

Parents Involved in Community Schools v. Seattle School District No. 1: A Return to a Separate and Unequal Society?

I. Introduction

Justice Roberts firmly concludes his plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*¹ by stating that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”² With this final sentiment, Roberts signs, seals and delivers his perspective in a case poised to potentially alter the course of race relations in America.³ According to Roberts, by reversing the Court of Appeals for the Ninth and Sixth Circuits⁴ and by holding that the use of racial classifications in the school assignment plans at issue is not narrowly tailored to achieve a compelling government interest,⁵ the Supreme Court maintained the sanctity of the Fourteenth Amendment⁶ and promulgated the fundamental notion that no child should be accorded differential treatment based on the color his skin.⁷

Yet while claiming to further the Supreme Court’s decision in *Brown v. Board of Education*,⁸ Roberts’ literal adherence to *Brown*’s wording fails to acknowledge or advance the true spirit of that case.⁹ This note argues that Roberts’ opinion,¹⁰ under the guise of preserving the Constitution and the sanctity of the Fourteenth Amendment, strays far from the heart of

Brown by ignoring the critical history and contexts in which both *Brown* and the current case came to fruition, and in turn threatening the future viability of *Brown*'s promise of true equality.¹¹ Part II of this note presents a historical perspective of relevant case law, specifically focusing on the overall policy and educational goals past decisions sought to advance. In light of such precedents, Roberts' decision in *Parents Involved in Community Schools* marks a significant departure from the thematic overtones of prior civil rights cases.¹² Part III compares the plurality's strict constructionist view with the more historical, policy oriented analysis of the dissent¹³ and examines how the justices arrive at their respective outcomes. Finally, Part IV discusses the possible consequences of the Supreme Court's decision in the noted case, as well as the many questions and problems left unresolved by Roberts' opinion.

II. Perspective: A Historical Journey Toward *Parents Involved in Community Schools*

For the past fifty years, this nation has struggled to find the way in which to best implement *Brown*'s central promise,¹⁴ and although the Supreme Court has both narrowed and expanded *Brown*'s holding at different points in time, the Court has always remained true to *Brown*'s message of racial equality.¹⁵ Roberts' decision in *Parents Involved in Community Schools* marks a stark departure from this tradition.¹⁶

In *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁷ the Supreme Court held that when a school board fails in its duty to create an acceptable school integration plan, a district court has broad discretion to impose a plan that utilizes a ratio of white to black students as a starting point to achieve racial integration in public schools.¹⁸ In so holding, the Supreme Court explicitly acknowledged the relation of the Equal Protection Clause of the Fourteenth Amendment to *Brown's* central message- that state-enforced separation of races in the public school system is discrimination that violates the Equal Protection Clause, and this country must remedy the violation by dismantling a dual school system.¹⁹

The court in *Swann* implicitly understood that simply requiring racially neutral assignment plans would not accomplish *Brown's* prescribed remedy²⁰ and structured *Swann's* outcome accordingly. In contrast, the plurality in *Parents Involved in Community Schools*, while enforcing the literal meaning of the Equal Protection Clause,²¹ disregards the Fourteenth Amendment's connection to *Brown* and denounces the important role race-conscious considerations may play in actually achieving equality.²² Instead of using the Fourteenth Amendment to further the spirit of *Brown*, Roberts halts *Brown's* quest for equality by striking down the school assignment plans at issue. In this sense, *Parents Involved in Community*

Schools constitutes a significant break from *Brown*'s precedent as perpetuated by *Swann*.²³

Nearly a decade after *Swann*, the Supreme Court limited the holding of *Brown* through its opinion in *Regents of the University of California v. Bakke*.²⁴ Yet while *Bakke* held that the race-based admissions program used by the University of California violated the Fourteenth Amendment,²⁵ it remained, unlike the plurality in *Parents Involved in Community Schools*, true to the principles of *Brown*. Justice Powell preserved the historical spirit of *Brown* by intentionally stating that an admissions program may take race into account in order to achieve educational diversity.²⁶ Powell specifically noted that "in some situations race can be helpful information in enabling the admissions officer to understand more fully what a particular candidate has accomplished and against what odds."²⁷

Bakke thus recognized that, regardless of the fact that state sponsored segregation no longer exists, subtle vestiges of a segregated society remain, especially within the realm of education.²⁸ Powell preserved the spirit of *Brown* by warning those responsible for furthering the education of America's youth to remain cognizant of the past in order to pursue a more equal society and prevent a return to a pre-*Brown* era.²⁹ Roberts' opinion in *Parents Involved in Community Schools*, however, departs from the promise of *Brown* and from Powell's words of

caution in *Bakke* by failing to acknowledge that the remnants of a previously segregated society still color this country's present. Indeed, Roberts blatantly discounts the turbulent history that gives rise to the noted case by repeatedly referencing the fact that the "Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary."³⁰ Yet to state that formal segregation did not exist in these cities is a far cry from claiming that segregation - in and of itself - was not prevalent and pervasive; the extensive history provided by the dissent in the noted case proves otherwise.³¹ Robert's failure to recognize history ignores the sad but true notion that this country is still struggling to overcome its segregated past, and in doing so, marks a significant departure from the spirit of *Brown* and its subsequent history.

With respect to the series of historical decisions leading up to *Parents Involved in Community Schools*, two final cases epitomize the Supreme Court's desire to maintain and strengthen *Brown*'s promise of racial equality, not only on paper, but as an ever-present, ubiquitous theme in everyday life.³² And in as much as *Gratz v. Bollinger*³³ and *Grutter v. Bollinger*³⁴ solidify fifty years of precedent perpetuating *Brown*'s vision, so do they further expose the Justice Roberts' radical shift away from the very ideals *Brown* and sought to embody.

While the Supreme Court decided *Gratz* and *Grutter* on the very same day,³⁵ it

denounced the use of race in the school admissions plan at issue in *Gratz*³⁶ but upheld its use in *Grutter*.³⁷ In *Gratz*, the Supreme Court held that the University of Michigan's use of race is not narrowly tailored to achieve the asserted compelling interest in diversity and thus violated the Fourteenth Amendment.³⁸ In *Grutter*, conversely, the Court held that "the Equal Protection Clause does not prohibit the [University of Michigan] Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."³⁹

Although the outcomes of *Gratz* and *Grutter* differ, it is important to note that the Supreme Court, in both cases, specifically stated that racial and ethnic diversity *can* constitute a compelling state interest,⁴⁰ and, when a court reviews race-based governmental action under the Fourteenth Amendment, context does matter.⁴¹ Thus, the Supreme Court explicitly pointed out the importance of recognizing racial and ethnic diversity and the context in which it arises. In doing so, the Court furthered both *Brown*'s inherent theme of striving toward racial equality and gently reminded the nation that the reality of compulsory segregation is not far enough in this country's past for America to confidently dispose of the use of racial considerations in the realm of education.⁴²

By strictly construing the Equal Protection Clause, Roberts and the plurality in *Parents Involved in Community Schools* expressly disregard *Grutter's* warning,⁴³ and, by invalidating the school assignment plans at issue without evaluating the context in which they arise⁴⁴ or the historically significant goals the plans seek to achieve,⁴⁵ Roberts and the plurality fail to understand and internalize *Brown's* ideal of equal educational opportunity. Thus, *Parents Involved in Community Schools* marks a significant departure from precedent.

From a historical perspective, it is evident that the Supreme Court has spent the past fifty years striving to keep *Brown's* central theme of racial equality alive. Regardless of whether the Supreme Court has expanded or limited *Brown's* initial holding,⁴⁶ the Court, prior to the noted case, has always remained true to *Brown's* idealistic goal of equality⁴⁷ and has fervently reminded America to not forget its history, lest we risk repeating it. Yet after just a few short years on the bench,⁴⁸ Chief Justice John Roberts, through his plurality opinion in *Parents Involved in Community Schools*, significantly departs from the historic message of *Brown* and from the strong line of precedent and progress set by *Brown* and its progeny.

III. Analysis: A Divergence of Views

A thorough reading of *Parents Involved in Community Schools* clearly indicates that the

diverging opinions in this case stem from the justices' distinct styles of legal construction.

Roberts and the plurality construe the Equal Protection Clause of the Fourteenth Amendment, the Constitution and case law in a strict and literal manner.⁴⁹ On the other hand, Breyer and the dissent approach the noted case from a more global perspective, interpreting the Constitution as a flexible document and taking full account of the historical themes and overtones that surround the line of cases leading up to *Parents Involved in Community Schools*.⁵⁰ This section seeks to understand the reasoning behind both the plurality's holding and the dissent's conclusions, as well as their respective interpretations of cited case law in light of each side's distinct perspective. Additionally, this section sets forth the main proposition for which this case stands and that proposition's possible implications.

After holding that *Parents Involved in Community Schools* had standing and recognizing the Supreme Court's jurisdiction over the present matter,⁵¹ Roberts states that the action before the Court, which involves the "distribution of burdens or benefits on the basis of individual racial classifications," must be reviewed under strict scrutiny.⁵² In order to satisfy such a standard, the assignment plans at issue, or at least the part that utilizes racial classifications, must be narrowly tailored to achieve a compelling government interest.⁵³

A: The Battle Over the Existence of a Compelling Interest

Roberts initially recognizes two interests that past courts have deemed compelling,⁵⁴ but, by strictly construing both the facts of the this case as well as prior case law, Roberts distinguishes the interests presented in the current case. While acknowledging that “remedying the effects of past intentional discrimination”⁵⁵ may constitute a compelling interest, Roberts narrowly defines “intentional discrimination” as discrimination resulting solely from state imposed discrimination and then concludes that such a compelling interest does not exist in this instance.⁵⁶ Roberts reasons that, because Seattle schools were never segregated by law⁵⁷ and because the Jefferson County schools had achieved “unitary status,”⁵⁸ the school districts can “no longer rely on an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students.”⁵⁹ By construing the concept of “past intentional discrimination” strictly as state sponsored discrimination, once a state no longer legally enforces segregation, Roberts no longer recognizes a problem in need of a remedy.

Additionally, Roberts and the plurality acknowledge that *Grutter* recognized that an interest in diversity in education constitutes a compelling interest for purposes of a strict scrutiny analysis.⁶⁰ Roberts, however, distinguishes *Grutter* by narrowly confining the diversity

championed in that case to the context of higher education,⁶¹ concluding that “the present cases are not governed by *Grutter*” because the plans at issue involve race-based assignments in elementary, middle, and high schools.⁶² By strictly construing the meaning of “past intentional discrimination” and by limiting *Grutter* solely to the context of higher education, Roberts effectively dismisses the notion that a compelling interest exists in this instance.

Roberts’ strict style of construction regarding the existence of a compelling interest in this case, is further illuminated when compared to the Breyer’s dissenting opinion. Breyer, taking full account of this nation’s history and the thematic overtones promulgated by *Brown* and its progeny, finds a compelling interest both in remedying the effects of past discrimination and in promoting racial and ethnic diversity.⁶³ For example, with respect to the compelling interest of remedying the effects of past intentional discrimination, Breyer contends that the plurality’s narrow construction of “past intentional discrimination” fails to take into account the historical and factual context in which civil rights cases arise.⁶⁴ The dissent then proceeds to set forth that history,⁶⁵ demonstrating that the negative impacts of segregation stemmed not only from state laws, but from housing patterns or generalized discrimination that resulted from centuries of racial inequality.⁶⁶ When compared to Roberts’ opinion, Breyer’s conception of past

discrimination is much farther reaching, and the plans at issue in this case clearly constitute a acceptable means by which to remedy past wrongs when viewed through Breyer's flexible framework.⁶⁷

B: The Struggle to Define “Narrowly Tailored”

The plurality next contends that, even if a compelling government interest has presented itself in *Parents Involved in Community Schools*, the plans at issue are not narrowly tailored to meet the school districts' stated goals; the plurality finds that “in design and operations, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”⁶⁸ Roberts narrowly construes the notion of “racial balance,” and he refuses to distinguish between plans that serve to segregate and plans that seek to integrate.⁶⁹ In fact, Roberts' interpretation of the Equal Protection Clause is so literal, it renders nearly every plan that seeks to utilize race as a factor, no matter how slight, unconstitutional. This, however, is the very essence of the plurality's opinion; indeed, Roberts believes the only way to achieve equality in public schools, and society in general, is to literally phase out any and all assignments based on race.⁷⁰

In contrast, the dissent once again voices a very different view regarding whether the use

of racial classifications in the assignment plans under review is sufficiently narrowly tailored to meet the compelling government interest. Indeed, Breyer concludes that the plans at issue survive the strict scrutiny analysis.⁷¹ First of all, Breyer argues that the race-conscious element in the school assignment plans constitute “but one part of the plans that depend primarily upon other, nonracial elements.”⁷² Second, he contends that the plans, in their current state, are certainly more narrowly tailored and far less burdensome than the plan in *Grutter*, an assignment plan that this Court has expressly approved.⁷³ Third, Breyer makes the strong argument that “the manner in which the school boards developed these plans itself reflects ‘narrow tailoring.’”⁷⁴ When taken as a whole, the dissent’s view of a properly “narrowly tailored” school assignment plan consists of a an approach that takes into account history, context and the unique factors of the school district in question⁷⁵ and, as such, significantly differs from the plurality’s highly technical definition.

Overall, the plurality’s opinion in *Parents Involved in Community Schools* stands for the strict proposition that “the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.”⁷⁶ Implicit in this literal interpretation of the Constitution and prior case law is the understanding that very few future

cases involving race-based decision-making will ever survive the strict scrutiny analysis envisioned by the plurality. In turn, *Parents Involved in Community Schools* may prove to be detrimental to plans, like those at issue in the noted case, that seek to further the spirit of integration and equality demanded by *Brown*.⁷⁷

IV. Comment: What Happens Next?

The fallout from the plurality's opinion in *Parents Involved in Community Schools* remains to be seen. Potentially, this decision has the ability to affect *Brown* and its progeny in two distinct ways. First, Robert's rejection of the school assignment plans at issue may have negative consequences on *Brown's* literal demand for a more integrated, equal society.⁷⁸ The dissent in *Parents Involved in Community Schools* took great care in explaining that, when society takes a hands-off approach to implementing *Brown*, such as through the simple, racially neutral plans cautioned against in *Swann*,⁷⁹ this nation risks returning to a segregated school system and a segregated society.⁸⁰ The plans at issue in *Parents Involved in Community Schools* sought to counteract and prevent such retrogression,⁸¹ but the Supreme Court has now condemned these plans as unconstitutional. Furthermore, after invalidating both the Seattle and Louisville plans, the plurality offers no constructive means by which school districts and the

nation can address this looming problem of retrogression. A return to a dual school system, regardless of whether such a system is mandated by the state, perpetuates *de facto* segregation⁸² and, in turn, increases the risk that racism will once again become the norm.⁸³

Second, and more importantly, however, is the extent to which Roberts' opinion in *Parents Involved in Community Schools* threatens the theoretical, psychological concept of *Brown* and its subsequent history. For many years, *Brown* has symbolized a departure from the past and the promise of a brighter future;⁸⁴ *Brown* has become the ideal toward which we as a nation now strive. In striking down the Seattle and Louisville plans, the Supreme Court also struck down the very notions for which *Brown* stood. It is nearly impossible to envision true equality when the Supreme Court, the very entity whose job it is to "use the Constitution to ensure equal educational opportunity for all children in the United States,"⁸⁵ denies school districts the ability to actually achieve those goals.

The plurality's opinion is an assault on the very heart of *Brown*, and without *Brown*'s spirit, the ideal of a truly equal nation remains but a distant dream. *Brown* sought to fulfill a promise of "one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live."⁸⁶ Roberts' strict reading of the Fourteenth Amendment and

literal interpretation of a color-blind Constitution may seem promising as legal principles, but, in actuality, the plurality's decision in the noted case may critically impede the true aspiration of national unity *Brown* so deeply idealized. Only time will reveal the true consequences of the Supreme Court's decision in *Parents Involved in Community Schools*.

V. Conclusion

A court cannot decide a case in a vacuum; the present is inextricably linked to the past and, to this day, subtle vestiges of this country's troubled history remain palpable.⁸⁷ We cannot, and must not, forget the long struggle against the racial inequality that lawfully existed a mere half century ago. Fifty years ago, "in this Court's finest hour, *Brown v. Board of Education* challenged history and helped to change it."⁸⁸ Roberts' decision in *Parents Involved in Community Schools* may not only prevent this country from achieving *Brown's* ideal of a truly equal society, but his failure to consider this case in the context of America's embattled racial history, while shielding himself behind the very words of the Constitution, ignores the heart of *Brown* and sets this country on a backward path toward a separate and unequal nation.⁸⁹

¹ 127 S.Ct. 2738 (2007).

² *Id.* at 2768.

³ *See id.* at 2837 (Breyer, J., dissenting) (“To invalidate the plans under review is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret”).

⁴ *Id.* at 2768.

⁵ *Id.* at 2755.

⁶ The Equal Protection Clause guarantees that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

⁷ *See Parents Involved in Community Schools*, 127 S.Ct. at 2767.

⁸ Both *Brown v. Board of Education*, 347 U.S. 483 (1954) (“*Brown I*”), and *Brown v. Board of Education*, 349 U.S. 294 (1955) (“*Brown II*”), capture the Supreme Court’s sentiments regarding the constitutional violations of school segregation. *See Parents Involved in Community Schools*, 127 S.Ct. at 2767.

⁹ Indeed, Roberts adopts the literal holding of the *Brown*. *See Parents Involved in Community*

Schools, 127 S.Ct. at 2767 (school districts are required “to achieve a system of determining admission to the public schools on a nonracial basis”) (quoting *Brown II*, 349 U.S. at 300-01).

However, by requiring the school districts to dispense with the programs at issue, Roberts’

holding actually “undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality.” *Parents Involved in Community Schools*, 127 S.Ct. at 2800 (Breyer, J., dissenting).

¹⁰ Chief Justice Roberts authored the plurality opinion of the Court with respect to Parts I, II, III-A, and III-C, and with respect to Parts III-B and IV, in which Justices Scalia, Thomas, and Alito join. *Parents Involved in Community Schools*, 127 S.Ct. at 2746.

¹¹ “To judge educational programs which benefit African-Americans the same way as programs which injure them is to ignore the history and contemporary reality of differences in educational opportunity.” Michael J. Kaufman, *Reading, Writing and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 756 (2007).

¹² See *School Committee of Boston v. Board of Education*, 352, Mass. 693, 698 (Mass. 1987) (noting the irony that would result if a court proclaimed an act whose purpose was to achieve

equal educational opportunities invalid based on a violation of the Equal Protection Clause of the Fourteenth Amendment), *appeal dismissed*, 389 U.S. 572 (1968).

¹³ Justice Breyer, joined by Justices Stevens, Souter, and Ginsberg, authored the dissenting opinion discussed in this note. *Parents Involved in Community Schools*, 127 S.Ct. at 2800.

Justice Stevens authored an additional dissenting opinion in the noted case. *Id.* at 2797.

¹⁴At heart, *Brown* sought to achieve the “promise of 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.” *Id.* at 2836 (Breyer, J., dissenting).

¹⁵ While a vast amount of case law demonstrates the Supreme Court’s continued devotion to *Brown*’s message, four cases are of particular relevance to the noted case and shall be discussed in detail in section II of this note.

¹⁶ “At heart, Roberts’s opinion is an assault on *Brown v Board of Education*, the landmark 1954 desegregation case, masquerading as an attempt to redeem it.” Editorial, *Roberts Rules*, THE NEW REPUBLIC, July 13, 2007, at 1.

¹⁷ 402 U.S. 1 (1971).

¹⁸ *Id.* at 25.

¹⁹ *Id.* at 22.

²⁰ *See id.* at 28 (stating that “such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial separation”).

²¹ The Equal Protection Clause of the Fourteenth Amendment literally states that “no State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (emphasis added).

²² “Where teaching racial literacy depends on understanding the existence of at least some racial differences, a program that is *conscious of those differences* in meeting its goal of teaching about them *cannot be inconsistent with an authentic understanding of equality.*” Michael J. Kaufman, *Reading, Writing and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. RICH. L. REV. 707, 714 (2007) (emphasis added).

²³ “Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day- to equate the plight of Linda Brown (who was ordered

to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined).” *Parents Involved in Community Schools*, 127 S.Ct. at 2836.

²⁴ 438 U.S. 265 (1978).

²⁵ The Supreme Court specifically found the program unconstitutional because the school reserved a specified number of seats for individuals from certain minority groups. *See id.* at 315. In the sense that the admissions program in *Bakke* explicitly used quotas and the school assignment programs at issue in *Parents Involved in Community Schools* did not, the two cases are patently distinguishable.

²⁶ *Bakke*, 438 U.S. at 316.

²⁷ *Id.* at 318.

²⁸ *See Parents Involved in Community Schools* 127 S.Ct. at 2824 (Breyer, J., dissenting) (“This Court pointed out that in ‘one sense of the term, vestiges of past segregation by state decree do remaining our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and

persist.” (quoting *Freeman v. Pitts*, 503 U.S. 467, 495 (1992))). *See also* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 113-114 (2004) (discussing the notion that unequal and segregated schools still exist and that even those schools that have managed to become more integrated since *Brown* are “moving backward at an accelerating rate”).

²⁹ *See Bakke*, 438 U.S. at 320 (noting that “the State has a substantial interest that legitimately must be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin”).

³⁰ *Parents Involved in Community Schools*, 127 S.Ct. at 2761.

³¹ *See id.* at 2801-2809.

³² *Id.* at 2836.

³³ 539 U.S. 244 (2003).

³⁴ 539 U.S. 306 (2003).

³⁵ The Supreme Court decided both cases on June 23, 2003. *Gratz*, 539 U.S. at 244; *Grutter*, 539 U.S. at 306.

³⁶ *Gratz*, 539 U.S. at 275.

³⁷ *Grutter*, 539 U.S. at 344.

³⁸ *Gratz*, 539 U.S. at 275.

³⁹ *Grutter*, 539 U.S. at 343.

⁴⁰ *Gratz*, 539 U.S. at 246; *Grutter*, 539 U.S. at 327-333.

⁴¹ *Grutter*, 539 U.S. at 327 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-344).

⁴² *Grutter*, 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”).

⁴³ *See id.* at 343.

⁴⁴ The most recent versions of both the Seattle and Louisville plans evolved after several years of struggling to find the best ways in which to achieve *Brown*’s call for school integration. *Parents Involved in Community Schools*, 127 S.Ct. at 2801-2809 (Breyer, J., dissenting).

⁴⁵ *See id.* at 2800 (Breyer, J., dissenting) (noting that the plans at issue, like those plans before them, seek to bring about the type of racially integrated education that *Brown* intended).

⁴⁶ Compare the outcomes in *Bakke*, 438 U.S. at 315, and *Gratz*, 539 U.S. at 275, with the

outcomes in *Swann*, 402 U.S. at 25, and *Grutter*, 539 U.S. at 344.

⁴⁷ See *Parents Involved in Community Schools*, 127 S.Ct. at 2837 (Breyer, J., dissenting) (“The last half century has witnessed great strides toward racial equality”).

⁴⁸ John Robert’s was sworn in as Chief Justice of the United States Supreme Court in the fall of 2005. See Erwin Chemerinsky, *The Rookie Year of the Roberts Court & a Look Ahead*, 34 *Pepp. L. Rev.* 535, 536 (2007).

⁴⁹ See, e.g., *Parents Involved in Community Schools*, 127 S.Ct. at 2768 (noting that the Fourteenth Amendment literally prevents states from according differential treatment on the basis of race at all, regardless of the context in which the differential treatment occurs).

⁵⁰ *Id.* at 2818 (Breyer, J., dissenting) (noting that “context matters when reviewing race-based governmental action under the Equal Protection Clause” (citing *Grutter*, 529 U.S. at 327)).

⁵¹ *Id.* at 2750.

⁵² *Id.* at 2751 (citing *Johnson v. California*, 543 U.S. 499 (2005)).

⁵³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁵⁴ Past courts have held that remedying the effects of past intentional discrimination constitutes a

compelling interest. *Parents Involved in Community Schools*, 127 S.Ct. at 2752 (citing *Freeman*,

503 U.S. at 494). Additionally, *Grutter* found a compelling interest in racial and ethnic diversity.

Parents Involved in Community Schools, 127 S.Ct. at 2753.

⁵⁵ *Parents Involved in Community Schools*, 127 S.Ct. at 2752.

⁵⁶ *Id.* at 2752.

⁵⁷ *Id.* at 2752.

⁵⁸ *Id.* at 2752 (citing *Hampton v. Jefferson Cty. Bd. of Ed.*, 102 F.Supp.2d 358, 360).

⁵⁹ *Parents Involved in Community Schools*, 127 S.Ct. at 2752.

⁶⁰ *Id.* at 2753.

⁶¹ “The specific interest found compelling in *Grutter* was student body diversity in the context of higher education.” *Id.* at 2753 (internal quotations omitted).

⁶² *Id.* at 2254.

⁶³ Indeed, Breyer notes that the Supreme Court has repeatedly required, permitted and encouraged local authorities to undertake efforts to achieve integration on the basis that racial equality and school integration in and of themselves constitute “compelling” interests. *See id.* at

2800 (Breyer, J., dissenting).

⁶⁴ *See id.* at 2801 (Breyer, J., dissenting).

⁶⁵ *See id.* at 2801-07 (Breyer, J., dissenting).

⁶⁶ *See id.* at 2802 (Breyer, J., dissenting).

⁶⁷ *See id.* at 2800 (Breyer, J., dissenting) (noting that the plans reflect the longstanding effort of school boards to remedy past discrimination through integration and diversity).

⁶⁸ *Id.* at 2755. Roberts further states that “however closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled ‘racial diversity’ or anything else.” *Id.* at 2759.

⁶⁹ *See id.* at 2767 (arguing that *Brown* stands for the notion that any instance that involves according differential treatment to American children on the basis of their color or race is unconstitutional).

⁷⁰ *Id.* at 2768 (“The way to stop discrimination on the basis or race is to stop discriminating on the basis of race”).

⁷¹ *See id.* at 2824 (Breyer, J., dissenting) (stating that several factors lead Breyer to “conclude

that the school boards' use of race-conscious criteria in these plans passes even the strictest

'tailoring' test").

⁷² *Id.* at 2824 (Breyer, J., dissenting).

⁷³ *Id.* at 2825 (Breyer, J., dissenting).

⁷⁴ *Id.* at 2825 (Breyer, J., dissenting).

⁷⁵ "The upshot is that these plans' specific features . . . specifically show that the districts' plans are 'narrowly tailored' to achieve their 'compelling interests.'" *Id.* at 2829-30 (Breyer, J. dissenting).

⁷⁶ *Id.* at 2767 (quoting Brief for Appellants in Nos. 1, 2, and 3 and for Respondents in No. 10 on Reargument in *Brown I*, O.T. 1953, p. 15 (Summary of Argument)).

⁷⁷ "To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret." *Parents Involved in Community Schools*, 127 S.Ct. at 2837 (Breyer, J., dissenting).

⁷⁸ The plurality's decision demonstrates that, at this point in time, "at least four conservative

justices have made it clear that they believe that nearly all racial classifications are

unconstitutional.” Jeffrey Rosen, *Can a Law Change a Society*, THE NEW YORK TIMES, July 1, 2007, at 1.

⁷⁹ *See Swann*, 402 U.S. at 28.

⁸⁰ *Parents Involved in Community Schools*, 127 S.Ct. at 2802.

⁸¹ *See id.* at 2802.

⁸² *De facto* segregation is segregation caused by housing patterns or general societal discrimination as opposed to *de jure* segregation, which is segregation caused by a legally enforced dual school system. *Id.* at 2802.

⁸³ *See id.* at 2837 (Breyer, J., dissenting) (noting that the plurality’s opinion would break *Brown*’s promise of integration and equality, thus threatening a return to a pre-*Brown* era of unequal treatment).

⁸⁴ “Finally, what of the hope and promise of *Brown*? For much of this Nation’s history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate busses, and studied in separate schools. In this Court’s finest hour,

Brown v. Board of Education challenged history and helped to change it.” *Parents Involved in*

Community Schools, 127 S.Ct. at 2836 (Breyer, J., dissenting).

⁸⁵ Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111 (2004).

⁸⁶ *Parents Involved in Community Schools*, 127 S.Ct. at 2836.

⁸⁷ “The enduring hope is that race should not matter; the reality is that too often it does.” *Id.* at 2791 (Kennedy, J., concurring).

⁸⁸ *Id.* at 2836 (Breyer, J., dissenting).

⁸⁹ *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 134 (2004).