to promote judicial integrity and social cohesion. As evidenced by her analysis in *Grutter*, Justice O'Connor refused to resort to arbitrary rulemaking to achieve a particular judicial or political agenda. She sought to preserve judicial integrity and stability, including society's ability to rely on the Court's prior cases in making daily decisions and understanding the constitutional effects of those decisions.[88]

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to remedy prior general and societal discrimination against minority public school teachers violates the Equal Protection Clause of the Fourteenth Amendment), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989) (requiring the government to present evidence showing institutional discrimination rather than general, societal discrimination to survive strict scrutiny).

85 *See Grutter*, 539 U.S. at 323, 333 (relying on the diversity rationale underlying Justice Powell's opinion in *Bakke* because of its social and judicial impact).

86 *Id.* at 323.

87 *Id.* at 324 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.)).

88 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854, 856 (1992) (voting to affirm *Roe v. Wade* because the Court has an "obligation to follow [its] precedent" and to acknowledge the fact that individuals and institutions have "organized intimate relationships and made choices that define their views . . . and their places in society, in reliance on" the Court's prior cases).

II
THE JUDICIAL RESPONSE TO *GRUTTER* AND THE BENIGN USE OF RACE IN THE CONTEXT OF PRIMARY AND SECONDARY EDUCATION

The Supreme Court's holding in *Grutter* that student body diversity is a compelling interest was long overdue. In 1954, *Brown v. Board of Education* ended more than 100 years of state-sanctioned racial segregation in public education.[89] The *Grutter* holding is consistent with *Brown*'s mandate that requires the elimination of racial segregation in the field of public education. Underlying this mandate was the recognition that racial segregation and isolation "generates a feeling of inferiority . . . that may affect [the] hearts and minds [of black schoolchildren] in a way unlikely to ever be undone."[90]

Yet, in the fifty-three years since that decision, eliminating racial segregation in public schools has been both problematic and divisive. Many Americans began to believe that affirmative action meant preferential treatment for racial and ethnic minorities who were less qualified than their white counterparts. This public perception was reflected in the post-*Bakke* race-based affirmative action decisions that prohibited the nonremedial use of racial classifications.[91] Following the Supreme Court's decision in *Grutter*, the circuit courts were internally divided over *Grutter*'s effect on the nonremedial use of race to integrate primary and secondary schools.[92] At issue was whether *Grutter*'s diversity benefits applied to primary and secondary education and, if *Grutter* did apply, whether *Grutter* prohibited the exclusive use of race to integrate primary and secondary schools.[93]

89 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

90 *Id.* at 494.

91 *E.g.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (explaining that the nonremedial use of race "promote[s] notions of racial inferiority and lead[s] to . . . racial hostility").

92 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *rev'd*, 377 F.3d 949 (9th Cir. 2004), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

93 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1179 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007); Comfort v. Lynn Sch. Comm., 418 F.3d 1, 16 (1st Cir. 2005); McFarland *ex rel.* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 855 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th

Public school officials had little difficulty in meeting the "compelling interest" prong needed to satisfy strict scrutiny.[94] Judges recognized that the benefits of student body diversity in primary and secondary schools were the same as the recognized benefits in the university setting: "[D]isarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society."[95] But dissenting judges found that the exclusive use of race in the context of primary and secondary schools to achieve those benefits violated the Constitution's prohibition against classifying individuals, including children, based on their race.[96] Consequently, public school officials could not satisfy strict scrutiny's narrowly tailored prong because race was outcome determinative.[97]

The First, Sixth, and Ninth Circuits held that public school officials had a compelling interest in meeting *Brown*'s mandate that the state make public education "available to all on equal terms."[98] Consistent with *Brown*'s conclusion that "education is

Cir. 2005), *rev'd sub nom.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

94 *See Parents*, 426 F.3d at 1179; *Comfort*, 418 F.3d at 16; *McFarland*, 330 F. Supp. 2d at 855.

95 *Comfort*, 418 F.3d at 14; *see also Parents*, 426 F.3d at 1196 (Bea, J., dissenting) (acknowledging that children gain civic and educational skills in attending integrated schools); *Comfort*, 418 F.3d at 32 (Selya, J., dissenting) (conceding that the school plan was "well-intentioned and that it has helped promote greater diversity" in the district's public schools).

96 *Parents*, 426 F.3d at 1200–01 (Bea, J., dissenting) (stating that the exclusive use of race to promote racial diversity violates the Equal Protection Clause of the Fourteenth Amendment); *Comfort*, 418 F.3d at 30–31 (Selya, J., dissenting) (stating that the "bestowal of any benefit [based on racial classifications] counteracts the ultimate goal of relegating racial distinctions to irrelevance"); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999) (finding that the school assignment plan was not narrowly tailored because it was "not tied to identified past [discriminatory conduct on the part of the school district]"); *McFarland*, 330 F. Supp. 2d at 864 (finding that automatically placing black and white students on separate assignment tracks was not narrowly tailored because public school officials did not engage in an holistic review of each applicant).

97 *Compare* Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (finding that the law school's admission plan was narrowly tailored to meet its goal of obtaining "the educational benefits of diversity" because it reviewed each applicant's file), *with McFarland*, 330 F. Supp. 2d at 864 (finding that automatically placing black and white students on separate assignment tracks was not narrowly tailored because public school officials did not engage in an holistic review of each applicant).

98 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *accord Comfort*, 418 F.3d at 16; *McFarland*, 330 F. Supp. 2d at 855.

perhaps the most important function of state and local governments,"[99] the First, Sixth, and Ninth Circuits held that public school officials had a compelling state interest in maintaining a racially diverse student body that prepares children for living and working in an increasingly diverse workforce and society.[100]

Distinguishing *Grutter*, the First and Ninth Circuits held that individualized, holistic review was inapplicable and unnecessary in the context of primary and secondary education because students do not suffer the same risks associated with being denied placement at an elite university.[101] Unlike the First and Ninth Circuits, however, the Sixth Circuit held that public school plans that rely solely on racial classifications to make student assignments violated *Grutter*'s narrowly tailored requirements.

A. First Circuit: Race-Based Assignment Plans Are Constitutionally Permissible

Despite the constraints of *Grutter* and *Gratz*, in *Comfort v. Lynn School Committee*, the First Circuit concluded that a public school transfer plan that relied solely on race to make assignments survived strict scrutiny.[102] In that case, the First Circuit addressed whether the school district's voluntary desegregation plan violated, among other laws, the Equal

99 *Brown*, 347 U.S. at 493.

100 *Parents*, 426 F.3d at 1175 (finding that public schools have an important role in preparing schoolchildren in meeting their democratic and civic responsibilities); *Comfort*, 418 F.3d at 15–16 (finding that there was "significant evidence in the record [to support the conclusion that] the benefits of a racially diverse school are more compelling at younger ages"); *McFarland*, 330 F. Supp. 2d at 853 ("[T]he benefits of racial tolerance and understanding are equally 'important and laudable' in public elementary and secondary education as in higher education.").

101 *Parents*, 426 F.3d at 1181 (concluding that the dangers present in the university context of using race as a proxy for merit are not present in the noncompetitive K–12 environment); *Comfort*, 418 F.3d at 19 (finding that "individualized consideration of each student is unnecessary under a noncompetitive, voluntary student transfer plan"); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) (explaining that the school district offered students who were not permitted to attend the school of their choice "an equivalent alternative education" at their assigned school).

102 *Comfort*, 418 F.3d at 16, 19–23 (explaining that narrow tailoring requires consideration of the following narrowly tailored factors: (i) whether the relief is necessary; (ii) whether the relief is in proportion to the problem; and (iii) whether the relief unduly harms the rights of third parties) (citing United States v. Paradise, 480 U.S. 149, 171 (1987)).

Protection Clause of the Fourteenth Amendment when public school officials used race alone to determine student eligibility for transferring to a school that was not in the student's neighborhood.[103] The district court held that the plan was constitutional because student body diversity is a compelling interest, and the plan was narrowly tailored to achieve that interest.[104]

A First Circuit panel reversed, holding that the "[p]lan [was] not narrowly tailored . . . because it use[d] race 'mechanically' and [forewent] 'individualized consideration of transfer applications.'"[105] Additionally, the panel found that the plan was overly broad and indefinite in duration.[106] The First Circuit granted an en banc hearing, and a divided court affirmed the judgment of the district court.[107] The First Circuit held that the exclusive use of race to reduce racial isolation in the noncompetitive academic environment of K–12 did not violate the Equal Protection Clause of the Fourteenth Amendment because the plan "did not seek racial balancing for its own sake."[108] Instead, the transfer plan used race to "(i) reap the educational benefits that flow from a racially diverse student body . . . and (ii) avoid the negative educational consequences that accompany racial isolation."[109]

In deciding that the diversity benefits identified in *Grutter* applied to primary and secondary education, the First Circuit rejected the contention that the benefits that flow from student body diversity in the context of higher education did not extend to "the benefits that flow from racial diversity in the K–12 context."[110] It reasoned that there was a "strong familial resemblance" between viewpoint diversity in the university

103 *Id.* at 6–8.

104 *Id.* at 9–10.

105 *Id.* at 10 (quoting Comfort v. Lynn Sch. Comm., No. 03-2415, Slip Op. at 40 (1st Cir. Oct. 20, 2004), *opinion withdrawn on grant of reh'g by* 2004 WL 2348505 (1st Cir. Nov. 24, 2004), *en banc reh'g*, 418 F.3d 1 (1st Cir. 2005)).

106 *Id.* ("The panel also cited other narrow tailoring flaws, including the Plan's breadth and indefinite duration.").

107 *Id.* at 6.

108 *Id.* at 21.

109 *Id.* at 14.

110 *Id.* at 15.

setting and racial diversity in the K–12 setting.[111] The First Circuit identified three common factors supporting the conclusion that the diversity benefits identified in *Grutter* applied to primary and secondary education: "[B]reaking down racial barriers, promoting cross-racial understanding, and preparing students for a world in which 'race unfortunately still matters.'"[112]

The First Circuit relied on the factors that the Supreme Court used in *United States v. Paradise* rather than on the *Grutter* factors to determine whether the school district's plan was narrowly tailored.[113] Although the the court believed that *Grutter* "provide[d] some guidance for [its] narrow tailoring inquiry,"[114] it held that the *Grutter* narrowly tailored requirements were distinguishable because refusing a student's request to transfer to a particular school was significantly different than denying an applicant "a spot at a unique or selective educational institution."[115]

Under *Paradise*, courts are required to consider the following factors in determining whether the policy or plan is narrowly tailored to meet the compelling state interest: first, whether the plan or policy is necessary to achieve the interest; second, whether the numerical goals are based on the racial demographics of "the relevant labor market"; and third, whether the plan unduly burdens the rights of third parties.[116] Relying on the *Paradise* factors, the First Circuit found that the school district's plan was narrowly tailored because the evidence showed "a causal link [existed] between improvements in the school system and increased racial diversity";[117] the racial composition of the schools reflected the racial composition of the city's population; and the schools within the district provided "a comparable education."[118]

111 *Id.*

112 *Id.* at 16 (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

113 *Id.* (citing United States v. Paradise, 480 U.S. 149, 171 (1987)).

114 *Id.* at 17.

115 *Id.* at 20.

116 *Paradise*, 480 U.S. at 171.

117 *Comfort*, 418 F.3d at 15.

118 *Id.* at 20; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (explaining that public school officials have authority to adopt policies

B. Sixth Circuit: The Exclusive Use of Race to Determine Which Children Can Attend Which Schools Violates the Equal Protection Clause

Affirming the judgment of the United States District Court for the Western District of Kentucky, the Sixth Circuit held that racial diversity in the context of primary and secondary public education was a compelling interest.[119] In *McFarland*, the district court addressed whether the county's student assignment plan was narrowly tailored when the county used race in making nontraditional and traditional school assignments.[120] The court held that the county met its burden of showing that maintaining a fully integrated school system was a compelling interest; however, the district court's application of the *Grutter* narrow tailoring criteria allowed the county to use race to meet its mission in making nontraditional school assignments and deprived the county of using race in making traditional school assignments.[121]

In holding that the process used to make nontraditional school assignments was narrowly tailored, the court found that students were not "insulated from competition with all other students and no student [was] placed on a separate [assignment] track" because of the student's race.[122] The district court rejected the plaintiffs' argument that the county's use of race in making nontraditional school assignments operated as a racial quota.[123] Applying *Grutter* and *Gratz*, the court reasoned that the county could use race to achieve the desired racial mix so long as it did not reserve a fixed number or proportion of educational opportunities exclusively for racial and ethnic minorities.[124]

The district court found that the county considered several factors, such as residency, student choice, lottery assignments,

that ensure each school's population reflects the racial composition of the school district as a whole).

119 McFarland *ex rel.* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

120 *See id.* at 837.

121 *Id.* at 858–59, 864.

122 *Id.* at 858.

123 *Id.*

124 *See id.* at 856–58.

and racial guidelines, in making nontraditional school assignments.[125] On the other hand, the court held that the county's use of race to make traditional school assignments was not narrowly tailored.[126] Unlike the assignments to the nontraditional schools, the court found that the traditional assignment process placed white and nonwhite applicants on separate assignment tracks, and the county did not engage in the holistic review required under *Grutter*.[127]

C. Ninth Circuit: Public School Officials May Use Race to Combat the Harmful Effects of Segregated Housing Patterns

The Ninth Circuit's decision in *Parents* underscores the problems and divisiveness that arise in desegregation cases and the application of the *Grutter* criteria in the context of primary and secondary education.[128] In *Parents*, the plaintiffs and the school district filed cross-motions for summary judgment based on the fact that the school district was using a racial tiebreaker to determine who was entitled to attend an oversubscribed high school.[129] The district court granted summary judgment in favor of the school district, and a Ninth Circuit panel reversed.[130] The panel majority held that the racial tiebreaker violated the Equal Protection Clause of the Fourteenth Amendment because the tiebreaker was analogous to a quota system.[131] In reaching its holding, the panel majority stated that the "School District's racial tiebreaker fail[ed] virtually every one of the [*Grutter*] narrow tailoring requirements."[132] With respect to the school district's use of race to make public school assignments, the panel majority stated that *Gratz* specifically prohibited the

125 *Id.* at 858.

126 *Id.* at 862.

127 *See id.* at 862–64 (rejecting the County's argument that the "separate racial lists [were] necessary to maintain solid levels of black student participation in traditional schools").

128 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *rev'd*, 127 S. Ct. 2738 (2007).

129 *Id.* at 1171.

130 *See id.* at 1172.

131 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 969–70 (9th Cir. 2004), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

132 *Id.* at 969.

school district's tiebreaker because it classified "hundreds of white and non-white applicants [based] solely . . . [on] their race."[133]

Like the First Circuit, an en banc hearing was granted and a divided Ninth Circuit affirmed the judgment of the district court.[134] In *Parents*, a majority of the Ninth Circuit judges agreed with Judge Graber, the dissenting panel judge, that racial diversity in the context of public primary and secondary education is a compelling interest because it affects younger and more impressionable students "'before they are locked into racialized thinking.'"[135] Relying on prior Supreme Court precedent that encourages public school desegregation efforts, the Ninth Circuit reasoned that public school officials could voluntarily seek to eliminate the harmful consequences caused by de facto segregation.[136]

Furthermore, the Ninth Circuit contended that the Supreme Court had acknowledged that there was no constitutional prohibition preventing public school officials from using integration to achieve a diverse academic environment.[137] The purpose of voluntary integration is "to ensure that patterns of residential segregation are not repeated as patterns of

133 *Id.* at 969–70 (stating that *Gratz* prohibited race-conscious measures that guaranteed one-fifth of the necessary points for admission "to every single 'underrepresented minority' applicant solely because of race" (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003)) (internal quotation marks omitted)).

134 *Parents*, 426 F.3d at 1172.

135 *Id.* at 1176 (quoting Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 356 (D. Mass. 2003), *aff'd sub nom.*, 418 F.3d 1 (1st Cir. 2005)). *Compare id.* at 1175 (finding that public schools have an important role in preparing schoolchildren in meeting their democratic and civic responsibilities), *with* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 15–16 (1st Cir. 2005) (finding that there was "significant evidence in the record [to support the conclusion] that the benefits of a racially diverse school are more compelling at younger ages").

136 *Parents*, 426 F.3d at 1179 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971); Bustop, Inc. v. Bd. of Educ. of L.A., 439 U.S. 1380, 1383 (1978); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 480 (1982)).

137 *Parents*, 426 F.3d at 1173 ("'School boards . . . [are] free to develop and initiate further plans to promote school desegregation . . . . Nothing in this opinion [requiring parties to show that the government was a passive participant in a public system of racial discrimination] is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.'" (quoting *Keyes*, 413 U.S. at 242 (Powell, J., concurring in part and dissenting in part)) (second omission in original)).

educational segregation that would be [detrimental to] and 'determinative of a child's opportunity.'"[138]

Although public school officials are not required to take affirmative steps to create a racially diverse and integrated student body, the Ninth Circuit asserted that it was within the discretion of public school officials to adopt and implement school assignment plans that combat the harmful consequences of racial segregation in public education even though the segregation arises from "white flight" or residential patterns.[139]

D. Applying Grutter*'s Diversity Rationale to Public School Assignment Plans*

The majority in both *Comfort* and *Parents* held that public school officials have a compelling interest in eliminating racial isolation and maintaining integrated public schools.[140] At the heart of the disagreement between the majority and the dissenting judges was whether the school district's interest in diversity, absent a finding of de jure segregation, is the same as the university's interest in creating a diverse student body when the assignments to traditional primary and secondary schools do not involve competitive academic qualifications.[141] As Judge Graber stated in her Ninth Circuit panel dissent: "Recent research has identified the *critical role of early school experiences* in breaking down racial and cultural stereotypes. The research further shows that *only a desegregated and diverse school can offer such opportunities and benefits*. The research further supports the proposition that these benefits are long lasting."[142]

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138 *Parents*, 377 F.3d at 993 (Graber, J., dissenting) (quoting *Comfort*, 283 F. Supp. 2d at 384).

139 *See* Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 750 (2d Cir. 2000) ("'[F]ederal courts have held that local school authorities may legitimately take into account the phenomenon of white flight in formulating voluntary programs designed to achieve integration.'" (quoting Johnson v. Bd. of Educ. of Chi., 604 F.2d 504, 516–17 (7th Cir. 1979), *vacated on other grounds*, 449 U.S. 915 (1980))).

140 *See Parents*, 426 F.3d at 1173–79; *Comfort*, 418 F.3d at 16.

141 *Parents*, 426 F.3d at 1178–79.

142 *Parents*, 377 F.3d at 992 n.9 (Graber, J., dissenting) (internal quotation marks omitted); *see also Parents*, 426 F.3d at 1175 (explaining that even the defendant's expert conceded that "diversity encourages students not only to think critically but democratically").

Applying Justice O'Connor's diversity rationale in *Grutter* and the Second Circuit's desegregation analysis, both the First and Ninth Circuits agreed with the Second Circuit that neither *Bakke* nor the Supreme Court's subsequent cases addressing affirmative action held that the government could only survive strict scrutiny if it was using race to remedy the effects of past, intentional discrimination.[143] The Second Circuit was one of the first circuit courts to address whether public school officials could use race to "ameliorate *racial* isolation" and integrate a school district.[144]

In framing the issue, the Second Circuit stated that the question was whether the school assignment plan was "narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation."[145] The Second Circuit held that the exclusive use of race in the context of primary and secondary education did not violate the Equal Protection Clause of the Fourteenth Amendment.[146] Thus, the First, Second, and Ninth Circuits believed that context defined the state's interest and whether the use of race was narrowly tailored to meet that interest.

Distinguishing *Grutter* and following the diversity rationale of the Second Circuit, the First and Ninth Circuits stated that reliance on factors other than race to achieve a diverse student body is inapplicable in the context of primary and secondary education. Specifically, the Ninth Circuit stated that "the contextual differences between public high schools and selective institutions of higher learning make . . . [individualized, holistic review] ill-suited for . . . [*Grutter*'s] narrow tailoring inquiry."[147] Although the Sixth Circuit affirmed the district court's faithful application of the individualized, holistic review requirement set forth in *Grutter*, it agreed with the First and Ninth Circuits that the diversity-based benefits identified in *Grutter* justified the narrowly tailored use of race to determine which students could attend which schools.[148]

143 *See Parents*, 426 F.3d at 1178–79; *Comfort*, 418 F.3d at 14, 23.

144 *Brewer*, 212 F.3d at 753.

145 *Id.* at 752.

146 *See id.* at 741.

147 *Parents*, 426 F.3d at 1184.

148 *See* McFarland *ex rel.* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev'd*

III
IDEOLOGICAL DIFFERENCES UNSETTLE *BROWN* AND LIMIT THE EXCLUSIVE USE OF RACE IN THE K–12 CONTEXT

In *Parents*, Chief Justice Roberts changed the direction of the Court from left to right by narrowly interpreting the holdings of *Brown* and *Grutter*.[149]

In his opening statement before the Senate Judiciary Committee, Chief Justice Roberts pledged to "uphold[] the rule of law and safeguard those liberties that make this land one of endless possibilities for all Americans."[150] Based on these promises, precedent from the Warren Court, and other decisions protecting the victims of discrimination, the disenfranchised appeared safe from judicial review and the prospect of being overruled.[151]

As evidenced by Justice O'Connor's opinion in *Grutter* and Chief Justice Warren's opinion in *Brown*, the commitment to the principles of stare decisis means a commitment not only to the ultimate outcome in prior Supreme Court cases but also a commitment to the principles and policies underlying the

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

149 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752–54 (2007).

150 *Hearing on Roberts Nomination Before the Senate Judiciary Committee*, *supra* note 13, at 57 ("I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability and I will remember that it's my job to call balls and strikes and not to pitch or bat.").

151 Beginning with the appointment of Chief Justice Burger in 1969, conservatives hoped that the Court would begin to overrule Supreme Court cases that expanded the scope of constitutional protections for the indigent, the disenfranchised, and the victims of discrimination. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (requiring law enforcement officials to inform suspects that they are entitled to an attorney, the right to remain silent, and that their statements may be used against them in a court of law); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that states cannot prohibit the use of birth control). But replacing Chief Justice Burger with Chief Justice Rehnquist and adding Justices Scalia, O'Connor, and Kennedy did not produce the conservative results that opponents feared. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973)); Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that public universities could use race-conscious measures in the admissions process); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas state law banning homosexual sodomy); Dickerson v. United States, 530 U.S. 428 (2000) (holding that a federal statute permitting courts to admit statements made during a custodial interrogation without the Miranda warnings into evidence if the accused made the statement voluntarily was unconstitutional).

result.[152] Hitting all the right notes during his confirmation hearing, Chief Justice Roberts opined that "the [C]ourt should decide each case on a ground that decides no more than is necessary to resolve the dispute before it."[153]

Replacing Chief Justice Rehnquist with Chief Justice Roberts and Justice O'Connor with Justice Alito has created a Court that is willing to limit the power of the government to initiate and promote social programs that protect the victims of discrimination and the disenfranchised by limiting the effect of Supreme Court precedent.[154] Together with Justices Scalia and Thomas, Chief Justice Roberts and Justice Alito insist that they are relying on judicial restraint as the foundation for constitutional and statutory analysis.[155] In reality, however, Chief Justice Roberts and Justice Alito have chipped away at the scope and effect of constitutional protections by adopting a narrow view of precedent.[156] Under this narrow view, Chief Justice Roberts and Justice Alito limited earlier decisions to their facts or refused to apply the principles and policies

152 *Compare Grutter*, 539 U.S. at 323–24 (examining the rationale underlying Justice Powell's conclusion that student body diversity is a compelling state interest and how universities can satisfy that interest), *with* Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954) (comparing the rationale of cases desegregating law schools to desegregating public schools).

153 Stone, *supra* note 13 (stating that Chief Justice Roberts believes that "the Supreme Court [should] decide[] cases narrowly, resolving only the particular dispute before it"). *See generally Hearing on Roberts Nomination Before the Senate Judiciary Committee*, *supra* note 13 (explaining that the role of the Court is not to shape policy but interpret the law).

154 In addition to finding that the exclusive use of race to make public school assignments was unconstitutional, the Court in a series of five-to-four opinions, held that a federal ban on late term abortion procedures was unconstitutional, Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007), struck down the electioneering communication provision of the Bipartisan Campaign Finance Reform Act, which prohibited special interest groups from airing negative candidate ads within thirty days of a primary and within sixty days of a general election, Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2658–59 (2007), and held that that taxpayers lacked standing to challenge faith-based initiatives, Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2559 (2007).

155 *See Right to Life*, 127 S. Ct. at 2684 n.7 (Scalia, J., concurring) (characterizing Chief Justice Roberts's application of stare decisis as "faux judicial restraint").

156 *See id.* at 2683 n.7 ("Indeed, [Chief Justice Roberts's] attempt at distinguishing [the Court's prior precedent] is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules [the prior precedent] without saying so.").

underlying the results.[157] Disguising judicial activism as judicial restraint, Chief Justice Roberts was able to overrule the liberal precedent of the Warren, Burger, and Rehnquist Courts and deliver a victory for conservatives by ending state-sanctioned, race-based affirmative action in the K–12 context.[158]

No case demonstrates Chief Justice Roberts's ability to achieve a conservative objective while at the same time protecting previous judicial decisions better than this term's decision in *Parents*. Unlike Chief Justice Warren and Justice O'Connor, Chief Justice Roberts does not look beyond the letter of the law to deduce an outcome consonant with the principles and policies underlying the holdings of the Court's prior precedent.[159] Instead, Chief Justice Roberts simply finds that the facts of the current situation are distinguishable from the facts of the prior cases. This allows him to reach his desired outcome without disturbing the Supreme Court's prior precedent.

A. Chief Justice Warren's Analysis of the "Separate but Equal" Doctrine

The Supreme Court in *Brown* eliminated the state-sanctioned practice that most will agree is inherently and morally unjust:

157 *See, e.g.*, *Hein*, 127 S. Ct. at 2571–72 (stating that the Court should neither extend nor overrule the Court's prior precedent; it simply should let it stand).

158 Chief Justice Roberts did not expressly overrule inconsistent precedent in delivering victories for conservatives; instead, he distinguished the facts of the prior cases from the current case before the Court, or he held that the earlier case did not apply on the merits. For example, in *Gonzales v. Carhart*, the Court did not disturb *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which reaffirmed *Roe v. Wade* and struck down a Pennsylvania law that required women to notify their sexual partners before having an abortion. *Gonzales*, 127 S. Ct. at 1619 (holding that a federal ban on late-term abortions was constitutional). Likewise, the Court did not overrule *McConnell v. Federal Election Commission*, which held that the Bipartisan Campaign Finance Reform Act was constitutional; instead, the Court rendered the Act meaningless by holding that the its key provision was unconstitutional. *Right to Life*, 127 S. Ct. 2658–59.

159 *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007) (holding that the Equal Protection Clause prohibits the racial classification of public schoolchildren), *with* Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954) ("We must consider public education in the light of its full development and its present place in American life throughout the nation."), *and* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (discussing "Justice Powell's decision in some detail" to determine whether the methods designed from and based on his opinion were constitutional).

the use of race to oppress and isolate black schoolchildren.[160] In that case, the Supreme Court found that racially segregated schools did not provide the same opportunities and advantages to black schoolchildren as white, even though "there [were] findings below that Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[161] Thus, the appeal focused on "the effect of segregation itself on public education."[162]

In *Brown*, the petitioners asked the Supreme Court to decide:

> (1) Whether the State of Kansas [had] power to enforce a state statute pursuant to which racially segregated public primary schools are maintained.
> (2) Whether the [U.S. District Court of Kansas's finding] that racial segregation . . . [had] the detrimental effect of retarding the mental and educational development of [black] children . . . .[163]

The Supreme Court, in a unanimous opinion, held that states, including Kansas, could not enforce statutes that maintained racially segregated schools.[164] It reasoned that the harmful effects of racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment because segregation denied black schoolchildren the tangible benefits of public education.[165]

Unlike Chief Justice Roberts's narrow application of precedent, Chief Justice Warren construed the Court's prior holdings broadly to support the Court's conclusion that "separate educational facilities are inherently unequal."[166] Chief Justice Warren relied on the Court's graduate school cases

160 *Brown*, 347 U.S. at 494 ("The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation." (internal quotation marks omitted)).

161 *Id.* at 492.

162 *Id.*

163 Brief of Appellants at 2, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1952 WL 47265.

164 *Brown*, 347 U.S. at 495.

165 *Id.* at 493.

166 *Id.* at 495 (stating that "in the field of public education the doctrine of 'separate but equal'" violates "the equal protection of the laws guaranteed by the Fourteenth Amendment").

holding that in the context of higher education state officials violated the Equal Protection Clause when they denied "specific benefits enjoyed by white students . . . to Negro students of the same educational qualifications."[167] For example, in *Sweatt v. Painter*, the Supreme Court required Texas to admit African Americans to the law school, because the evidence showed that the newly created law school for African Americans did not have the same faculty, library, or other intangible resources available to the all-white alumni.[168]

Implicit in Chief Justice Warren's analysis is the recognition that the doctrine of stare decisis does not prevent the Court from overruling prior precedent if that precedent is based on outdated social policies or unduly burdens affected litigants.[169] In writing his opinion, Chief Justice Warren analyzed the doctrine of separate but equal, including the scope and effect of *Plessy* on public education, in detail.[170] He stated that: "American courts have . . . labored with the doctrine for over half a century," and emphasized that the Court could not "turn the clock back to 1896 . . . when *Plessy v. Ferguson* was written."[171] Instead, the Court needed to "consider public education in light of its full development and its present place in American life throughout the Nation. Only in this way . . . [could the Court] determine[] if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[172]

In *Brown*, Chief Justice Warren expressly found that the harmful effects of racial segregation in the K–12 context were the same as the harmful effects of racial segregation in the context of higher education.[173] In reaching his conclusion that "separate educational facilities [were] inherently unequal," he examined the nature of the rights at issue, and the principles and policies underlying the holdings of the Court's prior cases in deciding whether the racial segregation of public schoolchildren violated the Equal Protection Clause of the Fourteenth

167 *Id.* at 492.

168 Sweatt v. Painter, 339 U.S. 629, 633–34 (1950).

169 *See Brown*, 347 U.S. at 494–95.

170 *Id.* at 494 nn.10 & 11.

171 *Id.* at 491–92.

172 *Id.* at 492–93.

173 *Id.* at 493–95.

Amendment.[174] Chief Justice Warren's analysis in *Brown* became the legal foundation for the Court's future holdings that all state-sanctioned racial segregation was unconstitutional.[175]

B. The Conservative Reinterpretation of Brown*'s Equal Educational Opportunities*

Chief Justice Roberts overruled the Court's prior cases that permitted the benign use of race to eliminate racial segregation and isolation when he refused to extend *Brown*'s desegregation rationale to meet the current problems of de facto segregation and limited *Grutter* to its facts.[176] As previously stated, in *Parents*, the petitioners sued the Seattle and Louisville School Districts alleging that the school district assignment plans violated the Equal Protection Clause of the Fourteenth Amendment when the school districts prevented students from attending the schools of their choice based on the race of the students. Under these plans, a student could not attend the chosen school if the student's race upset the desired racial balance of that school.[177] Thus, the student's race determined whether the school district would prevent the student from attending the chosen school.[178]

Chief Justice Roberts stated that *Brown* promised that children would not be sent to a particular school on the basis of

174 *Id.*

175 *See, e.g.*, Heart of Atlanta Hotel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (holding that Congress had authority to require states and private entities to comply with the 1964 Civil Rights Act and provide access to public accommodations without regard to an individual's race); Katzenbach v. McClung, 379 U.S. 294, 295 (1964) (holding that Congress had authority to require states and private entities to comply with the 1964 Civil Rights Act and provide equal access to restaurants regardless of race).

176 In *Brown*, the Court was asked to end de jure segregation, which was segregation imposed by state and local laws that were enforced by public school officials. *See Brown*, 347 U.S. at 487–88; *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2802 (2007) (Breyer, J., dissenting). On the other hand, in more recent school desegregation cases, the Court was asked whether public school officials could use race to eliminate de facto segregation, which is segregation that is "caused by housing patterns or generalized societal discrimination." *Id.*

177 *Parents*, 127 S. Ct. at 2750.

178 *See id.* at 2746–50.

their race.[179] Relying on a narrow interpretation of the principles articulated in *Brown*, he concluded that the racial classification of public schoolchildren is per se unconstitutional.[180]

In analyzing whether the Ninth Circuit erred in holding that the exclusive use of race to integrate primary and secondary schools was constitutionally permissible, Chief Justice Roberts held that *Grutter* was factually inapposite.[181] He recognized that student body diversity is a compelling state interest in the context of higher education, and stated that in *Grutter*, the "Court relied upon considerations unique to institutions of higher education, noting that in light of 'the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'"[182] Relying on this specific language, Chief Justice Roberts held that *Grutter* did not govern the use of race in the K–12 context.[183]

Although Chief Justice Roberts held that *Grutter* did not apply in the K–12 context, he still used the *Grutter* diversity factors to foreclose its application in the K–12 context.[184] Chief Justice Roberts conceded for the sake of argument that the school districts' desire to eliminate racial segregation and isolation in primary and secondary schools was a compelling state interest.[185] Nevertheless, he held that the school districts failed to meet their burden of showing that the plans were narrowly tailored because the school districts were using racial quotas to achieve the benefits of student body diversity.[186]

In limiting the scope and effect of *Grutter*, Chief Justice Roberts did not attack *Grutter*'s holding or rationale. Instead,

179 *See id.* at 2753 (explaining that the assignment plans before the Court made the student's "race . . . determinative standing alone"); *cf.* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (holding that the exclusive use of race to determine which student was entitled to attend the university violated the Equal Protection Clause of the Fourteenth Amendment).

180 *Parents*, 127 S. Ct. at 2768.

181 *Id.* at 2754.

182 *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).

183 *Id.*

184 *See id.* at 2751–58.

185 *See id.* at 2752.

186 *Id.* at 2755.

he purportedly invoked the traditions of judicial restraint.[187] Despite this "faux judicial restraint," Chief Justice Roberts understands the impact that distinguishing current cases from prior Supreme Court cases can have as an effective tool for advancing a conservative social and political agenda.[188] By distinguishing current cases from prior Supreme Court cases, he is able to bury precedent that does not reflect the conservative ideology of the Court.

Like Justices Scalia and Thomas who believe that racial classifications violate the Equal Protection Clause of the Fourteenth Amendment,[189] Chief Justice Roberts believes that racial classifications are per se unconstitutional. Under the approach advocated by Justices Scalia and Thomas, however, the Court should overrule prior Supreme Court cases if the previous majority applied the incorrect legal standard or failed to follow the plain and ordinary meaning of the words used in the Constitution or federal statute.[190] But, by holding that *Grutter* did not apply in the K–12 context, Chief Justice Roberts was able to eliminate another state-sanctioned, race-based affirmative action program without expressly overruling prior Supreme Court cases that permitted the voluntary use of race to achieve student body diversity.[191]

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187 *See generally* Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2684–85 (2007) (Scalia, J., concurring) (discussing principle of stare decisis); Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2572 (2007) (disagreeing with Justice Scalia that the present case required the Court to reconsider its prior precedent because the earlier Court erred in its interpretation of the law; instead, Chief Justice Roberts "decide[d] only the case at hand" pursuant to the Court's Article III role of resolving cases and controversies presently before the Court).

188 *Compare Right to Life*, 127 S. Ct. at 2684 (Scalia, J., concurring) (arguing that the Court should have overruled *McConnell v. Federal Election Commission* because previous majority should have held that section 203 of the Act was unconstitutional), *with Parents*, 127 S. Ct. at 2772 (Thomas, J., concurring) (explaining that the government must present "'strong basis in evidence . . . that remedial action [is] necessary'" to combat past discrimination (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989))).

189 *See, e.g.*, *Parents*, 127 S. Ct. at 2770–71 (Thomas, J., concurring) ("[A]s a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.").

190 *See Right to Life*, 127 S. Ct. at 2684–85 (Scalia, J., concurring); *see also Hein*, 127 S. Ct. at 2574–70 (Thomas, J., concurring).

191 *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part) ("School boards . . . [are] free to develop and initiate further plans to promote school desegregation. . . . Nothing in this opinion [requiring parties to show that the government was a passive participant in a public

C. The New Conservative Ideology Causes the Liberal Justices to Strike Out

In *Parents*, Justices Breyer, Ginsburg, Souter, and Stevens voted to affirm the judgment of the Ninth Circuit in favor of the school district.[192] As evidenced by the dissenting opinions in *Parents*, these four Justices find the conservative agenda of Chief Justice Roberts, and fellow Justices Alito, Scalia, and Thomas frustrating and perplexing because these conservative Justices apply the law to facts without consideration of whether the outcome is consistent with the values embodied in the law.[193] In his *Parents* dissent, Justice Stevens stated that: "It [was his] firm conviction that . . . the Court that [he] joined in 1975 would [not] have agreed with [the Court's] decision" that *Brown* prohibited the use of voluntary efforts to integrate public schoolchildren.[194]

Likewise, Justice Breyer's dissenting opinion in *Parents* rejects Chief Justice Roberts's conclusion that *Brown* prohibits the use of racial classifications to eliminate the harmful effects of de facto segregation upon public schoolchildren.[195] In his dissent, Justice Breyer found that the race-conscious assignment plans were narrowly tailored.[196] The rationale for his conclusion was two-fold: first, the exclusive use of race to achieve student body diversity in primary and secondary education was consistent with the moral values embodied in the Constitution; and second, prior Supreme Court cases permitted public school officials to

system of racial discrimination] is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25–26 (1971) (explaining that public school officials have authority to adopt policies that ensure each school's population reflects the racial composition of the school district as a whole); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) (explaining that public school officials may develop policies to achieve racial balance in their schools).

192 *See Parents*, 127 S. Ct. at 2800 (Breyer, J., dissenting).

193 *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 313 (2001) (Stevens, J., dissenting) ("[I]f the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. . . . [T]he objective manifestations of congressional intent . . . must be measured in light of the enacting Congress' expectations as to how the judiciary might evaluate [the statute].")

194 *Parents*, 127 S. Ct. at 2800 (Stevens, J., dissenting).

195 *See id.* at 2834 (Breyer, J., dissenting).

196 *See id.* at 2824–36.

adopt race-conscious assignment plans that reflect the racial composition of the district as a whole.[197]

In concluding that the race-based assignment plans were constitutionally permissible, Justice Breyer emphasized the historical context that created the need for voluntary desegregation efforts, the role of the courts in protecting the voluntary desegregation efforts of public school officials, and the proper method for interpreting federal law.[198] In interpreting the Equal Protection Clause, Justice Breyer applied a two-step test: first, he examined the consequences that would flow from giving the law one interpretation over another; and second, he analyzed whether the consequences were consistent with the underlying values embodied in the Constitution and the Supreme Court's prior cases.[199]

This approach is consistent with Chief Justice Warren's approach in *Brown*. In *Brown*, Chief Justice Warren found that state-sanctioned racial segregation adversely "affect[ed] [the] hearts and minds [of children] in a way unlikely ever to be undone."[200] Likewise, in *Parents*, Justice Breyer found that the elimination of de facto segregation positively affected the "hearts and minds" of public schoolchildren.[201]

In *Parents*, Justice Breyer identified three positive effects that justified the narrowly tailored use of race to eliminate de facto segregation: "setting right the consequences of prior conditions of [state-sanctioned] segregation"; increasing academic performance; and creating an integrated learning environment that increases interracial sociability and friendship and enhances "the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation."[202]

After examining the consequences that would occur if public school officials were allowed to rely exclusively on race as the tool for eliminating de facto segregation, Justice Breyer addressed whether public school officials are entitled to have the

197 *See id.* at 2825–34.

198 *See id.* at 2801–11, 2813–20.

199 *See id.* at 2824–34.

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

201 *See Parents*, 127 S. Ct. at 2820–21 (Breyer, J., dissenting).

202 *Id.* at 2820–22.

Court protect their actions when they are not using race as a tool of oppression or segregation or for preferential treatment to a limited governmental resource.[203] In his *Parents* dissent, Justice Breyer noted that both the Supreme Court and an overwhelming majority of the circuit courts recognized the right of school districts to adopt measures that would "'prepare students to live in a pluralistic society.'"[204] Justice Breyer concluded that neither the Constitution nor the Court's prior cases prohibited school districts from using race as the sole means for eliminating the harmful effects of racial isolation upon public schoolchildren, regardless of whether the isolation arises from de jure or de facto segregation.[205]

Once again, Justice Breyer's analysis is consistent with Chief Justice Warren's analysis in *Brown*. In *Brown*, Chief Justice Warren held that segregated "educational facilities [were] inherently unequal" and violated the Equal Protection Clause.[206] In *Parents*, Justice Breyer relied on the constitutional values of equality embodied in *Brown*'s holding to conclude that the race-conscious measures were constitutionally permissible.[207]

Comparing Chief Justice Roberts's majority opinion in *Parents* with Justice Breyer's dissenting opinion in *Parents* shows that distinguishing prior cases from current cases is an effective tool for overruling prior Supreme Court cases when a justice is dissatisfied with the results of the prior cases. Justice Breyer's interpretation that *Brown* prohibits the *racial segregation of public schoolchildren* is significantly different than Chief Justice Roberts's interpretation that *Brown* prohibits the *racial classification of public schoolchildren*.[208]

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203 *See id.* at 2811–20.

204 *Id.* at 2811–12 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)); *see id.* at 2814–15.

205 *See id.* at 2811–16 (citing Bustop, Inc. v. Bd. of Educ. of L.A., 439 U.S. 1380, 1383 (1978)).

206 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

207 *See Parents*, 127 S. Ct. at 2834 (Breyer, J., dissenting) (stating that "since this Court's decision in *Brown*, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools").

208 *Compare id.* at 2768 (opinion of Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."), *with id.* at 2834–35 (Breyer, J., dissenting) ("The Equal Protection Clause . . . has always distinguished in practice between state action that excludes and thereby

Unlike Chief Justice Roberts who used *Brown* as a shield to prohibit the exclusive use of racial classifications to integrate primary and secondary schools, Justice Breyer was willing to use *Brown* as a sword to dismantle the continuing legacy of racial segregation in public education.[209] As Chief Justice Roberts's and Justice Breyer's *Parents* opinions illustrate, the Court's interpretation of federal law depends not only on the Justices' ideological philosophy on the proper method for interpreting federal law, but on the political and social agenda that the Justices hope to advance based upon those interpretations.[210]

D. Justice Kennedy, the Pragmatic Conservative, Bridges the Ideological Paradigm Between Conservative Legal Process and Judicial Lawmaking

Despite the detailed analysis that followed the outcome and rationale of the Court's prior cases, Justice Breyer could not convince Justice Kennedy that the school plans at issue were narrowly tailored. Justice Kennedy wrote a concurring opinion that agreed with the dissent on two very important points: first, the elimination of racial segregation and isolation in public primary and secondary education is a compelling state interest; second, that public school officials could use race to achieve that interest absent a finding of de jure segregation.[211] Nevertheless, Justice Kennedy found that the specific race-conscious plans before the Court in *Parents* failed the narrowly tailored prong of strict scrutiny because they failed to satisfy the *Grutter* narrowly tailored factors.[212] Because Justice Kennedy held that the

subordinates racial minorities and state action that seeks to bring together people of all races.").

209 *Compare id.* at 2768 (opinion of Roberts, C.J.) (explaining that *Brown* prohibits the exclusive, nonremedial use of race to eliminate public school segregation), *with id.* at 2836 (Breyer, J., dissenting) (explaining that *Brown* promised "true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools").

210 *See id.* at 2768 (Thomas, J., concurring) ("The Court holds that state entities may not experiment with race-based means to achieve ends that they deem socially desirable."). *But see id.* at 2788 (Kennedy, J., concurring) (stating that his views prevented him from joining Chief Justice Roberts's opinion in *Parents* because the Chief Justice's approach was "inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause").

211 *See id.* at 2791.

212 *See id.* at 2788.

diversity benefits identified in the context of higher education apply to the K–12 context, his concurring opinion controls the use of race to integrate public primary and secondary schools.[213] Thus, Justice Kennedy's *Parents* analysis stands at the center of the ideological divide among the current Court.

Although conservative in mindset and jurisprudence, Justice Kennedy tends to follow both the outcome and rationale of the Court's prior cases. He bridges the ideological gap between Chief Justice Roberts and Justice Breyer by balancing the need for judicial stability against the factual assumptions underlying the Court's prior cases and the current dispute.[214] This balancing test allows Justice Kennedy to interpret the law rather than read his own policy preferences into the law.[215] Under this approach, the role of the Court is to exercise judicial restraint based on the application of the Court's prior precedent to subsequent cases. Based on Justice Kennedy's approach to interpreting federal law, the Court may only avoid the application of stare decisis if the prior judicial decision is factually distinguishable, the prior judicial decision addressed questions that are not at issue in the case, or the factual assumptions underlying the dispute in the prior judicial decision are outdated.[216]

To understand the importance of Justice Kennedy's concurring opinion in *Parents*, it is important to understand whether and when a Supreme Court decision is binding or nonbinding precedent. Generally, lower courts are required to follow the outcome and rationale of a prior case if, in a factually similar situation, a higher level court in the same jurisdiction has applied the same law.[217] For example, federal circuit and district courts, as well as state courts, applying federal law are required

213 *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977).

214 *See* Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 853 (1992) ("[T]he reservations any of us may have in reaffirming . . . *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

215 *See, e.g.*, *id*. at 854–55 (explaining that *Roe* established a woman's right to choose whether and when to have a child, and that the legal and factual assumptions underlying a woman's right to choose had not changed); *cf.* Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954) (explaining that the factual assumption that separate but equal facilities did not cause Negroes undue or unreasonable harm was incorrect).

216 *See Casey*, 505 U.S. at 854–55.

217 *See* 2A FEDERAL PROCEDURE LAWYERS EDITION, *supra* note 81, § 3:789.

to follow the rules set forth by the U.S. Supreme Court.[218] Traditionally, the judicial decision, its outcome, and its rationale are binding upon the lower courts.[219] The outcome and rationale of the dissenting opinion has no effect upon the lower court because the dissenting opinion is not binding authority.[220] The lower courts may consider the dissent's arguments in evaluating subsequent cases, but they cannot apply the dissenting opinion to reach a result that is inconsistent or contrary to the majority's opinion.[221]

If a majority of the Justices agree on the outcome, but disagree on the analytical framework for resolving the dispute, the outcome is still binding on lower courts applying the same law in factually similar situations.[222] This is known as a plurality opinion.[223] Unlike a majority opinion, a plurality opinion represents a decision in which the outcome received a greater number of votes than any other outcome.[224] In a plurality opinion, the justice's rationale that expresses the narrowest grounds for the outcome is the only rationale that is binding upon the lower courts.[225] Thus, the scope and effect of prior judicial decisions cannot be based solely on the number of Justices who voted in favor of one party over another.

Justice Kennedy's concurring opinion in *Parents* is binding upon the lower courts because he agreed with Chief Justice Roberts that the school assignment plans before the Court violated the Equal Protection Clause; however, he remained faithful to the legal principles set forth in *Grutter* and *Gratz* concerning the use of race as a plus factor to achieve student body diversity.[226] As previously discussed, a race-conscious admissions policy will survive strict scrutiny if the policy is based

218 *See id.* § 3:791.

219 *See id.*

220 *See id.*

221 *See id.*

222 *See id.* §§ 3:790, 3:791.

223 *See id.* § 3:791.

224 *See id.*

225 *See* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that a concurring opinion is binding if it is the opinion that resolves the issue before the Court on the narrowest of grounds).

226 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2788–89 (2007) (Kennedy, J., concurring).

on individual assessments, in which race is only one consideration among many in deciding whether to admit students.[227]

In *Parents*, Justice Kennedy agreed with the dissent that student body diversity is a compelling state interest, and that public school officials could use race to achieve that interest.[228] As evidenced by his opinions, Justice Kennedy's approach to determining the scope and effect of prior judicial decisions is similar to his liberal colleagues.[229] He uses a three-step test to determine the scope and effect of the Court's prior precedent. First, he examines the conflict in the current case to determine whether the Court has previously addressed and resolved the conflict. Second, if the answer is yes, he identifies the legal principles that the previous majority used to resolve the conflict. Finally, he determines whether the Court needs to modify, change, or overrule the existing law.[230] In deciding whether the existing rule is still viable, Justice Kennedy considers the following factors: (i) whether the factual assumptions underlying the current conflict are similar to the factual assumptions underlying the previous conflict; (ii) whether the legal assumptions that are relevant to the conflict are the same as the legal assumptions underlying the prior conflict; and (iii) whether the potential outcome is consistent or inconsistent with the factual or legal assumptions that were used to resolve the prior conflict.[231]

Like Justice Breyer's dissent, Justice Kennedy's concurrence recognizes the Court's duty to examine the rights at issue and the effect of the Court's interpretation of the law on those rights.[232] Refusing to sign off on the majority's opinion, Justice Kennedy explained that the public school officials in the companion cases before the Court failed to show race-neutral alternatives were unavailable to eliminate the harmful effects of

227 Gratz v. Bollinger, 539 U.S. 244, 274 (2003); *see also* Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (explaining that a race-conscious admissions policy will survive strict scrutiny if the process is designed to "assemble a student body that is diverse in ways broader than race").

228 *See Parents*, 127 S. Ct. at 2791–92 (Kennedy, J., concurring).

229 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992).

230 *See id.*

231 *See id.* at 853–55.

232 *See Parents*, 127 S. Ct. at 2794–95 (Kennedy, J., concurring).

segregated housing patterns.[233] Nevertheless, Justice Kennedy recognized that *Brown* established a moral imperative to eradicate racial injustice in public education.[234] He also recognized that *Brown* had changed society and its values.[235]

Although courts have struggled to achieve *Brown*'s mandate of eliminating the harmful effects of racial segregation upon public schoolchildren, Justice Kennedy did not believe that the Court's affirmative action or public school precedent had foreclosed the use of race as a tool for eliminating those effects.[236] Finally, Justice Kennedy found that the facts demonstrating the advantages and disadvantages of racial diversity in public education had not changed since the Court's holding that separate but equal in the context of public education was unconstitutional.[237]

Despite Justice Kennedy's willingness to follow the Court's prior precedent permitting the voluntary use of race to eliminate racial segregation and isolation, his requirement that public school officials comply with the *Grutter* diversity factors undermines those efforts because school districts do not have the resources to meet the *Grutter* test of individualized, holistic review.[238] The plurality opinion in *Parents* leaves intact the authority of public school officials to adopt voluntary race-conscious measures aimed at eliminating the harmful affects of de facto segregation.[239] But, like the plurality opinion in *Bakke* that left unresolved the issue of whether student body diversity was a compelling state interest, the *Parents* decision leaves unresolved what race-conscious measures will survive judicial scrutiny. Thus, conservatives were able to count *Parents* as a

233 *See id.* at 2790–91.

234 *See id.* at 2797.

235 *See id.* at 2791, 2797.

236 *See id.* at 2791.

237 *See id.* at 2791–93.

238 *See* Justin M. Norton, *9th Cir. Strikes Diversity Program*, RECORDER (S.F., Cal.), July 25, 2004, at 1, *available at* http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&t=PrinterFriendlyArticle&cid=1090180187397 ("I don't know of any program that I've examined that can meet those requirements-especially in K through 12 public education." (quoting Sharon Browne, Principal Attorney, Pacific Legal Foundation) (internal quotation marks omitted)).

239 *See Parents*, 127 S. Ct. at 2761 (opinion of Roberts, C.J.). Chief Justice Roberts's discussion of the distinction between de jure and de facto segregation was not joined by a majority of the court. *See id.* at 2746.

victory that limited state-sanctioned, race-based affirmative action.[240]

IV
USING SES FACTORS TO MEET *BROWN*'S VISION OF ELIMINATING THE HARMFUL EFFECTS OF RACIAL SEGREGATION AND ISOLATION

Parents, a plurality opinion, does not prohibit primary school officials from considering race in deciding whether students may attend the school of their choice; however, the reality is that Justice Kennedy's concurring opinion severely limits the ability to use race as a tool for eliminating de facto segregation. Consequently, public school officials may turn to socioeconomic status ("SES") factors to eliminate the harmful effects of racial isolation and segregation upon public schoolchildren without the fear that courts will find an equal protection violation.[241] Although previous Court majorities, including Justice Kennedy, have recognized that the public school context permits the voluntary use of race to end the harmful effects of racial segregation and isolation, the application of the *Grutter* diversity factors will defeat any plan that relies solely on a student's race to exclude the student from attending a particular school.[242] Fulfilling *Brown*'s vision of an integrated learning environment requires balancing competing social values that ensure both legal stability and social cohesion.[243] Public school officials can

240 *See* George Will, Editorial, *Clueless in Seattle*, WASH. POST, Dec. 3, 2006, at B07 ("The Supreme Court has said that all racial classifications are 'presumptively invalid' unless narrowly tailored to serve a compelling government interest. . . . Supreme Court deference to [the Seattle School District's use of race] would make a mockery of the equal protection guarantee.").

241 *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION 61–70 (2004), *available at* http://www.edu.gov/about/list/ocr/raceneutral.html [hereinafter ACHIEVING DIVERSITY].

242 *See generally* Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1554, 1555 n.48 (2007) (explaining that "[u]nder longstanding Fourteenth Amendment jurisprudence, the government's use of race is held to a tough standard of strict scrutiny" and noting the legal distinctions between *Grutter* and *Gratz*).

243 *See id.* at 1555 n.49 (explaining that "[r]acial integration is important to furthering . . . goals" that promote academic achievement and good citizenship, and that "[e]ven opponents of using race in student assignment concede that using socioeconomic status [to achieve these goals] is perfectly legal").

achieve *Brown*'s vision and survive constitutional challenges to their efforts if they use economic classifications to achieve student body diversity rather than racial classifications.[244] Economic diversity focuses on assigning students to a particular school based upon socioeconomic preferences or economic affirmative action.[245] These plans favor applicants who "have faced various social and economic obstacles."[246]

The statistics further suggest that a family's household income, including the parents' educational and occupational background, is a sound predictor of academic stability and student achievement.[247] Using SES factors to create diverse student populations is based on research showing that academic success or failure is based on poverty rather than race.[248] The effectiveness of SES-based plans is demonstrated by research that shows in an economically diverse student population academic achievement is valued and academic aspirations are high; the school achieves student body diversity based on a cross-cultural mix of students; behavior issues are minimal; and at-risk, at-need students do not overwhelm teachers, staff, and administrators.[249]

Relying on this research, schools limit the number of available seats for students who are eligible for free or reduced-price lunches.[250] Typically, the percentage of students eligible for free or reduced-price lunches does not exceed forty percent of the total available seats.[251] While race is not an outcome determinative factor in making school assignments, proponents claim that racial and ethnic minority students benefit from the use of the SES factors based upon the economic realities that affect many African American and Latino families.[252] Statistics show that thirty-five percent of African American families that are headed by a female and thirty-four percent of Hispanic families that are headed by a female live below the poverty

244 *Id.* at 1554–55.

245 ACHIEVING DIVERSITY, *supra* note 241, at 61.

246 *Id.*

247 *Id.* at 62–63.

248 *See id.*

249 *See id*. at 64.

250 *Id*. at 67.

251 *See, e.g.*, *id.*

252 *Id.* at 62.

line.[253] Studies also indicate that poor African Americans are six times more likely to live in areas of concentrated poverty.[254] The same studies indicate comparable results for poor Hispanics.[255]

On the other hand, only seventeen percent of non-Hispanic white female-headed households live below the poverty line.[256] Six percent of African American two-parent households and fourteen percent of Hispanic two-parent households live below the poverty line.[257] Only three percent of non-Hispanic white two-parent families live below the poverty line.[258] Statistics also indicate that the greatest factor in educational achievement is socioeconomic status. Recent studies show that the reading level of a low-income twelfth grade student is the same level as the average eighth grade, middle-class student; twenty-five percent of students from the lowest-income quintile drop out of high school compared to two percent of students in the highest quintile; and four percent of low-income students obtain their bachelor's degrees compared to seventy-six percent of high-income students.[259]

Legally, the benefits of creating an economically diverse student body are threefold. First, economic diversity is subject to rational basis review rather than strict scrutiny. Second, the burden of proof is on the challengers to show that the government's efforts are unreasonable rather than on the government to show that their actions are narrowly tailored. Finally, even if the economic assignment plans are subject to strict scrutiny, a student's race is a plus factor rather than outcome determinative.[260]

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253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.* at 63 fig.3.

257 *Id.*

258 *Id.*

259 *Id.* at 63.

260 *Compare* Dandridge v. Williams, 397 U.S. 471, 483–87 (1970) (holding that social and economic legislation is subject to rational basis review), *with* City of Mobile v. Bolden, 446 U.S. 55, 92 (1980) (Stevens, J., concurring) ("[A] political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group."), *and* Grutter v. Bollinger, 539 U.S. 306, 336, 339 (2003) (explaining that race-conscious measures are constitutionally permissible if they are one of several factors used in the decision-making process).

A. Economic Diversity Is Subject to Rational Basis Review

Because public school officials are relying on SES factors to make assignments, they do not have to satisfy the requirements of strict scrutiny.[261] Public school officials intend the assignments to eliminate the harmful effects of poverty upon public schoolchildren.[262] Assignments based on poverty are not subject to strict scrutiny because the assignments are not based on racial classifications, and they do not burden a fundamental right.[263] Thus, public school officials can exclude students from attending the school of their choice if the decision is intended to preserve the economic balance of the student body.[264] If the chosen method falls within the government's power, then the court will defer to the government's chosen method to achieve the result.[265]

Rational basis review requires the challengers to prove that the classification is arbitrary and does not serve the intended purpose.[266] Under the rational basis standard, courts examine the relationship between the chosen classification, and whether the result falls within the scope of the government's power to achieve that result.[267] Unlike strict scrutiny, rational basis review does not require a perfect fit between means and ends; instead it requires a rough accommodation.[268] Creating an educational

261 *See Dandridge*, 397 U.S. at 483–87.

262 Kahlenberg, *supra* note 242, at 1557–58.

263 *Compare* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986) (reasoning that the government's use of racial classifications is subject to strict scrutiny), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (noting that education "is not among the rights afforded explicit protection under our Federal Constitution").

264 *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines").

265 *See* Heller v. Doe, 509 U.S. 312, 319 (1993) (explaining that the government does not have to prove a perfect fit between means and ends to satisfy the requirements of rational basis review).

266 *See id.* at 320 ("Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

267 *See id.* (explaining that courts must uphold a government classification against equal protection challenge if "'there is any reasonably conceivable state of facts that could provide a rational basis for the classification'" (quoting Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993))).

268 *See Rodriguez*, 411 U.S. at 55 (explaining that rational basis requires the government to show that a "plan is not the result of hurried, ill-conceived

environment that promotes academic success is a legitimate government goal.[269] Under rational basis review, socioeconomic assignment plans should be able to survive constitutional scrutiny because they serve the important interests of eliminating the harmful effects of poverty upon public schoolchildren and preparing them to live and work in a pluralistic society.[270]

Opponents to school assignment plans may argue that public school officials are using reduced-price and free lunch programs or economic status as a means for making assignments based on race.[271] But the right to a reduced price or free lunch does not mean the student is an ethnic or racial minority.[272] Likewise, the right to a reduced price or free lunch neither automatically creates a racially balanced nor diverse student body.[273] To defeat a school plan that uses socioeconomic status to make student assignments, opponents would have to prove that the efforts of public school officials are unrelated to the stated objectives of creating an economically diverse student body.[274] For example, in *Plyler v. Doe*, the Court addressed whether a Texas law prohibiting illegal immigrant children from attending public schools was arbitrary and unreasonable.[275]

The Supreme Court held that the State's reasons for excluding these children from attending public schools or withholding funds for their education was unsupported by the evidence.[276]

legislation" but a rough accommodation of interests that rationally further a legitimate state purpose or interest).

269 *Cf.* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.").

270 Kahlenberg, *supra* note 242, at 1555.

271 *See Comfort*, 418 F.3d 1, 29 (Boudin, C.J., concurring) ("The choice is between openly using race as a criterion or concealing it through some clumsier proxy device (*e.g.*, transfer restrictions based upon family income).").

272 Kahlenberg, *supra* note 242, at 1555 ("Even opponents of using race in student assignment concede that using socioeconomic status is perfectly legal." (footnote omitted)).

273 *See id.* (explaining that although "there is clearly no better way to ensure a certain racial mix than by using race per se, socioeconomic integration can produce a substantial racial dividend").

274 Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364–65 (1973).

275 *See* Plyler v. Doe, 457 U.S. 202, 210–30 (1982).

276 *See id.* at 228–30.

The Court found that there was no evidence in the record to support the conclusion that illegal immigrant children unduly burdened the State's economy.[277] The Court also found that there was no evidence in the record to support the State's claim that these children affected the quality of public school education.[278] Finally, the Supreme Court rejected the State's argument that illegal immigrant children would not remain in the State and use their education productively.[279] Consequently, the Court concluded that excluding illegal immigrant children from attending public schools was arbitrary and unreasonable.[280]

Under *Plyler*, public school officials would have to present evidence that supports the use of socioeconomic classifications to survive judicial scrutiny.[281] Unlike the situation in *Plyler*, there is evidence to support the conclusion that the use of socioeconomic preferences and economic affirmative action creates a stable academic learning environment and reduces the harmful effect of poverty on public schoolchildren.[282] Finally, the justification offered in support of "[a]ccess to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education*" established "'a moral imperative to eradicate racial injustice in public schools.'"[283]

Consistent with the principles of stare decisis and equal protection jurisprudence, the Court should not prohibit schools from using socioeconomic preferences to create student body diversity, even though the policy may have a discriminatory impact on nonminority students.[284]

277 *See id.* 229–30.

278 *See id.*

279 *See id.*

280 *See id.* at 230.

281 *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (explaining that the Court will uphold "legislative classifications so long as [they have] a rational relationship to a legitimate end").

282 *See* Kahlenberg, *supra* note 242, at 1555–56. *See generally* ACHIEVING DIVERSITY, *supra* note 241, at 62–64 (noting the effect of SES on learning and educational success).

283 McFarland *ex rel.* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004) (quoting Hampton v. Jefferson County Pub. Sch., 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000)), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

284 *See* Village of Arlington Heights v. Metro. Hous. Dev., 429 U.S. 252, 264–68 (1977).

Although the Court may have doubts about the use of socioeconomic factors to achieve racial diversity, the Court should permit public school officials to use these factors to eliminate racial isolation and the harmful effects of de facto segregation. Consistent with his commitment to judicial integrity, Justice Kennedy should follow the Court's prior precedent in deciding whether a state law or policy violates federal law.[285] Thus, Justice Kennedy should join his liberal colleagues in holding that the use of socioeconomic preferences to eliminate the harmful effects of poverty is constitutionally permissible, even though the preferences may have a negative impact on nonminority students.

Relying on Justice Kennedy's analytical framework in *Parents*, courts should find that the use of socioeconomic factors to achieve a diverse student body does not violate the Equal Protection Clause of the Fourteenth Amendment for the following reasons. First, the factual assumption underlying the use of socioeconomic preferences is the same as the factual assumption underlying the Court's public school jurisprudence.[286] Public school officials have authority to formulate school policy for their school districts.[287] Second,

285 Although conservatives hoped that the addition of Justice Kennedy would overrule *Roe v. Wade*, Justice Kennedy joined Justices Souter and O'Connor in refusing to overrule the decision based upon their commitment to judicial integrity and social stability. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (refusing to overrule *Roe v. Wade* because the decision clearly established the constitutional right of women to terminate a pregnancy within the first trimester; the Court's subsequent decisions had not changed *Roe's* holding; neither the facts nor the Court's understanding of the facts relevant to the Court's decision had changed; and, finally, society's position on abortion had changed based on the *Roe* decision).

286 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2791 (Kennedy, J., concurring) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one respect of which is its racial composition." (citing Grutter v. Bollinger, 539 U.S. 306 (2003))); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25–32 (1971) (explaining that public school officials have authority to adopt policies that ensure each school's population reflects the racial composition of the school district as a whole).

287 *See McFarland*, 330 F. Supp. 2d at 850 (stating that "over many years and a variety of circumstances, the Supreme Court has strongly endorsed the role and importance of local elected school boards as they craft educational policies for their constituents") (citing Freeman v. Pitts, 503 U.S. 467, 489–90 (1992); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 481–82 (1982); Dayton Bd. of Educ. v. Brinkman, 433 U.S.

rational basis review is the appropriate standard for determining whether a school policy that does not use racial classifications is constitutionally permissible.[288] Public education is not a fundamental right that triggers strict scrutiny.[289] Third, the use of socioeconomic preferences to integrate primary and secondary schools is consistent with the Court's public school jurisprudence.[290] Although the elimination of the harmful effects of racial segregation and isolation is desirable, the use of socioeconomic preferences is consistent with the public's expectation that *Brown* guaranteed equal educational opportunity for public schoolchildren regardless of race and the Court's holding that student body diversity is a compelling state interest.[291]

In short, the use of socioeconomic preferences provides state and local governments with the means to integrate public primary and secondary schools without having to satisfy strict—and almost always deadly—scrutiny.[292] Holding that public school officials may use socioeconomic preferences to integrate public and primary schools preserves the judicial integrity of the Court and the principles of stare decisis as the foundation for determining whether the Court should follow or overrule prior

406, 410 (1977); Milliken v. Bradley, 418 U.S. 717, 741–42 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–51 (1973)).

288 *See Rodriguez*, 411 U.S. at 35.

289 *See Parents*, 127 S. Ct. at 2791–92 (Kennedy, J., concurring).

290 *See id.* at 2791 ("School districts can seek to reach *Brown*'s objective of equal educational opportunity.").

291 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1195–96 (9th Cir. 2005) (Kozinski, J., concurring) (citing Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, C.J., concurring)), *rev'd* 127 S. Ct. 2738 (2007).

292 *Id.* at 1195 (Kozinski, J., concurring) (hoping that the Supreme Court would "give serious thought to bypassing strict—and almost always deadly—scrutiny and adopt something more akin to rational basis review").

precedent.[293] Thus, the Court maintains its proper role of interpreting the law rather than creating it.[294]

B. The Use of Socioeconomic Preferences Can Survive Strict Scrutiny

Under *Grutter*, public school officials who use socioeconomic preferences to integrate primary and secondary schools may also consider a student's race in deciding which students should attend which schools because race is only one factor used to make school assignments. Although Chief Justice Roberts held that *Grutter* did not control the voluntary use of race in the context of public primary and secondary education, Justice Kennedy and the dissenting justices disagreed, relying on the *Grutter* outcome and rationale in deciding whether the assignment plans violated the Equal Protection Clause.[295] Traditionally, the mere fact that the government's policies or practices had a discriminatory impact was insufficient to trigger strict scrutiny.[296] Plaintiffs alleging equal protection violations had to prove intentional discrimination by showing facial discrimination, discriminatory application, or discriminatory motive.[297] Now, the Supreme Court requires lower courts to

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293 *Compare Parents*, 127 S. Ct. at 2793 (Kennedy, J., concurring) (refusing to join the dissent because "the dissent's reliance on [the] Court's precedents to justify the explicit, sweeping classwide racial classifications . . . is a misreading of our authorities that . . . tends to undermine well-accepted principles needed to guard our freedom"), *with* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (explaining that "[a]lthough [he] believe[d] the Court's result [was] quite sensible, [he could not] go along with the unhealthy process of amending the statute by judicial interpretation").

294 *See, e.g.*, U.S. v. Nat'l Treasury Employees Union, 513 U.S. 454, 479 (1995) (explaining that the Court has an "obligation to avoid judicial legislation").

295 *See Parents*, 127 S. Ct. at 2792 (Kennedy, J., concurring) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)); *id.* at 2822 (Breyer, J., dissenting) (citing *Grutter*, 539 U.S. 306).

296 *Compare* Reed v. Reed, 404 U.S. 71, 73 (1971) (finding that the words of the statute expressly made a distinction between classes of people on the basis of gender), *with* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that the law prohibiting the operation of laundries in wooden buildings was unconstitutional because the government granted exemptions only to non-Asian applicants), *and* Washington v. Davis, 426 U.S. 229, 252 (1976) (finding that the police department's test was not unconstitutional simply because it had a disproportionate impact on minority applicants).

297 *See Grutter*, 539 U.S. at 327–28 (explaining that strict scrutiny "is designed to provide a framework for carefully examining the importance and the sincerity of the

apply strict scrutiny when the plaintiff alleges that the state's process or policy relies on racial classification, even though the policy affects whites and nonwhites equally.[298]

In *Johnson v. California*, the Supreme Court addressed whether a prison policy was unconstitutional when it required the racial segregation of new inmates for at least a sixty-day period.[299] The Supreme Court held that strict scrutiny applied whenever the government uses racial classifications or distinctions to make decisions.[300] The Court stated that strict scrutiny is required because "'there is simply no way of determining . . . [which decisions] are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[301] Thus, *Johnson* requires the application of strict scrutiny """to smoke out" illegitimate uses of race by assuring that [the] [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'"[302]

As previously stated, whether the use of race violates the Equal Protection Clause is a context-specific inquiry.[303] In deciding whether a voluntary, race-conscious assignment plan violates the Equal Protection Clause, courts are required to presume that public school officials have adopted their educational objectives in good faith and should defer to judgment of public school officials that the policy is necessary to achieve those objectives.[304] Thus, the only inquiry for review is whether the policy legitimately achieves those objectives subject to the appropriate level of judicial review.[305]

reasons advanced by the governmental decisionmaker for the use of race in [a] particular context").

298 Johnson v. California, 543 U.S. 499, 505–09 (2005).

299 *See id.* at 502.

300 *See id.* at 505–09.

301 *Id.* at 506 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)) (omission in original).

302 *Id.* (quoting *Richmond*, 488 U.S. at 493) (second alteration in original).

303 Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

304 *See id.* at 328–29 ("[A]ttaining a diverse student body is at the heart of the Law School's proper institutional mission, and [its] 'good faith' is 'presumed' absent 'a showing to the contrary.'" (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978))).

305 *Compare id.* at 329 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which [the Court] defer[].").

Socioeconomic plans that consider race in deciding which students can attend which schools mirror the policies and procedures that survived strict scrutiny in *Grutter*.[306] First, public school officials classify students based upon the students' eligibility for free and reduced-price lunches rather than by race. Second, public school officials do not define diversity solely in terms of racial diversity. Third, race is not outcome determinative and the goal is not to establish an equal balance of white and nonwhite students. Finally, and most importantly, public school officials can eliminate the harmful effects of poverty upon public schoolchildren because white and nonwhite students receive equal consideration and treatment in deciding how to achieve an economically diverse student body.[307]

CONCLUSION

In *Parents*, the four-four-one plurality allows public school officials to continue their race-conscious efforts to develop school policies and procedures that meet our basic constitutional and democratic principles. The current ideological differences among the current Supreme Court over the proper method for interpreting federal law makes "voluntary economic integration less risky as a legal matter"[308] and meets the letter and spirit of *Brown*—that public schoolchildren, regardless of race, are entitled to equal access to quality education. Although a majority of the current Justices agreed that the diversity-based benefits identified in *Grutter* apply to public primary and secondary education, the Court's decision in *Parents* began a new era in how far the Court is willing to go in maintaining the legacy of *Brown*, which declared that in the field of public education separate could never be equal.

Chief Justice Roberts and Justices Alito, Scalia, and Thomas believe that the Equal Protection Clause of the Fourteenth Amendment prohibits the benign use of race in any context.[309]

with id. at 388–89 (Kennedy, J., dissenting) (stating that the majority's deference "fails to confront the reality" that the Law School's use of race is unconstitutional).

306 *See id.* at 334, 339–42 (majority opinion).

307 *Cf. id.* at 334 (explaining that the school's diversity plan must be no broader than necessary to achieve its diversity goals).

308 Kahlenberg, *supra* note 242, at 1554.

309 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring) ("The plurality opinion is at least open to the

On the other side of the ideological divide, Justices Breyer, Ginsburg, Souter, and Stevens believe that voluntary, race-conscious assignment plans do not violate the Equal Protection Clause because public school officials are not using race to segregate, oppress, or provide access to a limited governmental resource or program.[310]

Justice Kennedy, as the Court's only moderate, reasoned that voluntary race-conscious measures are constitutionally permissible to eliminate the harmful effects of racial isolation and de facto segregation in primary and secondary education.[311] Justice Kennedy's concurring opinion sets the foundation upon which future judicial decisions will rest in deciding whether public school assignment plans are constitutionally permissible.

In short, his opinion provides public school officials with two options to achieve *Brown*'s vision of eliminating the harmful effects of racial segregation and isolation upon public schoolchildren. First, public school officials can decide which children can attend which schools based upon socioeconomic preferences, even though the use of those preferences may prevent students from attending the schools of their choice.[312] Second, public school officials may consider a student's race in deciding which children can attend which schools if race is a plus factor and not outcome determinative.[313] Thus, like Chief Justice Burger's opinion in *Bakke*, Justice Kennedy's concurring opinion will "serve[] as the touchstone for [the] constitutional

interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling.").

310 *See id.* at 2798 n.3 (Stevens, J., dissenting) (recognizing a fundamental difference between the "decision to exclude a member of a minority because of his race" and "to include a member of a minority for that reason").

311 *See id.* at 2791 (Kennedy, J., concurring) ("[Chief Justice Roberts's] opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.").

312 *See* City of Mobile v. Bolden, 446 U.S. 55, 92 (1980) (Stevens, J., concurring).

313 *See Parents*, 127 S. Ct. at 2792 (Kennedy, J., concurring). Justice Kennedy stated:

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in a different fashion solely on the basis of a systematic, individual typing by race.

Id.

analysis" of efforts to end the harmful effects of de facto segregation.[314]

[314] *Cf.* Grutter v. Bollinger, 539 U.S. 306, 323 (2003) ("Since [the] Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policy.").