Amidst heightened public awareness over persisting levels of racial segregation in our public schools, an awareness brought to public view in the debate over the Supreme Court's recent decisions in the Seattle and Louisville school districts and upon reflection on the fiftieth anniversary of the Little Rock Nine, there is a recurring national conversation over the legacy of Brown v. Board of Education and the promise of racial integration. One thread of this conversation begins with the proposition that colorblindness is paramount, a principle purportedly envisioned in the dream of Dr. Martin Luther King Jr., and the central meaning of the Brown decision. Consequently, a number of jurists, including at least four Justices on the Supreme Court, have selectively culled Brown's rhetoric into a prohibition on all racial classifications. Under this view, it is the categorization process, in which the state designates individuals as members of a particular race, which is the harm identified by the Court in Brown. In this Article, we will explore the development of the anticlassification principle, beginning with its full ascendancy in Parents Involved.
Although the anticlassification principle had been expressed in earlier cases, most conspicuously in the affirmative action context, it was unclear until now whether it would extend into the very domain in which Brown was settled. By crossing over into the heart of Brown, the colorblind narrative has reached an apex that threatens the promise of an integrated society as its foundation. The incongruence of abstracted legal formulation with the stark social backdrop has produced a tension that cannot hold. At the same time that colorblindness has reached new ascendancy, it has never been so powerfully contested.

In Part I, we will examine the logic of the plurality opinions in Parents Involved in an attempt to understand with greater precision how this principle is being supported and applied. The Court produced five different opinions in this lengthy, complicated decision. Our examination of the plurality opinion of Chief Justice Roberts and the concurring opinion of Justice Thomas is not an effort to lift up those opinions so much as to examine their foundations.

Justice Kennedy’s opinion has justifiably received much of the attention from legal scholars and commentators because his vote was decisive and his opinion marks the outer boundaries of consensus among the plurality voting block. Justice Kennedy’s opinion is also significant because of his holding that there exist compelling government interests in the avoiding racial isolation and in achieving a diverse student population in primary education. Along with the four dissenting Justices, a majority of the Justices on the Court have now voiced approval of a new compelling interest that may sustain race-conscious policies under the strict scrutiny framework. As momentous as this event may be in the efforts to build a fair and more inclusive democracy, the focus in this Article will be on the ongoing struggle to claim the mantle of Brown and interpret the Equal Protection Clause. This is a struggle that is most visible in the opinions of Chief Justice Roberts, Justice Thomas and Justice Breyer.

the school districts asserting that the plans violated the Equal Protection Clause of the Fourteenth Amendment. Although the district courts ruled in favor of the school districts and upheld the voluntary integration plans and the Ninth Circuit and the Sixth Circuit Courts of Appeal affirmed those rulings, the Supreme Court sided with parents who challenged the school assignments and struck down the race-conscious tiebreaker plans used by the school districts.

4 See generally id. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

5 Id. at 2797.

6 Justice Stevens’s brief dissent squarely addresses this issue as well, but serves primarily to reiterate themes found in Justice Breyer’s lengthy dissent and provide the personal perspective of the long-sitting Justice.
In probing the foundations of the plurality opinions, we will offer counter-points and highlight gaps in reasoning. We will also dig deeper, look for unstated premises, assumptions, and search for coherence as well as incoherence. We recognize that the anticlassification principle may have a cultural resonance and rhetorical grounding in the story of Brown and the language in that decision. However, once the logic of the Roberts and Thomas opinions are scrutinized, a very different concern emerges. As we will show, the core principle animating the arguments in the opinions of Justice Roberts and Justice Thomas is a dignitary harm incurred when the state labels a person of a particular race.

In Part II, we will present two narratives about the Brown decision and its progeny that explain the origin and development of the anticlassification principle. Rather than a ground of the Brown decision itself, the anticlassification principle is better understood as an outgrowth of the debates over Brown. The anticlassification justification was seen as a more neutral way of defending the decision. The ascendancy of the anticlassification principle is also a consequence of the conservative canonization and interpretation of the Brown decision. Supreme Court decisions are more than simply enunciations of legal opinion or rulings on a particular set of facts. They reflect the shifting political and social struggles in which the Court resolves debates. They shape, in turn, the debates that follow their pronouncement.

In Part III, we will critique the development of the plurality’s colorblind narrative and the attempt to claim the mantle of Brown. Contrary to the plurality’s anticlassification reading, the holding in Brown hinged on the harmful effects of segregation on the provision of educational opportunities. Rather than installing a formal rule of colorblindness, the Court in Brown was initiating the overthrow of a caste system. We suggest that the plurality’s approach is closer to Plessy in terms of its racially symmetrical legal formalism and a-contextual interpretation of the Fourteenth Amendment. In some ways, the understanding of the Equal Protection Clause developed in Parents Involved is more radical than the Plessy Court’s. In any case, the insistent application of a broad anticlassification rule is inconsistent with the purposes for which the Fourteenth Amendment was devised and should hardly be used to justify a categorical ban on race-conscious measures.

Finally, in Part IV, we will highlight the dissenting opinion of Justice Breyer and put him in conversation with the Court in Brown and beyond. His emphasis on the importance of integrated education in a vibrant, multi-racial democracy draws upon a thread spun in Brown and re-iterated in Grutter. Integrated education is instrumental in the development of good citizens and a
strong nation. At a time of exploding demographic diversity, the entrenched patterns of racial segregation and racial isolation evident across the United States serve only to fragment our communities, making these goals seem ever distant. Justice Breyer plays the role of constitutional prophet to the moral vision embodied in the Fourteenth Amendment of a truly racially inclusive democracy.

I. THE MODERN DEVELOPMENT OF THE ANTICLASSIFICATION PRINCIPLE

Rather than retrace the development of the anticlassification principle through Supreme Court jurisprudence over the last generation, we will focus on the opinions in Parents Involved. It is in Parents Involved that we reach the full ascendancy of this principle. And it is the opinions in Parents Involved that most directly bear on the struggle over the meaning of Brown. Parents Involved was decided in the K–12 context, the arena in which Brown was fought.

To accomplish our goal of uncovering the core animating principles and assumptions beneath the arguments of the colorblind wing of the Court, we will analyze the opinions of Chief Justice Roberts and Justice Thomas in three steps. First, we will present the arguments offered by each Justice. Secondly, we will conduct a micro-critique of the reasoning that supports those arguments. Finally, we will step back and offer a macro-examination of the logic of the opinion searching for coherence, for a recurring principle that runs through and seems to thread the disparate strands of argument.

A. The Opinion of Chief Justice Roberts

Chief Justice Roberts delivers the opinion of the Court in Parents Involved with the exception of Parts III-B and IV, in which Justice Kennedy parts company and authors a separate concurrence explaining his disagreement. Roberts's opinion is divided into four parts, only three of which contain argument, and only the latter two which interest us. Part I of the Roberts opinion recounts factual and the procedural history of the cases. Part II addresses the question of whether the Court has jurisdiction to decide the cases. We turn to Part III and Part IV to examine the reasoning behind the arguments presented by Chief Justice Roberts.

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7 *Id.* at 2746–50.
8 *Id.* at 2750–51.
Chief Justice Roberts ultimately concludes that the voluntary racial integration plans implemented by the Seattle and Louisville school districts are unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. To arrive at this conclusion, Roberts advances three sub-arguments in Part III. First, Roberts seeks to establish that the Equal Protection Clause requires that all racial classifications be subjected to strict scrutiny review. Second, under strict scrutiny review, state action must be narrowly tailored to serve a compelling government interest. Roberts contends that neither the Seattle nor the Louisville school districts can rely upon previously established compelling government interests that would justify the use of race under strict scrutiny review. Third, Roberts argues that the racial integration plans are not narrowly tailored to serve their asserted government interests. We will examine the support Chief Justice Roberts offers for each of these propositions.

1. The Standard of Review

Chief Justice Roberts begins Part III(A) by arguing that the strict scrutiny standard of review is the applicable legal standard. In support of this contention, he relies entirely on recent Supreme Court precedent bolstered by the proposition that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classifications." Since 1995, a bare majority of the Supreme Court has consistently held that strict scrutiny review applies to all government race-based classifications.

Although some Justices, as some of the judges that reviewed these cases in the courts below, might prefer to apply a less stringent standard of review,
and although Justice Breyer is unwilling to concede the issue, the dissent seems unwilling to launch a full-frontal attack on the application of strict scrutiny review. Instead, the disagreement between the plurality and the dissent on this issue centers upon what that standard means in this context and how to apply it. The fact that the Justices accept that the school districts must assert a "compelling government interest" and that the plans must be "narrowly tailored" to achieve that interest does not get us very far. Even accepting the standard of review, it is an open question what may be considered 'compelling' or 'narrowly tailored' in this context.

After concluding that strict scrutiny is the applicable standard of review, Chief Justice Roberts argues that the school boards cannot rely upon previously established compelling government interests that would justify the use of race under strict scrutiny review. The two previously established government interests that justified the use of race were remedying de jure segregation and promoting diversity in higher education.

2. Compelling Interest in Remediying De Jure Segregation

Roberts first addresses the question of whether the school boards can rely upon a compelling interest in remedying the past effects of intentional government discrimination. The mandatory desegregation plans that typify the pursuit of this compelling interest are in many ways similar to the voluntary plans at issue in these cases. In order to conclude that these plans are unconstitutional, Roberts must show that this interest is inapplicable.

Roberts addresses the applicability of this interest in Seattle and Jefferson County Public Schools (JCPS) separately. Since Seattle public schools were never adjudicated by a court to be segregated by law and were not the subject of desegregation decrees, Roberts concludes this interest is inapplicable to Seattle. Roberts then turns to JCPS. He argues that JCPS could not rely upon

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18 Parents Involved, 127 S. Ct. at 2820 (In light of the precedents, Justice Breyer would nonetheless review the cases under strict scrutiny.).

19 Id. at 2752–54.


21 Parents Involved, 127 S. Ct. at 2752. Chief Justice Roberts refers to this interest as "past intentional discrimination."

22 Id.
an interest in remedying the effects of past intentional discrimination in defending the present use of race in assigning students.\footnote{Id.}

After explaining that the U.S. District Court for the Western District of Kentucky dissolved the mandatory desegregation decree in 2000 upon a finding that the school district had eliminated the vestiges of segregation, the Chief Justice explains why JCPS could not rely upon an interest in remedying \textit{de jure} segregation. Putting his argument in standard form for analytical clarity, his reasoning proceeds as follows:

1. "[T]he harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation."\footnote{Id.}

2. "[T]he Constitution is not violated by racial imbalance in the schools, without more."\footnote{Id.}

3. "Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments."\footnote{Id.}

4. "Any continued use of race must be justified on some other basis."\footnote{Id.}

Aside from asserting a connection between the harm being remedied by mandatory desegregation plans and the harm traceable to segregation in statement (1), the Chief Justice leaves unspecified what precisely that harm is.\footnote{Id.} The question of harm is not a semantic inquiry. It bears upon the plurality's understanding of \textit{Brown},\footnote{Id.} and the meaning the plurality ascribes to the Equal

\footnote{The Chief Justice is also not explicit about whether the terms "harm," "constitutional wrong," and "constitutional violation" are roughly interchangeable in their intentional meaning. Following the pattern of logical support numbered above through his conclusion, the Chief Justice's reasoning implies a rough equivalence. However, the way it is accomplished is by subtly shifting terminology. The fact that he finds the terms "harm of segregation" and "constitutional violation/wrong" to be roughly coterminous is significant because it suggests that he does not take cognizance of harms of segregation that do not rise to the level of a constitutional violation. This has implications for the voluntary plans at issue since they are justified on grounds of ameliorating harms of racial isolation, which, by themselves, are not generally understood to be constitutional violations.}

\footnote{The articulation of the harms of segregation in \textit{Brown} became a flashpoint of debate, and the critical distinction from the analysis in \textit{Plessy}. \textit{See infra} Parts II and III.}
Protection Clause. Moreover, it could prove decisive to the constitutionality of the voluntary integration plans at issue.

In analyzing the Chief Justice’s understanding of the harm of segregation, we begin by examining his definition of “segregation.” The term is contested throughout the various opinions of Parents Involved. Fortunately, the Chief Justice is unambiguous regarding his understanding of the meaning of segregation. He defines segregation as “legally separate schools for students of different races.” This definition excludes de facto segregation, in which racially identifiable schools manifest, but are not legally compelled.

Plugging the Chief Justice’s definition of segregation into statement (1), we see that the harm of segregation, according to the Chief Justice, must have something to do with the role of the state in facilitating it rather than the fact of racially separate schooling. This is because the only difference between segregation, as the Chief Justice defines it, and racially imbalanced schools, is the hand of the state.

Therefore, the plurality’s understanding of the harm of segregation gives little weight, if any, to the harms that flow from de facto segregation. This is accomplished by re-defining the previous distinction between de jure and de facto segregation as the difference between ‘segregation’ and mere ‘racial imbalance.’ The Court in Brown observed that although the pernicious impact of segregation is greater when legally compelled, segregation even without the sanction of law is harmful to school children and civic life generally. “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law.” Simply because the past effects of de jure segregation have ostensibly been addressed does not mean that there are no persisting harms from segregation or other reasons which might constitute a sufficiently com-

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30 See discussion of Justice Thomas’s definition of segregation infra Part B.1.
31 Parents Involved, 127 S. Ct. at 2747 (“Seattle has never operated segregated schools—legally separate schools for students of different races.”). This definition of segregation appears to be overly simplistic and troubling because it casts segregation as symmetrical. Although the Court in Brown was careful to emphasize that it was the fact of separation, not the inequality of educational provision, which violated the Equal Protection Clause, the Court did not assume that the impact of that separation was the same for each race. The Court understood the function of legal segregation to be a part of a larger system of Jim Crow subordination. That is why the Court reiterated the findings of the Kansas court that separation of blacks from whites both denoted inferiority of black students and therefore and generated a ‘feeling of inferiority’ among them. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
32 Brown, 347 U.S. at 494.
Compelling government interest to justify the use of race. Indeed, the school districts defend their plans on the ground that even though these plans might not be constitutionally required, it would still be constitutionally permissible for a school district to seek racially integrated schools as a matter of “educational policy.”

The Chief Justice’s approach to this issue is troubling. Although it is the central issue before the Court, rather than rebutting this contention directly, he attacks the citations given in support of it. He then distinguishes or explains away statements that would provide precedential support for this proposition. As a matter of logic, even if the citations and case law offered in support of the school board’s contentions are dicta or other unpersuasive authority, it does not follow that the proposition itself should be dismissed. The Chief Justice acknowledges that the particular issues before the Court in these cases, “whether a district’s voluntary adoption of race-based assignments in the absence of a finding of prior de jure segregation was constitutionally permissible,” was “expressly reserved” and not directly in issue in the cases he distinguishes away. According to the Chief Justice’s own logic, this particular issue remains unsettled. The citations marshaled in support of the school districts’ positions are therefore relevant considerations for their insight into how earlier iterations of the Court may have viewed this issue.

By characterizing the use of race-conscious measures in the remediation of de jure segregation plans in statement (3) as an exception to the general principles of the Equal Protection Clause, the Chief Justice is effectively making a claim about what those principles may be. What remains unclear, however, is why the constitutional wrong of de jure segregation “allows race-based assignments.” Beyond merely asserting a connection between the harm being remedied by race-conscious desegregation plans and the harm of segregation in statement (1), the Chief Justice leaves unanswered why such an

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33 See Parents Involved, 127 S. Ct. at 2752 n.10.
34 Id.
35 The framing of the issue is also troubling. Rather than acknowledge that this is one of the central issues before the Court and one of the chief arguments advanced by the school districts, he characterizes these arguments not as a free-standing legal proposition, but as a claim about precedential support. As a matter of legal argumentation, virtually every assertion could be similarly characterized due to the obvious fact that legal advocacy requires lawyers to marshal the best legal support they can for any given proposition, even if that authority were imperfect.
exception exists.\textsuperscript{36} At the time of Brown, neither the courts nor the general public understood race-conscious mandatory integration plans as an exception to a general rule of colorblindness, but saw them as effectuating the broader equality principle.

Although the issue of whether an interest in remedying \textit{de jure} segregation exists here is not by itself important since neither school district asserts it in support of their plans, the logic of the Chief Justice carries critical assumptions about the harm of segregation, and the meaning of the Equal Protection Clause. These assumptions have important implications for the validity of the voluntary plans at issue.

3. \textbf{Compelling Interest in Diverse Student Body}

Given that the Jefferson County School Board (JCSB) has long been lifted from its mandatory desegregation order and the fact that Seattle was never under such an order, deciding that the compelling interest in remedying \textit{de jure} segregation is inapplicable is a foregone conclusion. None of the courts below relied upon this interest in upholding the plans at issue. They did, however, decide that the compelling interest in a diverse study body first announced in \textit{Bakke} and affirmed in \textit{Grutter} was applicable, and applied \textit{Grutter}'s analytical framework.\textsuperscript{37} Chief Justice Roberts has a more difficult task in persuading the reader that \textit{Grutter} does not govern these voluntary integration plans.

To support this claim, he focuses on three features of \textit{Grutter}. First, he writes that \textit{Grutter} emphasized the importance of context.\textsuperscript{38} The diversity interest asserted in \textit{Grutter} drew upon the important function of public education, emphasizing particular First Amendment dimensions which support educational autonomy in light of the special role of universities in our constitutional tradition.\textsuperscript{39} According to the Chief Justice, those particular constitutional dimensions, unique to institutions of higher education, are not present here. Secondly, \textit{Grutter} commended a broad notion of diversity, of which racial diversity was merely one element, albeit an important one.\textsuperscript{40} The plans in Seattle and Jefferson County focused more singularly on racial

\textsuperscript{36} Depending upon the articulation of reason for it, however, it might also support the use of race outside of the context of remedying \textit{de jure} segregation. Indeed, this argument was made by several of the amici.

\textsuperscript{37} See generally \textit{Grutter}, 539 U.S. at 306.

\textsuperscript{38} \textit{Parents Involved}, 127 S. Ct. at 2753.

\textsuperscript{39} \textit{Grutter}, 539 U.S. at 306.

\textsuperscript{40} \textit{Parents Involved}, 127 S. Ct. at 2753.

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diversity, and specifically on a limited notion of racial diversity, the black/white binary or the white/non-white binary.\textsuperscript{41} Third, the admissions program in \textit{Grutter} was an individualized review process in which no one was reduced to a member of a race. Accordingly, race was not a decisive factor in \textit{Grutter}, but merely one factor.\textsuperscript{42} Roberts claims that race, when it applies, is determinative under the plans being reviewed.

As with all analogical reasoning, finding features that differ between the cases does not necessarily compel the conclusion that the interest upheld in \textit{Grutter} is inapplicable. It is up to the Justices to decide upon the relevance, scope, and applicability of earlier precedent. What Roberts needs to demonstrate is not that \textit{Grutter} and these cases are different but that the logic of \textit{Grutter} should not apply. On this ground he falters.

In the first instance, the Chief Justice strives to cabin \textit{Grutter}'s reach by asserting that the compelling interest in diversity recognized in that case is strictly limited to the "unique context of higher education."\textsuperscript{43} As for what makes the context of higher education "unique" in respect to this interest, the Chief Justice parrots the theory of the \textit{Grutter} Court that on account of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."\textsuperscript{44}

The Chief Justice is correct that universities enjoy a special niche in our constitutional tradition, a niche grounded in First Amendment considerations, among others. But the role of K–12 public education is no less significant within that tradition.\textsuperscript{45} They occupy different perches on the same shelf. Although the freedoms of thought and expression may be associated with a university environment, these considerations are at least partially implicated in the K–12 setting. To the extent that they are unique to the university, they are unique in degree, not in kind.\textsuperscript{46} An inspection of the case law support cited in

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} at 2754.
\item \textsuperscript{42} \textit{Id.} at 2753.
\item \textsuperscript{43} \textit{Id.} at 2754.
\item \textsuperscript{44} \textit{Grutter}, 539 U.S. at 329.
\item \textsuperscript{45} If anything, the role of K–12 education in our constitutional tradition is more significant and more important.
\item \textsuperscript{46} It is true that most public primary and secondary schools do not select their own student bodies. However, the autonomy accorded the universities in \textit{Grutter} with respect to the selection of the student bodies were to serve the ultimate goals of the university. It is those goals, if not the means, which those schools share with the universities to a greater or lesser degree.
\end{itemize}
Grutter for this proposition bears this out. However, even if those particular constitutional considerations were absent in the K-12 context, there are other constitutional considerations which are just as important.

If the diversity interest upheld in Grutter is somehow unique to institutions of higher education on account of their role in fostering a robust exchange of ideas, a principle grounded in the First Amendment, the manifold civic purposes underlying public education generally, and K-12 education in particular, find firm constitutional grounding throughout that document, including the guarantees of the Fourteenth Amendment. Indeed, the Court has repeatedly emphasized the overwhelming importance of public education to our constitutional and democratic tradition. Over five decades ago, the Court in Brown unanimously observed that “education is perhaps the most important function of state and local governments.” The Court explained that “[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.” These constitutional dimensions are also visible in the Supreme Court’s enumeration of the benefits of diversity in Grutter. If the Court was correct in its assertion about the overriding importance of public education in preparing students for work and citizenship and in “sustaining our political and cultural heritage” and in “maintaining the fabric of society” in the

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47 In Grutter, the Court noted:

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, e.g., Wieman v. Updegraff, 344 U.S. 183, 195, 73 S. Ct. 215, 97 L. Ed. 216 (1952) (Frankfurter, J., concurring); Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); Shelton v. Tucker, 364 U.S. 479, 487, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S., at 603, 87 S. Ct. 675.

Grutter, 539 U.S. at 329. The Court in Wieman, for example, does not confine its analysis to universities, but speaks to the “entire educational system”:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.

Wieman, 344 U.S. at 196.


49 Id.
context of higher education, then surely that interest is magnified in the K–12 context. Even Justice Thomas appreciates the connection between public education and constitutional provision. In his view, education is a vital component in securing the “civic, political, and personal freedoms conferred by the Fourteenth Amendment.”

The conclusion that K–12 education occupies a similar niche to university education in our constitutional tradition is inescapable once we restore the omitted six words that precede Chief Justice Roberts’s excerpt from Grutter. Presented in full, the excerpt reads: “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” In reiterating the claim that universities occupy a “special niche in our constitutional tradition,” the Chief Justice presented only one of the grounds for that conclusion. The Court in Grutter was not only relying on First Amendment considerations, but also taking a view of universities within the broader backdrop of public education generally. This puts K–12 public education and university public education on similar ground.

But it is not simply that one of the bases for the conclusion that ‘universities enjoy a special role in our constitutional tradition’ also applies to the K–12 context. The purported educational benefits to diversity in higher education are no less present in the K–12 context. In Grutter, the postulate that “universities occupy a special niche in our constitutional tradition” was an integral component of the Court’s theory that universities should be accorded a consonant degree of autonomy in the selection of its student body, a selection process that should be “defined by reference to the educational benefits that diversity is designed to produce.” The Court proceeded to catalogue those benefits, which it described as “substantial.” Among the benefits of diversity identified in Grutter, the Court cited the breakdown of racial stereotypes, building up cross-racial understanding, promoting learning outcomes, and preparing “students for an increasingly diverse workforce and society.” And yet, as Justice Scalia noted in his dissent, these benefits are “surely not

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50 Grutter, 539 U.S. at 331.
52 Id. at 329.
53 Id. at 330.
54 See id. at 330–33.
55 Id.
56 Id. at 330.
one[s] that [are] uniquely relevant to law school," but are life lessons learned by “people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergarten.”\(^{57}\) If the plurality subscribes to the reasoning of \textit{Grutter} and is sincere, it is difficult to avoid the conclusion reached by Justice Scalia.

The diversity interest articulated in \textit{Grutter} may have different contours in the context of K–12 education, but that does not mean that it is inapplicable. In drawing out the phrase that “context matters,” Roberts uses it to bolster the claim that the interest asserted and ultimately upheld in \textit{Grutter} was an interest unique or specific to institutions of higher education. However, the premise “context matters” just as easily supports the opposite conclusion. In the context of public education the benefits of diversity are just as important and the citizenship function of K–12 institutions which support an interest in racial diversity is more significant, than in the context of a professional education.

The second difference the Chief Justice highlights between the admissions plans reviewed in \textit{Grutter} and the voluntary integration plans at issue here is the narrower conception of diversity being pursued, specifically racial diversity rather than a broader notion of diversity, of which racial and ethnic diversity is merely one component. The benefits of diversity which these school boards hope to capture, benefits which are clearly stated in \textit{Grutter} and excerpted above, flow from the organization of racially diverse student bodies. It therefore makes sense for the school districts to pursue racial diversity directly rather than a broader conception of diversity that is less likely to achieve those pedagogical benefits. Moreover, there are forms types of pedagogy. The importance of public education is not just teaching academic knowledge, but preparing students to be good citizens and socializing students for life in a diverse society.\(^{58}\) What Roberts fails to address is the socializing function of public education.

Finally, the fact that the admissions plans evaluated in \textit{Grutter} were individualized and used race in a non-mechanical, “holistic” way is cited by the Chief Justice as a reason that \textit{Grutter} is inapplicable to the voluntary integration

\(^{57}\) \textit{Id.} at 347 (Scalia, J., dissenting).

\(^{58}\) There is a substantial body of literature to support these goals in K–12. They seem on their face at least as important as the development of critical thinking skills generated by viewpoint diversity. \textit{See, e.g.,} Brief of 553 Social Scientists as Amicus Curiae in Support of Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
plans at issue, in which race, as a tie-breaker, is determinative. In the view of the Chief Justice, narrow tailoring requires that racial classifications are used in an individualized, non-mechanical way. Highlighting the importance of context also suggests the need for a contextual evaluation of what narrow tailoring requires. If “context matters,” then the limitations applied to race-conscious diversity plans in the context of higher education should be revised or abandoned in this context. Since the context here is K–12 attendance decisions rather than selective admissions at elite universities, the sorts of individualized reviews that were required in Grutter make little sense. How does one evaluate on an individual, holistic fashion children who, rather than being expected to participate in a robust exchange of ideas, are still learning the rudiments of knowledge? It is not as though the Justices are required to import wholesale the narrow tailoring requirements found in Grutter into the K–12 context. They may use their analogical reasoning capacity to import those areas of Grutter that make sense while ignoring the requirements that do not make sense in this context.

The Chief Justice’s most persuasive argument is that there is a fundamental difference between the type of diversity relied upon in Grutter and the more narrow interest in racial diversity articulated in these cases. Although there is a conceptual difference between a broad notion of diversity, of which racial diversity is one component, but which might also include careers in other fields or exposure to different cultures, and outright racial diversity, the benefits which the school districts are hoping to capture primarily from racial diversity. As such, it makes sense to rely on that interest alone rather than to advance a broader notion of diversity which would be far more challenging to implement given the nature of these assignment plans.

The argument advanced by the Chief Justice that the diversity interest affirmed in Grutter, as it was articulated and supported, is wholly unique to the context of higher education is so untenable that even Justice Scalia reached the opposite conclusion in his dissent in Grutter. The Chief Justice’s admonition that “context matters” undermines his conclusion that the diversity interest in Grutter is unique to institutions of higher education. Among the litany of pedagogical benefits identified in Grutter and the elements described as constitutive of that diversity interest, most readily apply to the K–12 context. Moreover, the importance of the ends served by public education, a major premise in the reasoning of the Grutter decision, is magnified here. After all, the relative significance of K–12 instruction to those ends is far greater than that of professional schooling for lawyers.
4. Examining the Interest in Avoiding Racial Isolation

Chief Justice Roberts turns his attention to the additional interests asserted by the school districts in Part III(B). However, the Chief Justice finds it unnecessary to resolve the question of whether these interests are compelling because he concludes that the racial guidelines under review are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. Applying the heightened standard of review, strict scrutiny, the school districts bear the burden of showing that the assignment plans are “narrowly tailored” to achieve the asserted interest.

The Chief Justice identified at least four narrow tailoring defects. First, he argues that the plans are not narrowly tailored because they are tied to the demographics of the district rather than targeted to some pedagogical determination about the requisite diversity needed to achieve the benefits of a diverse school. Secondly, he argues that the specific racial guideline range is unnecessary to achieve the stated goal because enrolling students without consideration of race would produce a diverse student body under any definition of diversity. Third, Chief Justice Roberts expresses a concern that permitting racial guidelines that serve to generate roughly the same student body proportions as the district as a whole has no logical stopping point and would permit the “indefinite use of racial classifications.” Finally, the Chief Justice argues that the school districts have presented no definition of “racial integration, avoidance of racial isolation, or racial diversity” that differs from impermissible racial balancing.

Each of the critiques developed by the Chief Justice in support of his immediate conclusion display a degree of logical circularity. The Court in *Grutter* undertook its narrow tailoring inquiry with the appreciation that its inquiry “must be calibrated to fit the distinct issues raised” in each context, and formulated its tailoring requirements specifically for the context of public higher education. Here, the requirements of narrow tailoring are assumed rather than developed with the purposes of strict scrutiny analysis in mind and

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60 *Id.* at 2755.
61 *Id.*
62 *Id.* at 2756–57.
63 *Id.* at 2758.
64 *Id.* at 2758–59.
65 *Grutter*, 539 U.S. at 334.
commensurate to the interests being advanced. In addition, the Chief Justice's slippery slope argument overstates the ramifications of affirming the plans under review. Both errors are a consequence of failing to seriously consider the meaning of the interests being advanced by the school districts.

After a cursory sketch of the additional interests advanced by the school districts in support of their integration plans, the Chief Justice sidestepped a deeper investigation into the meaning and validly of these interests by proclaiming that this is not a "debate...we need to resolve" because the plans are not narrowly tailored.66 Chief Justice Roberts's pirouette around the issue of the validity of the compelling interests has troubling consequences. By neglecting to discern the various elements of the compelling interest being advanced, the Chief Justice misrepresents or fails to recognize vital components of those interests.

In the first instance, the Chief Justice argues that the districts' plans are not narrowly tailored since they are keyed to the demographics of the districts rather than to the level of diversity necessary to achieve pedagogical objectives.67 By comparing the enrollment targets by race for each district, which differs substantially, the Chief Justice suggests that neither district has a clear pedagogic conception of the level of diversity required to achieve the educational benefits they seek.

The interest described as "racial diversity" is not merely the pedagogical interest in bringing different viewpoints and experiences into classroom discussions, although that is certainly an important component. The government interests advanced by the school districts are multi-faceted. The Ninth Circuit's en banc decision below excerpted a lengthy statement on diversity offered by the Seattle School Board and refined those many elements into two "broad categories."68 In addition to achieving the benefits of racial diversity, there is also a component to the interest in ameliorating the harms of racial isolation on educational opportunity. Intuitively, the level of racial diversity necessary to achieve the in-class learning benefits may be different from that which is required to avoid the harms of racial isolation. The application of a narrow tailoring rule which requires strict adherence to the former when the latter is

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66 Parents Involved, 127 S. Ct. at 2759-61.
67 Id. at 2755-56.
68 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1174 (9th Cir. 2005) ("(1) the District seeks the affirmative educational and social benefits that flow from racial diversity; and (2) the District seeks to avoid the harms resulting from racially concentrated or isolated schools.").
implicated fails to reflect the full range of interests being advanced by the school boards.

The school boards purposefully designed these plans as a disincentive for white flight and to counteract the continuing residential segregation prevalent in most metropolitan areas.\textsuperscript{69} Without these racial integration plans, school districts risk becoming racially balkanized, if not immediately, then over time. The district court below noted that the patterns of segregated housing in Seattle remain as stark today as they were in the 1970s, at the time of mandatory busing.\textsuperscript{70} Seattle is not atypical in this regard. Similarly, Louisville sought to leverage public support for educational excellence and equity across the district by “invest[ing] parents and students alike with a sense of participation and positive stake in . . . the school system as a whole”\textsuperscript{71} rather than simply in the neighborhood school, often predominantly represented by a single race.\textsuperscript{72} This makes for better schools for all students, not simply those students who are not marginalized along racial and economic lines.\textsuperscript{73}

The criticism that these plans are not narrowly tailored because they are not strictly necessary to achieve racial diversity is similarly flawed. The Chief Justice argues that even if the school districts abandoned their racial guidelines, the schools would remain racially diverse. Although the particular plans at issue may be unnecessary to achieve some measure of racial diversity, they are necessary to achieve the full range of interests being advanced.

The third narrow tailoring defect pressed by the Chief Justice is a slippery slope argument. The Chief Justice is concerned that if achieving a rough demographic balance within schools is permissible, it would “justify the imposition of racial proportionality throughout American society.”\textsuperscript{74} Once again, the Chief Justice is bullying a straw man. The interests asserted by the school district, such as the concern that all students within a district have an equal educational opportunity, are in most respects unique to the educational context.

\textsuperscript{71} McFarland, 330 F. Supp. 2d at 854.
\textsuperscript{72} Id.
\textsuperscript{73} In short, the plurality is failing to account for the fact that the actions of the school boards may be designed to address behavior in a different domain that has spill-over effects into the educational domain. By focusing on the activity in a single domain, an intra-institutional perspective, the plurality fails to adopt the necessary inter-institutional perspective that would enable it to see why these interests are important and why they are being pursued.
\textsuperscript{74} Parents Involved, 127 S. Ct. at 2757.
Even if those interests are present in other domains of American society, the special role that education has in the life chances of young people and in maintaining the fabric of society suggests that they are most compelling in this context. The finding that school boards have a compelling government interest in ameliorating the harms of racial isolation which justify the use of racial guidelines in student assignment which approximate the demographics of the district as a whole would neither lead to the abandonment of strict scrutiny review nor open the door to racial proportionality throughout society.

The Chief Justice does take note of the fact that Seattle defends its plan on the grounds that it is combating racially identifiable housing patterns. However, the Chief Justice rejects this interest with reference to earlier rulings that “remedying past societal discrimination does not justify race-conscious government action.” The Chief Justice overlooks the fact that those earlier decisions were rulings on race-conscious remedies for “unidentified” discrimination. In the school cases at issue, the harm, causes and consequences of racially separate schools are known and have been identified. Even if the cause of residential segregation were unidentified or unknowable, these plans are not simply a remedy for past discrimination, nor were they advanced as such. Rather, they are forward looking. They are a mechanism to protect and promote equal educational opportunity and to provide a disincentive for future segregation and white flight. If there is any legitimacy to teaching racial understanding and tolerance by fostering diverse learning and playing environments, then racial isolation produced by pronounced residential segregation undermines that effort.

The Chief Justice is insistent upon the a-contextual narrow tailoring rule that “racial balancing is impermissible.” The condemnation of “racial balancing” developed in Grutter was intended to provide a careful limitation to the interest in assembling a broadly diverse student body. Its application in the context of pursuing racial diversity itself and avoiding racial isolation has no principled limitation. Even if the school districts had articulated a baseline level of racial diversity necessary to achieve the educational benefits of diversity, it is difficult to imagine how the implementation of this objective would survive a rule against racial balancing. Employing a quota to achieve

75 Id. at 2758.
78 Parents Involved, 127 S. Ct. at 2757–58.
this threshold minimum would then be subject to the approbation that this means was impermissible “racial balancing.”

Chief Justice Roberts, perhaps anticipating that the argument he is carrying forward would condemn all carefully crafted racial diversity plans, warrants that the “principle that racial balancing is not permitted is one of substance, not semantics.” But bald assertions are not testaments of truth. If “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity,’” is the opposite also true? Can a program designed to achieve “racial diversity” transform from being a “compelling government interest” to “patently unconstitutional” simply by relabeling it “racial balancing”? If so, then narrow tailoring here becomes an insurmountable hurdle. No compelling government interest in racial diversity will ever justify the use of racial classifications beyond remedying previous racial classifications because it will always fail narrow tailoring. A limitation that serves as a complete bar is no longer a mere limitation.

The Chief Justice’s analysis suffers from a shallow interpretation of the interests being asserted. Roberts does not seriously engage the meaning of these interests while overstating their consequences. His narrow tailoring analysis reflects not only this inadequate understanding of the interests being pursued, but also a circular logic of a-contextually importing narrow tailoring requirements from other cases and contexts with little explanation and then applying those requirements in a conclusory manner.

5. Narrow Tailoring Analysis

Part III(C) is also narrow tailoring analysis, a part of the opinion in which Justice Kennedy joins, and therefore represents the opinion of the Court. Chief Justice Roberts’s main argument in this section is that the districts have not met their burden of showing that the racial classifications employed in the assignment plans are necessary to achieve their stated ends. In particular, the Chief Justice points to the minimal impact of the assignment plans and the failure to consider race-neutral alternatives.

79 Id. at 2758.
80 Id.
81 It is possible that Chief Justice Roberts bifurcated his tailoring analysis into two distinctly labeled sections to provide clarity with respect to the sections of his opinion with which Justice Kennedy concurred.
A review of the operation of the assignment plans reveals that only a small fraction of the students are assigned to a different school as a result of the racial tiebreaker. In Seattle, fewer than 300 students were assigned to a different school due to the race tiebreaker. In Jefferson County, only 3 percent of assignments were affected by the race tiebreaker. The Chief Justice highlights the minimal direct impact of the race tiebreakers to suggest that they are unnecessary to achieve the goals advanced by the districts. In comparison, Chief Justice Roberts cites the fact that in *Grutter*, the consideration of race was viewed as indispensable in tripling the law school minority representation.

The Chief Justice dismisses the explanation offered by Jefferson County for this apparent discrepancy, that "the racial guidelines have minimal impact in this process, because they 'mostly influence student assignment in subtle and indirect ways.'" Although the direct impact of the plans may be minimal in terms of student assignment, they have powerful indirect effects which the Court overlooks. These plans are a signal to parents that the school district will not tolerate racial balkanization within the district and obstructs white flight across the district. Although the plans may have a minimal direct effect from year to year, without these plans the district's residential complexion could change dramatically over time. Jefferson County also explained that these plans help leverage public support for educational excellence and equity across the district by "invest[ing] parents and students alike with a sense of participation and positive stake in . . . the school system as a whole" rather than simply in the neighborhood school, often predominantly represented by a single race. In any case, it should not be assumed that a minimal effect means that a plan is unnecessary. Only nine students were integrated into Little Rock's all white Central High School in 1957, and yet the impact was anything but minimal.

The Chief Justice also believes that these plans are not narrowly tailored due to the failure to adequately consider race-neutral alternatives. According to the Chief Justice, many of the race-neutral alternatives were rejected by the Seattle school board with "little or no consideration." The record below, in
which the School Board gave thoughtful reasons for rejecting several alternatives, including a poverty tie-breaker, a lottery, and a more comprehensive plan proposed by the Urban League, does not support this conclusion.\textsuperscript{89} However, to conclude that narrow tailoring requires consideration of race-neutral alternatives is not compelled by law in this context, but a determination that has yet to be made by the Court. The type of diversity sought by the school boards is racial diversity, not the broader diversity sought by the University of Michigan's law school. Accordingly, it makes less sense, in the context where race is explicitly the goal, to require consideration of race-neutral alternatives. If one goal is to teach racial understanding, then using other alternatives to race would not address this goal.

6. \textit{Claiming the Mantle of Brown}

The normally circumscribed Chief Justice is not content to close his opinion on those terms. In Part IV, the Chief Justice, speaking on behalf of just three other Justices, directly engages the arguments made by Justice Breyer in dissent. He suggests that Justice Breyer's opinion would drastically alter the existing framework for analyzing racial classifications and relies on non-authoritative \textit{dicta} and opinions while ignoring contrary precedent. Most importantly, Chief Justice Roberts, recognizing the moral ground at stake, moves beyond the \textit{strictly} legal issues and speaks to the historical and symbolic meanings at issue by going out of his way to claim the mantle of \textit{Brown}.

The Chief Justice is carried by the belief that his opinion is most faithful to the spirit of \textit{Brown}. His condemnation of race-based voluntary integration plans therefore asserts a claim both to the meaning of \textit{Brown} and to the Equal Protection Clause. At the core of each, according to the Chief Justice, is the principle that government is not permitted to classify persons on the basis of race. From this perspective, the Chief Justice's analysis acquires greater coherence. Under the anticlassification principle, the harm for which the Equal Protection Clause has been framed is the harm of racial classification. Accordingly, the 'harm' of segregation, undefined by the Chief Justice in Part III(A) of his opinion, is the state's imposition of racial classifications. The standard of review, strict scrutiny, sets the highest possible bar for the use of racial classifications by a government entity, demanding that they be supported by a compelling government interest and narrowly tailored to achieve that interest. The Chief Justice's a-contextual narrow tailoring analysis makes sense

\textsuperscript{89} Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1188–90 (9th Cir. 2005).
if the chief or solitary concern is with racial classifications. Narrow tailoring does not need to be developed and calibrated to the interest being asserted; it is imposed and used to guard against government race classifications. The narrow tailoring analysis simply becomes a bulwark that prevents the government from using measures that classify individuals on the basis of race even in pursuit of compelling government interests. Consequently, the nature of the interest being asserted by the government is either less important or not relevant at all in the case of explicit racial classification. This explains the Chief Justice’s failure to seriously consider the meaning of the panoply of interests advanced by the school districts or calibrate the narrow tailoring requirements to those interests. From the anticlassification perspective, Grutter can be explained by the use of individualized review, a tailoring device that ameliorates the harm inflicted through the use of racial classifications. Under holistic, individualized review, no person is defined solely according to a racial classification. From the anticlassification interpretation of the Equal Protection Clause, the de jure/de facto divide is a meaningful distinction that speaks both to the harm at issue and the scope of a constitutional remedy. The de jure/de facto divide demarcates the line where government racial classifications have been employed and where they have not.

Still, tensions remain. If racial classifications always harm, logically, it is not clear why an exception should be permitted even in the remedial context. If “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” then the Supreme Court’s rejection of freedom-of-choice plans and ordering of affirmative integration in southern school districts following Brown was clearly wrong. Part of the answer to this quandary, or lack thereof, seems to be the need to accommodate an inescapable historical reality, one that will be more carefully examined in the next part of this article. Perhaps an alternative explanation is the characterization of Brown and other de jure segregation cases as cases of intentional discrimination directed against students of color. This interpretation of Brown meshes with a corollary view of the Equal Protection Clause as a glorified antidiscrimination provision. And yet, if the dignitary harm of classification exists regardless of intent, and if Brown and her progeny are really expressions of the anticlassification principle, then why describe de jure segregation as past intentional discrimination? Should not the fact of racial classification itself be enough to decide those cases

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90 Parents Involved, 127 S. Ct. at 2768. Furthermore, any judicial remedy for civil rights violations which awards damages or other remedy necessarily discriminate on the basis of race since the court is providing a remedy to the victim because of the victim’s race.  
91 Id. at 2758.
and condemn the government conduct at issue? The elevation of the anticlassification principle in the opinion of Chief Justice Roberts has ultimately answered many questions, but it has produced many other tensions and paradoxes, most visibly with the attempt to claim the mantle of Brown.

B. The Opinion of Justice Thomas

Unlike the Chief Justice, Justice Thomas does not claim the mantle of Brown. Instead, Justice Thomas would elevate his reading of Justice Harlan’s dissent in Plessy as the gold standard for interpreting the Equal Protection Clause. In the opinion of Justice Thomas, we find a more stringent account of the colorblind constitutionalism. Where Chief Justice Roberts reads Brown as a bar to racial classifications, Justice Thomas takes issue generally with race-conscious government decision-making.92

In its contours, the colorblind rationale is broader and more sweeping than the anticlassification principle, although the terms are misunderstood as interchangeable. Whereas Chief Justice Roberts leaves the door open for race-based decision-making that does not classify individuals on the basis of race,93 Justice Thomas’s reading of the Equal Protection Clause would proscribe virtually all race-conscious decision-making.94

1. Segregation and Integration

Justice Thomas takes up the semantic argument with much greater force than the plurality opinion. He begins his attack on the claim that public schools are resegregating by describing such trends as a misuse of the word “segregation.” As he defines it, “segregation is the deliberate operation of a

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92 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
93 While the Chief Justice does not foreclose that possibility, Justice Kennedy is explicit about it. In his view, school boards may pursue the goal of “bringing together students of diverse backgrounds and races through” race conscious mechanisms that do not classify on the basis of race. Parents Involved, 127 S. Ct. at 2792. Justice Kennedy then provides a list of examples, such as “strategic site selection of new schools; drawing attendance zones with drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” Id. at 2792. In fact, he suggests that it is “unlikely that any of them would demand strict scrutiny review to be found permissible” since they do not classify on the basis of race.
94 See id. at 2792 (Justice Kennedy’s concurrence goes even further and explicitly states that race-conscious decision-making would probably not even require strict scrutiny review at all.).
school system to ‘carry out a governmental policy to separate pupils in schools solely on the basis of race.’”\textsuperscript{95} In contrast, he defines “racial imbalance” as “the failure of a school district’s individual schools to match or approximate the demographic makeup of the student population at large.”\textsuperscript{96}

Justice Thomas is not content to redefine the meaning of “segregation.” He turns his sights to the meaning of “integration.” He writes:

[\textbf{T}he dissent refers repeatedly and reverently to “integration.” However, outside of the context of remediation for past de jure segregation, “integration” is simply racial balancing. See \textit{Post}, at 2820. Therefore, the school districts’ attempts to further “integrate” are properly thought of as little more than attempts to achieve a particular racial balance.\textsuperscript{97}

One need not be a deconstructionist to realize the importance of language. The fight to decide these cases is a fight over meaning, both linguistic and cultural. Precedent and well-worn, oft-repeated principles shape the outer limits of debate and inform legal meaning. Similarly, the repetition makes its way into the culture at large and becomes determinative “constitutional canon.”\textsuperscript{98} Chief Justice Rehnquist is noted for reversing his determination on the constitutionality of \textit{Miranda} law, in part, because of its cultural significance. A generation after having ridiculed the constitutionality of a decision requiring police officers to read suspects their \textit{Miranda} rights, Rehnquist voted to uphold it. In a 7–2 opinion on behalf of the Court in 2000, he wrote, “\textit{Miranda} has become embedded in routine police practice to the point where the warnings have become part of our national culture.”\textsuperscript{99} The condemnation of segregation in \textit{Brown} is both a recognition of the harm of segregation as well as a judicial determination that the system of dual schools on the basis of race was unconstitutional. The fight over meaning in \textit{Parents Involved} is a fight over when and where these culturally informed legal principles apply.

In this way, doctrine, precedent and rhetoric collide. The Justices have agreed upon a common framework for resolving these questions: they have tacitly or expressly consented to the strict scrutiny framework. Building upon

\textsuperscript{95} \textit{Id.} at 2769 (Roberts, C.J., plurality) (citing Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6 (1971)).

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} at 2769 (Thomas, J., concurring).


precedent which the Court has agreed to in other cases, the Justices seek to show that these plans fall into one category or another, hoping to win the case. For example, if Justice Thomas can establish that this is mere racial balancing, then the Grutter principle, that racial balancing is impermissible, could potentially decide the case. In fighting over terms, one could say that Justice Thomas is splitting hairs. But given the battlefield in which this debate is being determined, the particular plot of ground where these follicles sprout can be decisive.

The basic problem with Justice Thomas’s attempt to redefine these terms is this: while segregation might very well be the deliberate operation of a dual school system designed to separate the races, it is a leap to say that segregation is nothing more. The Supreme Court has repeatedly recognized de facto segregation as segregation. To take a counterfactual hypothetical, suppose that all housing stock is expressly racially segregated by local ordinance, just as schools were in the “paradigmatic segregation cases.”

A system of neighborhood schooling, assigning pupils to the school nearest their home, would produce extreme racial imbalance. It is true that Justice Thomas might find such a housing ordinance to be constitutionally infirm and permit the use of remediable race-conscious measures under Croson, which he cites for the proposition that the Court will authorize a government unit to remedy past discrimination for which it was responsible. However, such an obvious manifestation of segregation would fall outside of Justice Thomas’s narrow definition of segregation as the deliberate operation of a dual school system. In doing so, Justice Thomas’s definition would fail to account for the fact that the deliberate segregation of housing stock propagates segregated schools. Unfortunately, this is not far from reality. The Fair Housing Act, which prohibited discrimination in the sale, lease or renting of housing stock, was not federal law until 1968, well over a decade after Brown. Pervasive patterns of residential segregation persist in virtually all metropolitan regions, and the harm it produces is no less pronounced or less visible than if it were simply the product of deliberate state action.

100 Parents Involved, 127 S. Ct. at 2747 n.1.
101 Id. at 2769 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989)).
2. De Jure v. De Facto Segregation

Justice Thomas frames his analysis of the issues involved in these cases in terms of racial imbalance rather than segregation. Moreover, he has been transparent in the past about his ambivalence that racial segregation is a harm, let alone a cognizable harm, an ambivalence that is evident in his opinion here. While the Chief Justice wishes to interpret Brown and claim it, Thomas seems more interested in attacking the logic of Brown. The Court in Brown was unequivocal that there was an injury caused by segregation, even if not state imposed. Thomas not only dismisses the idea that racial isolation, not state imposed, is segregation, he rejects the claim of injury caused by segregation. Before Thomas is finished he has not only attacked the idea that segregation harms and the dismissed the benefits if integration, but he calls into question the relevance and utility of democracy to these important issues.

Justice Thomas articulates two reasons for arguing that the remediation of de facto segregation is significantly different from the remediation of de jure segregation. First, he states that the two concepts are distinct. Racial imbalance is not necessarily a product of de jure segregation. Secondly, he suggests that de jure segregation is a discrete injury whereas racial imbalance is a natural process that lacks an “ultimate remedy.” The reason for this is that racial imbalance will shift over time as demographics change.

For Justice Thomas, segregated housing patterns are “natural,” a “continuous process” with “no identifiable culpable party.” Justice Thomas’s view of de facto segregation as a natural phenomenon with no culpable parties surely explains much of his opinion, but this view ignores the long history of discrimination in housing patterns, urban disinvestment, and race-based resource allocation. This is partly how Justice Thomas frames his opinion. By


103 Parents Involved, 127 S. Ct. at 2778 n.14.

104 This attack is also implicit in his cynicism of social science research.

105 See infra Part IV.

106 Id. at 2773.

107 Kevin Fox Gotham, Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a U.S. City, 1900–1950, INT’L J. URB. & REGIONAL RES. 24.3 (2000) (describing the discriminatory FHA policies of the 1940s that virtually foreclosed meaningful housing funding to African American applicants); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (Oxford Univ. Press 1985) (property tax funding...
not focusing on the harms, but instead on culpability and the relationship of harm to remedy, Justice Thomas reasons that de facto segregation is too attenuated from any given act to justify government intervention.

3. Justice Thomas's Core Concern: Racial Paternalism

Although Justice Thomas argues about scope, remedy, duration, and even whether the Court is capable of ascertaining the motive behind government action, one concern seems to animate all of his arguments: it is a dignitary concern. At first glance, Justice Thomas’s opinion would seem to mesh with the plurality’s view that the primary harm comes from the government labeling a person on the basis of race. In articulating the general standard of review, Justice Thomas provides us with his reason for ensuring that raced-base government decision-making is generally prohibited. He cites his opinion in Grutter which reads:

[T]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.\(^{108}\)

From this perspective, his subsidiary arguments make sense. At the macro level, the distinction between de facto and de jure segregation may be a genuine distinction for Justice Thomas. But the distinction is not the same that it was for earlier iterations of the Court’s membership. For earlier iterations of the Court, the concern was about the appropriate scope of a remedy when the courts are interfering in the operation of local government, a fact that even Justice Kennedy concedes.\(^{109}\) For Justice Thomas, the harm of de jure segregation systems create disparities between wealthier white suburbs and minority concentrated poorer urban areas; MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY & STABILITY (Brookings Institute & Lincoln Institute of Land Policy 1997) (rev. ed. 1998) (showing that because public infrastructure and basic services like transportation, education, public safety, and recreation are funded largely by local tax revenues, residents in poor municipalities are taxed at higher rates than those in more affluent areas for similar services or they receive lesser services for the taxes they pay).

\(^{108}\) Id. (citing Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

\(^{109}\) "Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between de jure and de facto segregation has been thought to be an important one. It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies.” Id. at 2795–96.
igation is the fact that the government is defining a person on the basis of their race.

A closer reading of his opinion reveals that Justice Thomas's dignitary arguments are subtly different from Chief Justice Roberts's in ways that explain the articulation of the broader colorblindness principle. For Justice Thomas, it is not simply the fact that racial classifications offend individual dignity or self-identity; it is the unintended consequences of racial paternalism that demean individuals, and particularly individuals of color. Thus, he also rejects distinction between benign and discriminatory racial classifications by suggesting that all race-based decisions are pernicious. As he explains, "[r]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."¹¹⁰ What might those unintended consequences be? He does not launch into a detailed exposition on this point, but he does go on to say that this sort of government action "pits the races against one another, exacerbates racial tension," and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race."¹¹¹ This is a very different rationale than we have seen elsewhere. Chief Justice Roberts's concern on this point is racial classifications are not permitted because they affront individual dignity, even if they are benign. Justice Thomas, on the other hand, is suggesting a different rationale—that racial paternalism, particularly benign race-conscious government action intended to help certain races, is in itself an evil.¹¹²

¹¹⁰ Id. at 2775 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

¹¹¹ Id. It is curious that for the Justice concerned about classification, no attention is paid to a growing body of research about schemas, classification and prejudice. This research suggests that classification is not simply a conscious phenomenon "that goes away if not discussed." Indeed, the idea that people naturally sort themselves by race in housing is inconsistent with the notion of the lack of salience of race. Compare the opinions of these Justices with Justice O'Connor's position in Croson that the government could take notice of what is happening in the private contracting world that might cause racial exclusion.

¹¹² One is forced to wonder about the extent of Justice Thomas's views. The Reconstruction Amendments were clearly enacted to bring African-Americans into the body politic. Are these amendments examples of such racial paternalism? What about the civil rights laws? In fact, Justice Thomas concedes that the Fourteenth Amendment sought "to bring former slaves into American society as full members." Parents Involved, 127 S. Ct. at 2783 n.19 (Thomas, J., dissenting). The explanation he advances to resolve the paradox is his view that the race-based government measures of the 1860s and 1870s were intended to remedy "state-enforced slavery," and are therefore "not inconsistent with the colorblind Constitution." Id. His answer is unsatisfying. Making former slaves full members of "American society," whatever that might mean, is not the same thing as freeing them from state-imposed legal disabilities.
II. THEORIES OF DEVELOPMENT

What explains the ascendancy of the anticlassification principle as the predominant meaning of 'equal protection' when applied to race? Now that we have explored the reasoning and uncovered the animating theories that support this particular interpretation of the Fourteenth Amendment, we need to examine the origin of the anticlassification principle.

A. Antisubordination v. Anticlassification

Professor Reva Siegel recasts the struggle over the interpretation of Brown and the meaning of the Equal Protection Clause in terms of two basic principles in her seminal article Equality Talks: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown. It is the anticlassification understanding of Brown that has the most salience in popular culture and legal authority today, but it is a principle that emerged in the early debates over Brown's validity rather than as a core concern in Brown.

Although the Supreme Court had invoked the language of anticlassification in Fifth Amendment cases and in Brown's companion case, Bolling v. Sharpe, the language of racial classification was absent from Brown itself. To contemporary observers, the conspicuous absence of the language of anticlassification appeared intentional. Instead, the Court's reasoning turned on the intangible effects of mandated racial separation on minority school children.

The ensuing debate over the potential impact of the Brown holding centered on the justification for the Court's decision. Southern politicians, media outlets, judges and commentators denounced Brown, but were particularly incensed by the claim that minority children were psychologically harmed by segregation. It was in this crucible of Massive Resistance that

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Freedom from state-imposed disabilities would hardly be sufficient to make former slaves full members of American society, as our century and a half struggle with the legacy of racial slavery continually attests. In any case, it is not obvious why these legislative enactments would not entail the unintended racial resentments Justice Thomas finds so troubling in more recent enactments.

114 Id. at 1475.
115 Id. at 1482.
117 Siegel, supra note 113, at 1484.
118 Id. at 1483–89.
Herbert Wechsler's famous "Neutral Principles" article framed the debate over Brown.\textsuperscript{119} Wechsler argued that the Brown decision could not be grounded in neutral principles because there was no principled basis for choosing African-American associational rights to an integrated education over the right of southern whites not to associate with African-Americans. Ultimately, Wechsler concluded that the only explanation for the decision was the view that racial segregation was directed against a racial minority on behalf of a politically dominant majority and thus entailed a denial of equality.\textsuperscript{120} In those terms, Wechsler's account of Brown was explicitly antisubordination. Although many scholars rose to Brown's defense, both by articulating neutral principles, such as those embodied in Carolene Products' famous footnote four, and by attacking the premise of law's neutrality or Wechsler's standard of neutrality, the response and remaining contestation of Brown motivated many supporters of Brown to call for new ways of reasoning about the constitutionality of racial segregation.\textsuperscript{121}

Talking about Brown in terms of impermissible racial classifications was viewed as a more neutral way of defending Brown. The proponents of this view, as described by Owen Fiss in 1965, developed the argument that racial classifications were arbitrary and inherently irrational.\textsuperscript{122} Judge John Minor Wisdom enshrined this viewpoint in a judicial opinion in United States v. Jefferson County Board of Education.\textsuperscript{123} He wrote that "classifications based upon race are especially suspect, since they are 'odious to a free people,' and \textit{per se} discrimination against Negroes."\textsuperscript{124} This language provided a new way of speaking about Brown that frankly insulated Brown from the southern debate over harms, and which harms were to be preferred.\textsuperscript{125}

As the Court belatedly moved to strike down antimiscegenation statutes in the late 1960s, a decade after the Brown decision, it announced and adopted the

\begin{itemize}
\item \textsuperscript{119} Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
\item \textsuperscript{120} Siegel, supra note 113, at 1491 (citing Wechsler).
\item \textsuperscript{121} Id. at 1492–95. One of the defenses worth mentioning is the counter-claim by Louis Pollack that the Constitution should be construed in terms of neutral principles with respect to particular groups. He pointed out that the Reconstruction amendments were hardly neutral: they had a particular end in mind which was anything but neutral with respect to the newly freed Black slaves.
\item \textsuperscript{122} Id. at 1498 (citing Owen M. Friss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 HARV. L. REV. 564, 591 (1965)).
\item \textsuperscript{123} 372 F.2d 836, 845–47 (1966).
\item \textsuperscript{124} Id. at 871 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).
\item \textsuperscript{125} Siegel, supra note 113, at 1499.
\end{itemize}
new strict scrutiny framework for deciding Equal Protection Cases. Treating the racial classifications as presumptively unconstitutional, avoided the need to reiterate the particular harm of Jim Crow on blacks as the Court had done in Brown.

The application of Brown to northern, de facto segregation raised a series of interrelated questions that had not yet been resolved. Many of these questions lie at the core of Parents Involved, such as whether schools had the power to alleviate racial imbalance for which they were not responsible. The newly-ensconced framework for analyzing race questions and remnants of Jim Crow under strict scrutiny, anticlassification rules yielded unsatisfactory answers to these questions.

Throughout the 1960s there was early and widespread agreement that the Constitution prohibited racial separation in student assignment policies that were explicit, as well as policies that were tacitly designed for that purpose, although facially race-neutral. This approach is reflected in later Supreme Court cases such as Keyes. There was much greater disagreement as to whether school districts should be liable for segregation that was occurring where racial separation did not appear to be a product of school board policies.

Writing in 1964, John Kaplan took up the language of anticlassification in an influential article that shaped these debates. Rather than use the language of anticlassification as a way of shielding Brown, Kaplan emphasized the anticlassification framework as a way of defining the scope of liability, and thereby limiting its impact in the north. Kaplan’s primary concern was identifying some limitation on the authority of federal courts to intervene in the operation of northern school systems. If most agreed that Brown should apply to northern segregation built upon informal, but no less effective, segregative

126 Id. at 1500.
127 Id. At the time that the anticlassification principle was being first articulated and applied, it was addressing questions of group status harm. It was not until desegregation moved north in the late 1960s and early 1970s, and later still in the affirmative action debates, that the anticlassification presumption acquired an individualistic frame of analysis.
128 Id. at 1505.
129 Id. at 1510–13.
131Siegel, supra note 113, at 1514.
133 Siegel, supra note 113, at 1509.
mechanisms, Kaplan used the anticlassification framework as a means of protecting the value of local control.\textsuperscript{134} Since this articulation of anticlassification was an expression of federalism, it was not understood as a bar on the authority of local government to voluntarily remedy racial imbalance in public schools.\textsuperscript{135} Rather, the anticlassification principle would serve to curb judicial intervention into the operation of schools.

Courts and commentators throughout the 1960s seemed to uniformly understand that the anticlassification gloss on the Equal Protection Clause was asymmetric: it permitted government action that sought to alleviate or prevent the harms of racial separation even where federal courts did not intervene.\textsuperscript{136} Much has been made of Chief Justice Burger's dictum in \textit{Swann} throughout the opinions in \textit{Parents Involved}.\textsuperscript{137} Chief Justice Roberts criticizes the dissent for holding it up as persuasive authority.\textsuperscript{138} Professor Siegel reminds us that Justice Burger's dictum was unsupported by authority because it was a non-controversial point summarizing the holdings of lower federal courts.\textsuperscript{139} Importantly, it was not that such anticlassification objections were unheard of—white plaintiffs, defendants, critics and commentators routinely raised them. The Courts nonetheless refused to embrace them.\textsuperscript{140}

In the 1970s, the political context in which courts decided race cases changed, just as the types of cases that were being heard changed. Although the Nixon administration had initiated affirmative action in federal contracts, challenges to these programs, as with the desegregation in public schooling cases, did not result in judicial curbs on race-conscious policies. The courts continued to assume that the anticlassification was an asymmetric constraint. Thus, the Washington Supreme Court in \textit{DeFunis v. Odegaard} ruled that these

\textsuperscript{134} In his concurring opinion in \textit{Parents Involved}, Justice Kennedy wrote that this principle, the desire to restore local autonomy, largely explains the development of the \textit{de jure/de facto} distinction. \textit{Parents Involved}, 127 S. Ct. at 2796 (2007).
\textsuperscript{135} Siegel, \textit{supra} note 113, at 1515.
\textsuperscript{136} \textit{Id}.
\textsuperscript{137} \textit{Swann} v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.").
\textsuperscript{138} \textit{See supra} text accompanying notes 33–35.
\textsuperscript{139} Siegel, \textit{supra} note 113, at 1518.
\textsuperscript{140} \textit{Id} at 1520.
affirmative action programs did not violate the law, a case Reva Siegel
describes as “a watershed moment” which generated a “firestorm” response.\[141\] President Nixon’s southern strategy, begun in 1968 and mounted with greater
intensity in 1972, sought to harness, if not foment, white resentment to a range
of programs associated with race.\[142\] President Nixon’s success not only
changed the composition of the judiciary, but initiated a new political context in
which race was being debated and cases were being decided.\[143\]

There was growing concern that backlash might foster racial antagonism
and require some limits on such programs. This impetus to find limitations is
partially a reflection of the new political environment, engendered by the Nixon
campaign strategies.\[144\] Supreme Court Justices and other voices began to
search for distinguishing features, focusing on scarcity of resources or the merit
principle. These shifts culminated in the application of the anticlassification
principle to affirmative action admissions policies in Bakke.\[145\] The California
Supreme Court, and later the U.S. Supreme Court, employed strict scrutiny to
strike down the race-conscious admissions program, altering the existing
doctrinal understanding and elevating the anticlassification principle.

Although Chief Justice Roberts ominously defended his opinion with the
warning that “history will be heard,” we can see that this history is
complicated.\[146\] At the very least, the characterization of Brown as a blanket
anticlassification rule is a-historical. Instead, we can better understand this
principle as an outgrowth of the debates over the justification of Brown and
over the scope of its implementation. Its elevation as a presumption of
unconstitutionality emerges even later.

Just as important as her account for the development of the anticlassification
principle, Professor Siegel argues that anti-subordination and
anticlassification are not necessarily contrary principles, warring with each
other through decades of case law and legal authority.\[147\] Instead, they are a
complex set of values that are sometimes in tension, used to limit the other, but
sometimes to mask and express the other. Thus, in the early use of anticlassification, it was used to justify and condemn Jim Crow racial subordination.

\[141\] Id. at 1526–27.
\[142\] Id. at 1523.
\[143\] Id. at 1523–24.
\[144\] Id. at 1526.
\[146\] Siegel, supra note 113, at 1527.
\[147\] Id. at 1537.
Similarly, although *Grutter* is expressed in the language of anticlassification, its justification in terms of democracy and citizenship reflect anti-subordination values.

B. The Canonization of *Brown*

Like Reva Siegel, Brad Snyder supplies a distinctive historical narrative that describes how the conflict over *Brown* was channeled into conflict about its meaning.\(^{148}\) Snyder's insights further suggest that the status of the *Brown* decision is an unfolding historical process, not simply a decision manufactured in a particular moment in time.

For the first decade of *Brown*'s existence, the Supreme Court proceeded cautiously and in a contextually specific way. By sharply circumscribing its holding regarding the constitutionality of segregation to the immediate context, the Court left an interpretive void both as to the scope and ground of its decisions. Even as it moved to strike down segregation in other spheres of life in subsequent cases, it said little about the meaning of *Brown*. Much of the interpretive vacuum was an effort to mitigate southern backlash.\(^{149}\) *Brown II*, *Cooper v. Aaron*, and other per curiam opinions did little to fill this void. As a strategy for cooling resistance, this approach proved to be a failure. *Brown*'s validity remained a hotly contested matter well into the 1960s.\(^{150}\)

During this time, the American South was a one party region. Various Jim Crow mechanisms kept blacks from participating in politics. Consequently, Democrats from the South enjoyed safe congressional seats. As a result, southern legislators accumulated the advantages of seniority, including control over a number of key congressional committee chairs. As a voting block, they exercised either a critical swing vote or veto over any legislation that would challenge white southern rule, a power they exercised vigorously in the New Deal. Southern senators, sitting on powerful committee chairs and holding the reigns of power in the Senate, soon resorted to the judicial confirmation process as a means of resisting *Brown*.\(^{151}\)

Soon after *Brown* was decided, Justice Harlan was nominated for the Supreme Court to fill the vacancy opened by the death of Robert Jackson.\(^{152}\)

\(^{148}\) Snyder, *supra* note 98.

\(^{149}\) *Id.* at 391.

\(^{150}\) *Id.* at 391–97. Snyder provides an overview of much of the debate.

\(^{151}\) *Id.* at 399.

\(^{152}\) *Id.* at 399–400.
Harlan was anathema to southern politicians, a northerner whose grandfather penned the famous dissent in *Plessy*. At this time, however, *Brown*’s impact had yet to be felt. *Brown II* had yet to be decided and massive resistance had yet to take shape. Despite the heated rhetoric over Harlan, it was not until Potter Stewart was nominated that the South launched a broad interrogation of nominees during the confirmation hearing process. Although Stewart was a recess appointment, when the hearing took place, southern senators directly questioned Stewart about his view of the *Brown* decision. This was the first time that a nominee was asked about his personal views concerning a case or line of cases in the confirmation process. Although the southern senators were unable or unwilling to totally block Stewart and subsequent nominees, including Thurgood Marshall, there was a fundamental change in the role of the confirmation process. The personal views of judicial nominees now assumed critical importance.

The passage of the Civil Rights Act and Voting Rights Act, along with the successes of the Civil Rights Movement, gave *Brown* a sturdier edifice. Nonetheless, the Warren Court’s interpretive void remained. In the final stretch of the Warren Court, preceding the election of Richard Nixon to the presidency, the Court began to fill some of that void. Simultaneously, the passage of civil rights legislation put some of the burden for enforcement on the administrative agencies in the executive branch. Richard Nixon’s southern strategy had a profound impact on the Court. Part of Richard Nixon’s southern strategy was to find ways of appealing to southern supporters who opposed *Brown* without being overtly against *Brown*. One of the ways that Nixon did this was to support *Brown* in principle while standing for local control and freedom-of-choice plans that would, in effect, thwart integration. Another tactic was to use executive authority to put as much of the burden for enforcement on federal courts as possible. For example, Nixon authorized a sixty-day delay of the Department of Health, Education, and Welfare’s cutoff for non-compliant southern school districts.

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153 Id. at 400. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
154 Snyder, *supra* note 98, at 406–08.
155 This is a precedent that has changed the process today.
156 Snyder, *supra* note 98, at 413.
158 Snyder, *supra* note 98, at 416.
Richard Nixon gave a speech on March 24, 1970, that Brad Snyder marks as the conservative canonization of Brown. In the speech, Nixon pledged to enforce Brown, although he what that meant exactly was left open. Nixon did not believe that enforcing Brown meant doing away with local control or breaking up neighborhood schools. Simply put, Nixon’s Brown did not extend to de facto segregation. In order to control Brown’s interpretation, Nixon first had to embrace its validity, both morally and legally. The widespread acceptance of Brown in the wake of the nomination of Thurgood Marshall to the Supreme Court and the legitimacy it acquired through subsequent Civil Rights legislation, elevated Brown into lower constitutional canon. Snyder defines constitutional canon as the “set of foundational texts that undergird our socio-legal discourse, influencing the way academics, judges, policymakers, and political commentators think about constitutional law.” The notion of a canon is a useful metaphor. Our analysis of Brown reveals, if anything, that its status is both a product of legal decision-making and social meaning. It was only when the conservative Justices most likely to threaten Brown as precedent acceded to its legitimacy that Brown joined what Snyder calls upper constitutional canon. At that point, the battleground shifted from contesting Brown’s authority and validity toward controlling its interpretation.

Richard Nixon’s Supreme Court nominations of Judges Haynesworth and Carswell, southern judges with records evidencing opposition to Brown, were narrowly defeated by a Democratic Senate. His third nominee, Justice Rehnquist, would learn from these defeats. During questioning in Senate hearings Rehnquist affirmed the validity of Brown four times without qualification. Evidence emerged that cast doubt on Rehnquist’s veracity. He had opposed antidiscrimination legislation that would have prohibited blockbusting and ensured equal employment opportunity in Arizona. He also spoke out against a public accommodations ordinance in Phoenix. Most damning of all, a memorandum drafted by Rehnquist, as a law clerk to Justice Jackson, came to light, in which Rehnquist argued in defense of Plessy. In the storm of controversy, Rehnquist penned a letter once again reaffirming not
only the legal validity of *Brown*, but also its moral force. By using *Brown* as a shield, he was elevated to the Supreme Court.

Once on the Court, Rehnquist began to rewrite the nation's school desegregation jurisprudence, first in dissent, and then on behalf of the Court. In *Keyes*, Rehnquist penned a dissent criticizing the desegregation of a northern school district where there had been no legally-mandated segregation.\(^{166}\) Then in *Milliken*, Rehnquist voted to bar inter-district desegregation remedied in Detroit.\(^{167}\) Although these positions did not threaten the validity of *Brown* directly, they limited its reach. Both the ambiguities left by the Warren Court and the application of *Brown* in northern school districts were being resolved in ways that thwarted further efforts to integrate.

The melodrama of judicial confirmation in the politics of the Nixon presidency provides another explanation for the confused and fractured jurisprudence that followed *Brown*. The conservative acceptance of *Brown* paved the way for an interpretation of *Brown* that forms much of the basis for the plurality in *Parents Involved*, including sharply drawn distinctions between *de jure* and *de facto* segregation. The conservative canonization of *Brown* also speaks to its importance as foundational text and explains why the plurality and the dissent debate which side is more faithful to its legacy. The legitimacy of the Court’s decision in *Parents Involved* is measured in some ways by its fidelity to *Brown*.

Upon this understanding of *Brown*, we can read much of the plurality opinion in *Parents Involved* as a product of the conservative interpretation of *Brown*. However, just as Reva Siegel’s analysis suggested a complexity to this interpretation that goes beyond a simple claim of which side is right or wrong, so too does the story of the conservative canonization of *Brown*. The Warren Court was anything but diligent in fleshing out *Brown* and providing a framework that clarified its meaning and scope. The conservative canonizers had plenty of leeway to decide questions unresolved by *Brown* as well as issues that could not have been anticipated in *Brown*.

As a metaphor, we believe that the idea of *Brown* as canon is helpful beyond ways that Brad Snyder suggests. As with all foundational texts, the story is just the beginning. It is the meaning we ascribe to the stories in foundational texts which shapes their interpretation and gives them vitality. For Americans, *Brown* is part of a story of redemption from the great evil of Jim

Crow and a penance for the original sin of slavery. If case law is part of our Constitutional canon, the Justices are this nation's high priests, schooled in the "orthodoxies, mysteries and controversies of constitutional faith." As the ultimate arbiters of the Constitution, their interpretation commands our attention, if not our devotion. They play a critical role in the way that they interpret, expound, and announce constitutional meaning. They provide a common narrative, a shared story for a nation of 300 million bound together by words on parchment. In that sense, they are constitutive across space and time. They put all Americans in a meaning-making dialogue, past, present and future. Although their interpretation of the foundational text is sometimes a reflection of the political and social conflicts of the day, it just as often foments, heightens, and frames social and political conflicts that follow the Court's pronouncements.

III. THE MANTLE OF BROWN, THE LEGACY OF PLESSY

A. The Mantle of Brown

In Parents Involved, a plurality of the Court insists, for the first time, that voluntary integration plans must be viewed with the same skepticism as explicit state plans that would segregate students by race. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." Chief Justice Roberts argues that this is the clear meaning of Brown. A modest objection would challenge this assertion both on its claim of clarity and the meaning of Brown. Our discussion of the development of the anticlassification principle suggests that, at the very least, this principle is a product of the debates over Brown rather than grounded in the Brown decision. An analysis of the Brown opinion itself establishes this beyond doubt.

The Chief Justice's appropriation of both the substance and the moral force of the Brown decision rests on a mix of contemporaneous sources: a one-sentence excerpt from the appellants' brief, a statement by plaintiff's counsel at

170 Id. Of course, simple assurances should not—in themselves—suffice. No one is asking that they should. It would be quite a leap to simply take at face value the claim of the government. Even rational basis review asks that the government action be rational, and does not simply accept the good faith claim of government by itself.
oral argument, two partial sentences from the Brown II decision, a summary exposition of the historical change wrought by the case, and a short description of the holding of the case.\footnote{\textit{Id.} at 2767–68.} According to Chief Justice Roberts:

\begin{quote}
[In \textit{Brown}, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.\footnote{\textit{Parents Involved}, 127 S. Ct. at 2767.}]
\end{quote}

It should not be overlooked that the Court in \textit{Brown} was concerned with more than the equal provision of educational resources. The Court had found that in each of the cases consolidated into the \textit{Brown} decision the districts had made substantial progress in equalizing or having equalized “buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”\footnote{\textit{Id.} at 2767–68.} The Court’s holding that the doctrine of ‘separate but equal’ violated the Equal Protection Clause of the US Constitution turned instead on the ‘intangible’ effects of racial segregation on public education. According to the Chief Justice, the reason was that the “government classification and separation on grounds of race themselves denoted inferiority.”\footnote{\textit{Id.} at 2767.} However, the insertion of the word “classification” in this explanatory sentence is a clever re-write of the \textit{Brown} decision. As mentioned in Part II of this Article, the language of classification does not appear in the \textit{Brown} decision. In fact, the word “classification” or “classify” does not appear in the body text of the \textit{Brown} opinion at all. This is a guile attempt to read the anticlassification view of the Equal Protection Clause back into the \textit{Brown} decision itself. But most importantly, a careful reading of the \textit{Brown} decision shows that the Chief Justice is mistaking a subsidiary fact for the ultimate reason for the \textit{Brown} holding.

The \textit{Brown} Court affirmatively endorsed and adopted the finding of the Kansas court that “the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.”\footnote{\textit{Parents Involved}, 127 S. Ct. at 2767 (emphasis added).} The Court did not provide an explanation for this fact, possibly because of the sensitivity of the matter, but in

\begin{footnotes}
\item[171] \textit{Id.} at 2767–68.
\item[172] \textit{Parents Involved}, 127 S. Ct. at 2767.
\item[174] \textit{Parents Involved}, 127 S. Ct. at 2767 (emphasis added).
\end{footnotes}
any case it did not need to provide one. It was universally understood, especially in the context of Jim Crow, that racially separate schools marked blacks and black schools as inferior. That was the point of segregation—the maintenance of a caste system in law as well as social practice with unmistakable social meaning. According to the Kansas court, the fact that racially segregated schools denoted black inferiority affected black children in many harmful ways, such as “their motivation to learn,” their “educational and mental development,” and many other psychological effects cited in the infamous footnote eleven. These accumulated effects deprived black students of benefits they would receive in a racially integrated system. It was these effects which constituted the “intangible” effects of segregation and was the ultimate reason that the Supreme Court held that the doctrine of ‘separate but equal’ violated the Equal Protection Clause. Chief Justice Roberts confuses the fact of government imposed separation on racial grounds with the recognition of the harmful effects of racial segregation on the education of black children as the ultimate reason for the Brown decision. This subtle re-interpretation of the Brown decision is a gloss that over-emphasizes the importance of government imposed racial classifications and misapprehends—or altogether fails to acknowledge—the Brown Court’s analysis of the harm of segregation.

The Chief Justice continues: “The next Term, we accordingly stated that ‘full compliance’ with Brown I required school districts ‘to achieve a system of determining admission to the public schools on a nonracial basis.’” The Chief Justice italicizes the words “on a nonracial basis” for emphasis. But this is a misrepresentation of the decision and its progeny. In the immediate wake of Brown I, southern school districts argued that they were either forbidden from remedying segregation through race-conscious means or not required to do so, a position entirely consonant with an anticlassification interpretation of the Brown decision. For instance, on remand from Brown I, the district court

176 Id. at 494.
177 Id.
178 Id. at 495.
179 Parents Involved, 127 S. Ct. at 2767 (quoting Brown I, 349 U.S. at 300–01) (emphasis added).
in Briggs v. Elliot declared that the Constitution “does not require integration. It merely forbids discrimination.” However, the federal courts rejected the school districts’ freedom-of-choice plans and insisted on race-conscious integration plans. If Brown II’s order that school districts “achieve a system of determining admission to the public schools on a nonracial basis” was a strict rule against all racial classifications rather than an instruction to dismantle the existing system of segregation, then the remedial step of ordering race-based assignments would have been impermissible.

Finally, the Chief Justice uses Brown to directly analogize to the present cases. “Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin.” This recasting of Brown implies not only a symmetry between blacks and whites in the Jim Crow south under segregation, but that the forced segregation of Linda Brown is somehow equivalent to the measured integration of Joshua McDonald. Both symmetries are obviously problematic. In critical respects, the latter amounts to a revived neutral principles debate. It places the plurality in line with the arguments of Herbert Wechsler and the southern antagonists to Brown who argued that the right to segregate—to avoid association with blacks—be given equal weight as the right to integration. As for the former, if the harm of Jim Crow segregation was the harm of government imposed racial classifications, a ‘harm’ suffered by whites as well, then why was there no stampede of aggrieved southern whites into the courthouse filing lawsuits claiming dignitary harm? The answer cannot be that Brown is simply an intentional discrimination case, as the Chief Justice at times implies. The excerpts he quotes from Brown in support of his anticlassification reading would then make little sense. In the first instance, if Brown is simply an intentional discrimination case, then the fact of racial classification is not particularly important relative to the illicit motives that lay behind them.

The holding in Brown ultimately turned on a recognition of the harmful effects of racial segregation on black children. By minimizing the importance of the harmful effects of segregation to the reasoning in Brown in favor of an anticlassification reading, the Chief Justice can suggest that integration and segregation are constitutionally no different; they are both instances of student
assignment on the basis of skin color. While Roberts would draw our attention to the fact of racial classification or discrimination principles and frame these cases in those terms, Brown reasoned from the harm of segregation and the promise of equality and equal educational opportunity. Brown was not a case about racial classifications; it was part of the overthrow of a caste system.

To say that Brown is not a statement of anticlassification is not to say that the values which inform the anticlassification perspective are invalid. The political facts and social conflict that motivated their development are worthy of regard. Supreme Court Justices are free to tether their interpretive position to whichever principles they feel best support a workable outcome and remain faithful to the constitutional language and spirit. But insofar as Parents Involved is a fight for the mantle of Brown, the plurality’s position cannot hold.

B. The Meaning of Equal Protection

The insistence on a rule of colorblindness or anticlassification is not only contrary to the history of Brown, it is at odds with the purposes for which the Fourteenth Amendment was devised. Neither the Amendment construed in its entirety nor the provision of equal protection is race-neutral. Both the purposes of the Amendment and the means of implementation were race-conscious. The substantive core of the Fourteenth Amendment was a guarantee of equal citizenship to former slaves and the descendants of slaves and to make them full members of American society. One of the mechanisms for accomplishing this goal, the guarantee of equal protection of law, was designed to do more than serve as an antidiscrimination measure, but to use what white’s enjoyed as a benchmark for equality and to ensure fair consideration in the operation of law. The Supreme Court has not always been faithful to these purposes.

To this day, the jurisprudence of the Equal Protection Clause remains anything but clear regarding the “harm it is rectifying and the values it is vindicating.”\(^{184}\) As we have seen, the meaning of the Clause has been “approximated, changed, and, as of late, assumed or ignored.”\(^{185}\) Often, the meaning is derived from the substance or rhetoric of prior case law. For Justice Thomas, its meaning is derived from the dissenting opinion of Justice Harlan in Plessy. At other times the meaning of the Clause has been re-interpreted to suit

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\(^{184}\) Siegel, *supra* note 113, at 1546.

the changing needs of the nation. One scholar claims that the "predominant meaning at any single time has often been more a reflection of the cultural context than of an inherent legal principle." Another scholar suggests the possibility that the Equal Protection Clause of the Fourteenth Amendment was not even intended to govern discriminatory legislation, but was designed to protect against the discriminatory administration of facially equal laws. According to this view, the "paradigmatic" example of unequal administration that this clause was intended to address was the failure of law enforcement in the American South to investigate and prosecute crimes against freed slaves.

The lack of jurisprudential clarity regarding the Equal Protection Clause is not simply a result of the struggle over interpretation. It is also a consequence of the ambiguities in the constitutional provision itself. Although the Equal Protection Clause clearly means something, it does not very clearly say what it means. From the text, three bare inferences can be deduced. First, the clause imposes a duty regarding equality. Second, that which must be equalized is denominated as protection. Third, the bearer of the equalization duty is the state. The clause itself does not specify what it means to treat persons equally or indicate what activities it was intending to prohibit.

Originalist attempts to interpret the Equal Protection Clause have produced a broad spectrum of opinion. The Court in Brown devoted much attention to this end before throwing its hands up in exhaustion. Aside from the inherent

186 *Id.* at 534. We note that cultural context informs cultural meaning, and cultural meaning informs textual understanding.
188 *Id.*
189 U.S. CONST. amend. XIV.
191 *Id.*
192 *Id.*
193 *Id.*
194 Black, *supra* note 185, at 534.
195 See Snyder, *supra* note 98, at n.4., for a list of originalist scholarship.
196 Brown v. Bd. of Ed., 347 U.S. 483, 489 (1954). Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the amendment in Congress, ratification by the states, existing practices in racial segregation, and the views of proponents and opponents of the amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the Post-War Amendments undoubtedly
ambiguities, gaps, and conflicting evidence in such an endeavor, the framers of
the Fourteenth Amendment spoke a language that is substantively different
from our own, especially in connection with legislative drafting.\textsuperscript{197} The amend-
ment’s meaning is not solely legal; otherwise it would have been drafted to
lessen its ambiguity.\textsuperscript{198} In spite of its legal ambiguities, the amendment was
clearly understood by the public at large.\textsuperscript{199} It was intended to be more than a
legal instrument; it was an expression of ethical principles and natural rights.\textsuperscript{200}

The Fourteenth Amendment was framed by a Reconstruction Congress that
had recently emerged from Civil War. The Thirteenth Amendment’s abolition
of slavery had done little to curb southern re-imposition of caste laws, and
neither the outcome of the war nor the emancipation of slaves had the power to
overturn Chief Justice Taney’s infamous ruling in \textit{Dred Scott} that a black
man—even if born free in a state that treated him as a full and equal citizen—
was not and could never become a citizen of the United States.\textsuperscript{201} The first
post-war Congress took aim at \textit{Dred Scott} by directly legislating the principle of
birthright citizenship in the Civil Rights Act of 1866 and then constitutio-
nalized this principle in the proposed Fourteenth Amendment: “All persons
born or naturalized in the United States, and subject to the jurisdiction thereof,
are citizens of the United States and of the State in which they
reside.”\textsuperscript{202} Beyond simply declaring citizenship status, the framers included provisions
necessary to give life to this new status and ensure its realization. These
provisions included the protection of the privileges or immunities of national
citizenship, equal protection of law, and due process of law as well as granting
Congress the power to enforce these provisions through legislative enactment.
When the Supreme Court first took up the task of interpreting the amendment
in \textit{The Slaughterhouse Cases}, the Court wrote:

\begin{quote}
[A]n examination of the history of the causes which led to the adoption of
those amendments and of the amendments themselves, demonstrates that the
main purpose of all the three last amendments was the freedom of the African
intended them to remove all legal distinctions among “all persons born or naturalized in the
United States.” Their opponents, just as certainly, were antagonistic to both the letter and the
spirit of the amendments and wished them to have the most limited effect. What others in
Congress and the state legislatures had in mind cannot be determined with any degree of
certainty.
\end{quote}

\textsuperscript{197} Black, supra note 185, at 551.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Dred Scott v. Sandford, 60 U.S. 393, 404 (1857).
\textsuperscript{202} U.S. CONST. amend. XIV, § 1.
race, the security and perpetuation of that freedom, and their protection from
the oppressions of the white men who had formerly held them in slavery.\textsuperscript{203}

To these evident purposes, Chief Justice Roberts raises the objection that
the Equal Protection Clause “protects persons, not groups”\textsuperscript{204} because it creates
“rights guaranteed to the individual” and that the “rights established are
personal rights.”\textsuperscript{205} The often repeated claim that the Equal Protection Clause
“protects persons, not groups,” is a false dichotomy. The Equal Protection
Clause, it turns out, protects both individuals as individuals and as members of
a group. The fact that it protects individuals, even of groups that the Equal Pro-
tection Clause was not primarily intended to protect nor originally understood
to protect, such as women,\textsuperscript{206} does not negate its original purpose. As far back
as \textit{Strauder}, the Court announced that the Equal Protection Clause was
designed to “protect [the] emancipated race.”\textsuperscript{207} However, it then went onto to
explain that an equal protection denial could not be doubted if the group
excluded by it were white men . . . [n]or if a law should be passed excluding all
naturalized Celtic Irishmen, would there be any doubt of its inconsistency with
the spirit of the amendment.”\textsuperscript{208} Neither the fact that the Equal Protection

\begin{footnotes}
\item[203] 83 U.S. 36, 37 (1873).
\item[204] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2765
\item[205] \textit{Id.} at 2765 (quoting Univ. of California v. Bakke, 438 U.S. 265, 289 (1978)).
\item[206] Indeed, gender classifications today are subject to something approximating a height-
that the exclusion of women from Virginia’s Military Institute violates the Equal Protection
Clause of the Fourteenth Amendment). However, it was nearly half a century before the passage
of the Nineteenth Amendment extending suffrage to women, and much later still before the
Equal Protection Clause was used explicitly to protect women.
\item[207] \textit{Strauder} v. West Virginia, 100 U.S. 303, 310 (1880).
\item[208] \textit{Id.} at 308. It further stated:

[I]f, in those States where the colored people constitute a majority of the entire
population, a law should be enacted excluding all white men from jury service, thus
denying to them the privilege of participating fully with the Blacks in the
administration of justice, we apprehend no one would be heard to claim that it would
not be a denial to white men of the equal protection of the laws.

The Court’s hypothetical suggests a clear anti-subordination and democratic purpose at work—
intending to protect marginalized groups as well as emphasizing the “privilege of participating.”
This rhetoric is a far cry from the language of colorblind/anticlassification principles animating
the plurality in \textit{Parents Involved}.\end{footnotes}
Clause requires individuals to invoke its protection nor the universality of its language implies that the Equal Protection Clause is atomistic.\textsuperscript{209}

The debate over originalism is not over the purpose of the Fourteenth Amendment, but its scope and application.\textsuperscript{210} Although the amendment was drafted in universal terms, the Fourteenth Amendment was not a neutral instrument either in its objectives or its implementation. The framers of the Fourteenth Amendment sought equality, using what whites had as a benchmark for what the law required. In responding, in part, to the proliferation of black codes in the South, Congress passed the Civil Rights Act of 1866, which provided all citizens of every race and color the same rights "as is enjoyed by white citizens" in a host of areas.\textsuperscript{211} Republicans crafted a constitutional amendment to put the results of the Civil War beyond the reach of presidential veto and to shield it from constitutional infirmity and conservative attack.\textsuperscript{212} In considering many of the civil rights statutes, including the Civil Rights Act of 1866, which were contemporaneous to the Fourteenth Amendment, it is clear that Congress did not consider the amendment to be a-contextual. If anything, the amendment's goal was to provide substantive equality.\textsuperscript{213} It is important to consider the distinction between an assertion of equality and that of antidiscrimination.

The framers of the Fourteenth Amendment rejected the language of discrimination because this narrower principle would not encompass the much broader ethical principle behind the amendment.\textsuperscript{214} At the conceptual level,

\textsuperscript{209} 'Atomistic' is a term used by Daniel Tokaji to describe the narrow, individualistic lens with which the Court sometimes evaluates Equal Protection Clause cases, and a contrast to the antisuordination, 'systemic' lens applied in other, earlier cases.

\textsuperscript{210} Even Justice Thomas concedes as much. "I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members." Parents Involved, 127 S. Ct. at 2793 n.19 (Thomas, J., concurring).

\textsuperscript{211} Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). Michael Perry argues that the meaning of the Privileges and Immunities Clause also reflects this understanding given the historical relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment. Perry, supra note 187, at 58. "[A] law abridges a privilege or immunity within the meaning of the Privileges or Immunities Clause if it denies to nonwhite citizens a privilege or immunity "enjoyed by white citizens."" Id.

\textsuperscript{212} Id. at 114.

\textsuperscript{213} See id. at 115–16.

\textsuperscript{214} Black, supra note 185, at 563. See also James D. Anderson, Race-Conscious Educational Policies Versus a "Color-Blind Constitution": A Historical Perspective, 36 EDUC. RESEARCHER, 249, 256 (June–July 2007) ("With respect to the Fourteenth Amendment and the 1866 Civil Rights Act, the 39th Congress deliberately deleted the clauses prohibiting states from discriminating on account of race or color.").
equal protection is understood as an affirmative guarantee, whereas discrimination is often perceived as a negative right.\textsuperscript{215} In terms of application, a focus on discrimination rather than equality “skews [the] inquiry away from whether a racial minority member has been given fair consideration and protection of his government, to whether the government has implemented some design to harm him.”\textsuperscript{216} The Court’s multi-decade attempt to reduce equal protection into an antidiscrimination proviso saps it of much of its vitality and breadth.

Discrimination itself is an ambiguous term.\textsuperscript{217} Its definition ranges from “morally reprehensible conduct of unequal treatment to morally passive conduct of recognizing difference.”\textsuperscript{218} Before \textit{Brown}, segregation was not understood as being “discrimination,” nor did the Court in \textit{Brown} talk of segregation in those terms.\textsuperscript{219} As the Civil Rights movement altered the background assumptions of American society, discrimination took on new meanings, meanings which have infused law since the 1960s.\textsuperscript{220} The changing meaning of the language itself has in turn influenced legal determinations. “Once society became attuned to inequality following \textit{Brown}, segregation became synonymous with ‘discrimination’ and ‘discrimination began to conjure a notion of socially unacceptable and ‘dirty’ activity.’”\textsuperscript{221} It is the understanding of “discrimination” as morally reprehensible conduct that now infuses legal rhetoric and common usage. The modifier, ‘invidious,’ used to distinguish between unlawful discrimination and permissible recognition of difference has become somewhat redundant or dropped altogether.

When Respondents, their \textit{amici} and Justice Breyer suggest that there is a relevant constitutional distinction between racial classifications that seek to include and those that seek to exclude, the Chief Justice not only dismisses that

\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.} at 569.
\textsuperscript{217} Merriam Webster provides several functionally different definitions:
1 \textit{a}: the act of discriminating \textit{b}: the process by which two stimuli differing in some aspect are responded to differently
2 \textit{a}: the quality or power of finely distinguishing
3 \textit{a}: the act, practice, or an instance of discriminating categorically rather than individually \textit{b}: prejudiced or prejudicial outlook, action, or treatment <racial discrimination>

\textsuperscript{218} Black, \textit{supra} note 185, at 542.
\textsuperscript{219} \textit{Id.} at 543.
\textsuperscript{220} See \textit{id.} at 563.
\textsuperscript{221} \textit{Id.}
argument, he ignores the structure and history of the Fourteenth Amendment. In Chief Justice Roberts's words, "[t]he reasons for rejecting a motives test for racial classifications are clear enough."\textsuperscript{222} The reasons, citations, and supporting statements he then offers are, individually or taken together, anything but clear or persuasive. They are a mixture of quotes from non-authoritative sources and vague warnings. Chief Justice Roberts cites the dissenting opinion of former Justice O'Connor in \textit{Metro Broadcasting}, followed by the concurring opinion of Justice Powell in \textit{Bakke}, and finally the dissenting opinion of Justice Kennedy in \textit{Metro Broadcasting}—odd support from a Justice that mere pages earlier railed against Justice Breyer's improper reliance on "non-controlling pronouncements."\textsuperscript{223}

Consider the extended quote from Justice O'Connor that Justice Roberts offers:

The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility...."[B]enign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.\textsuperscript{224}

If the Court should be more humble, perhaps it should begin with a recognition that many of the words that legal conclusions turn on have no meaning independent of the current generation's understanding. The raw meaning of the Equal Protection Clause itself has changed in the nearly one and a half centuries it has been embedded in the Fourteenth Amendment. Indeed, it is difficult to imagine in 1870 that the clause might be used against an institution of higher education to condemn the exclusion of women.\textsuperscript{225} The Court in \textit{Strauder}, interpreting the meaning of the Equal Protection Clause,
invalidated the murder conviction of an African-American on the ground that the state law forbade blacks from serving on a jury.\textsuperscript{226} The Court went onto declare, at least in \textit{dicta}, that the State may confine jury "selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe that the Fourteenth Amendment was ever intended to prohibit this."\textsuperscript{227} Women's right to vote was not protected until nearly a half century later, and only then by further constitutional amendment.\textsuperscript{228} Constitutional jurisprudence over words such as "cruel and unusual," "reasonable"—words that are no less without immutable understanding than the word "benign," have continually taken new meaning through the generations.\textsuperscript{229} Likewise, our understanding of the meaning and scope of protection of "equal protection under law" has changed in that time. The Nineteenth Century understanding of the distinction between civil, political, and social rights is not a trichotomy that most modern legal practitioners readily intuit.\textsuperscript{230}

It is difficult to determine, at this historical remove, precisely how the Justices viewed the Louisiana statute in \textit{Plessy}—whether they honestly believed that the segregation in passenger cars was a reasonable, good faith effort to promote the public interest or whether the Justices understood that the legislature was disingenuous, but decided to uphold the statute anyway, perhaps because they sympathized with white supremacy. The text of Harlan's dissent strongly suggests the latter. As he wrote:

Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary.\textsuperscript{231}

The lesson of history is not that the Court cannot distinguish between malicious and benign government action. The long history of the Court making such distinctions up through \textit{Grutter} suggests otherwise. Rather, it is the Court's "candor" that has been wanting. If the word "benign" is subject to such uncertainty, what logical reason might we have to suspect that the word

\begin{itemize}
  \item \textsuperscript{226} Strauder v. West Virginia, 100 U.S. 303, 312 (1879).
  \item \textsuperscript{227} Id. at 310.
  \item \textsuperscript{228} U.S. CONST. amend. XIX.
  \item \textsuperscript{229} U.S. CONST. amends. I-X.
  \item \textsuperscript{230} Goodwin Liu, "\textit{History Will Be Heard}": An Appraisal of the Seattle/Louisville Decision, 2 HARVARD L. & POL'Y REV. 53, n.75 (2008).
  \item \textsuperscript{231} Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).
\end{itemize}
"malicious" is any less uncertain? Yet, even where ostensibly race-neutral government action is the subject of litigation, courts have found ways of ascertaining malicious intent.232

The final quote offered to suggest a "clear" reason for rejecting the distinction between race-conscious measures that include and those that exclude is an excerpt from Justice Kennedy's dissenting opinion in Metro Broadcasting in which he writes that such an approach would "do no more than move us from 'separate but equal' to 'unequal but benign.'"233 While intended to bolster the position that Justice Roberts is endorsing, this sentence provides little support. Instead, it assumes what it concludes. The Court is called upon to determine the meaning of the Equal Protection Clause before deciding whether any given measure is in violation of it.

The Chief Justice takes issue with Justice Breyer's claim that no Supreme Court decision has "repudiated the Constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races."234 Roberts claims to "have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis"235 The Chief Justice appears to be subtly misinterpreting Justice Breyer's claim. Clearly, Justice Breyer is aware of the line of cases originating in Adarand and Crosan extending strict scrutiny review to all racial classifications, whether 'benign' or invidious. Although the averred motivation for the race-conscious policy does not affect whether strict scrutiny review is applicable, it has affected whether the policy would be upheld or not. In Grutter, the Supreme Court explained that strict scrutiny review is "designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race."236 In short, there is both a balancing and a smoking out function performed by strict scrutiny review. The smoking out function does not take the word of the government entity, but investigates the interest being asserted to determine whether they are indeed valid. The validity of a government interest will necessarily depend upon the motivation of the government entity and whether the interests are sincere or hidden invidious ones.

232 See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Court striking down local ordinance that on its face appeared to be race-neutral but was administered in a discriminatory manner).
235 Id.
Justice Thomas also takes on the motives argument, but addresses this argument from a slightly different angle. In his view, "[i]t is the height of arrogance for Members of this Court to assert blindly that their motives are better than others."\(^{237}\) We contest both the claim that the Justices are blind in their evaluation of motivation and the claim that it is arrogant for the Court to make such determinations. Justice Thomas stridently argued in favor of deference to prison officials with respect to the segregation of prisoners in his dissenting opinion in *Johnson*.\(^{238}\) There is nothing to suggest that this deference was predicated on blind faith anymore than Justice Breyer's dissent in *Parents Involved*.

Moreover, the application of law to facts involving the assessment of the motives of government bodies is not arrogance, it is the judicial function. Justice Thomas continues: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow."\(^{239}\) Nor is it one that Justice Thomas must take here. He overstates his case. One need not be sure that such 'racial theories' will be nothing but beneficial—it is the judiciary's

\(^{237}\) *Parents Involved*, 127 S. Ct. at 2786 n.27 (Thomas, J., concurring).

\(^{238}\) *Johnson v. California*, 543 U.S. 499, 524 (2004) (Thomas, J., dissenting) "The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less 'fundamental' than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons." *Id.* In his concurring opinion in *Parents Involved*, Justice Thomas took the opportunity to chastise the Court for its insistence on strict scrutiny in *Johnson*, to which he attributes the death of several California inmates. *Parents Involved*, 127 S. Ct. at 2781 n.17 (Thomas, J., concurring). It is curious that Justice Thomas has little difficulty finding a penological interest to justify race-conscious measures which concern the well-being of prison inmates, but has such great difficulty finding a sufficiently compelling pedagogical interest to justify race-conscious measures which concern the well-being of K–12 students. In *Johnson*, Justice Thomas draws analogies between the K–12 context and the prison context with respect to the protection of constitutional rights. Taking his analogy to its logical conclusion, Justice Thomas would have to concede that penological and pedagogical interests are analyzed in a similar fashion for constitutional infringements. Therefore, a school's use of race-conscious student assignment plans should be justifiable under strict scrutiny for legitimate and compelling pedagogical interests if prisons' race-conscious prisoner assignment policies are justifiable under strict scrutiny analysis for legitimate and compelling penological interests.

\(^{239}\) *Parents Involved*, 127 S. Ct. at 2788 (Thomas, J., concurring).
role to make determinations on that point. The fact that it may be difficult does not change the responsibility of the Court to undertake it.240

Ultimately, as Justice Kennedy and the dissent in Parents Involved recognize, the Equal Protection Clause was not a colorblind instrument.241 It was phrased in language that was universal, espousing a higher ethical principle, but its purpose was quite evident. The Court has not always been faithful to this purpose. The Justices in the plurality do not pay particular attention to the text of the Equal Protection Clause itself, a formulation that not only contains no mention of levels of scrutiny, but does not speak of antidiscrimination. Equal protection and antidiscrimination are not the same in any obvious sense.242 An explanation for their conflation should be a minimum requirement, particularly for any textualist on the Court. In other contexts, the Court has undertaken the necessary interpretive steps to effectuate legislative and textual intent. For instance, in General Dynamics Land Systems, Inc. v. Cline243 the Court was asked to interpret the meaning of the Age Discrimination in Employment Act (ADEA) and, specifically, whether the antidiscrimination language protected the young against the old. The Court looked beyond the ambiguous statutory language and decided the case on the basis of the congressional intent to protect the relatively older worker from discrimination in favor of younger workers.244

C. The Legacy of Plessy

While Chief Justice Roberts claims to be the proper heir of Brown, he is closer company to Plessy with respect to his racially symmetric legal formal-

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240 The dissent makes much of the supposed difficulty of determining whether prior segregation was de jure or de facto. See, e.g., id. at 2810–11 (Breyer, J., dissenting). That determination typically will not be nearly as difficult as the dissent makes it seem. In most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races. And even if the determination is difficult, it is one the dissent acknowledges must be made to determine what remedies school districts are required to adopt. Id. at 2771 n.4 (Thomas, J., concurring).

241 Parents Involved, 127 S. Ct. at 2791–92.

242 Black, supra note 185, at 534.


244 Then Chief Justice Rehnquist and Justice O'Connor joined Justices Souter, Breyer, and Ginsburg in the majority. Justices Scalia and Thomas filed dissenting opinions, with Justice Kennedy joining the latter. In a sense, the dissent would have ruled in favor of an "age-blind" approach, ignoring the text, structure, and history of the Act which was intended to protect older workers.
Chief Justice Roberts and the plurality insist not only on the symmetry of all racial classifications, whether benign or invidious, but also on the symmetry of the racial impact of those classifications. Consequently, Roberts sees blacks and whites as similarly situated under the Equal Protection Clause, and makes no distinction between Linda Brown and Joshua McDonald. *Plessy* also adopted a false racial symmetry, the pernicious fiction known as "separate, but equal." The Court in *Plessy* refused to accept the claim that segregation was in any way unequal. By a-contextually fashioning and applying legal rules, *Parents Involved*, like *Plessy*, serves to protect segregation and to preclude efforts to bring the races together. In terms of the meaning of the text of the Equal Protection Clause and the doctrinal test used to implement it, *Parents Involved* is even more radical than *Plessy*. The Court in *Plessy* acknowledged the asymmetric nature of the constitutional provision. By reading *Brown* as a blanket prohibition on all racial classifications rather than a response to the harms of racial segregation, Chief Justice Roberts and the plurality marshal *Brown* for an anti-*Brown* reading.

Chief Justice Roberts refuses to delve into the interests the school boards are asserting and acquire a deeper understanding of the problems they are striving to address. According to Chief Justice Roberts, because the plans are instances of "racial balancing," they cannot be narrowly tailored. This is an artificial legal formalism that reasons from the conclusions backward, disconnected from factual reality. By arguing that the plans are not narrowly tailored, he sidesteps an examination of the problems that motivate these plans. This step was not a given. Since the tailoring required must be keyed to the interest asserted, Chief Justice Roberts did not have to decide that "racial balancing" automatically fails strict scrutiny review. In that way, Chief Justice Roberts uses formal legal analysis to obviate the need to examine the merits of the plans before the Court. Just as the Court in *Plessy* refused to recognize that enforced racial separation signified black inferiority in the context of a social caste system, the Chief Justice here refuses to credit the serious harms that motivate these plans.

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245 Goodwin Liu has done a magnificent job of teasing out this strain of the plurality opinion. See Liu, supra note 230.

246 Justice Brown stated:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.


247 Liu, supra note 230.
The emphasis on racial classifications as a hard and fast rule appears to be not only misplaced, but overwrought. It is another artificial legal formalism employed to achieve certain ends. Even if classifications harm by offending the dignity and self-autonomy of individuals who are labeled of a particular race, that does not mean that classifications are not present if the state is not involved, or that the dignitary harm suffered by individuals as a result of such classifications is particularly significant.

If the harm of racial classification is the violation of individual autonomy, individual dignity, or self-identity, the assumption seems to be that this harm is a product of state action. In the absence of state-imposed racial classifications, the notion that people would be unfettered in their ability to self-define contradicts both our knowledge of the brain and culture. Identity formation is an inter-subjective process and a function of our interactions with others. Our sense of self is a product of both self-definition but also of how others define us. Social cognition theory teaches that the normal human cognition results in automatic stereotyping based upon categorical structures. The process of categorizing enables people to perceive members of the different categories as being dissimilar to each other. Thus, we can distinguish a table from a chair. The categorical structures that humans naturally develop are termed "schemas." Stereotypes are simply schemas that all people develop—

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249 Id.

Every person, and perhaps even every object that we encounter in the world, is unique, but to treat each as such would be disastrous. Were we to perceive each object sui generis, we would rapidly be inundated by an unmanageable complexity that would quickly overwhelm our cognitive processing and storage capabilities. Similarly, if our species were "programmed" to refrain from drawing inferences or taking action until we had complete, situation-specific data about each person or object we encountered, we would have died out long ago. To function at all, we must design strategies for simplifying the perceptual environment and acting on less-than-perfect information. A major way we accomplish both goals is by creating categories... Categories and categorization permit us to identify objects, make predictions about the future, infer the existence of unobservable traits or properties, and attribute the causation of events.

Id at 1188–89.
251 Id. at 1188.
not only prejudiced persons—to aid in cognitive processing and normal human functioning.\textsuperscript{252}

If the state plays a role in creating or affirming existing classifications, and it certainly has historically when the definition of 'white' was legally contested, it is a leap to suggest that classifications such as those under review are particularly significant, either in the role they play in perpetuating those classifications or in the dignitary harms that flow from them. If anything, the dignitary harms of racial classification accrue more directly as a consequence of the fact of segregation itself, whose powerful associations of race and space,\textsuperscript{253} such as the black ghetto, contribute far more to the development of racial stereotypes and prejudiced attitudes than modest government imposed classifications such as the tiebreaker student assignment plan being reviewed. The plurality does not consider the constitutive function of segregation to the way that racialized groups are constituted. Although the Equal Protection Clause specifically targets state action, to completely bar the use of racial classifications by government in pursuit of compelling government interests on an assertion of harm to individual autonomy is extreme in light of these facts.

In addition to the use of the anticlassification principle and the invocation of "racial balancing" in its narrow-tailoring inquiry, the plurality trots out the \textit{de jure/de facto} distinction as a third, related legal formalism which it deploys to insulate patterns of racial segregation from intervention. For the plurality, the \textit{de jure/de facto} divide demarcates the line where government classifications have been employed and where they have not, and as such speaks to the harm at issue and the scope of a permissible constitutional remedy. The notion that underpins this distinction is the correlate idea that there exists a point where legally imposed disabilities terminate and societal discrimination begins. This notion was central to the Supreme Court's analysis in \textit{Plessy}. For the Court in \textit{Plessy}, the domain of civil and political rights was wholly distinct from the sphere of social prejudice:

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to

\textsuperscript{252} \textit{Id.}  
enforce social, as distinguished from political, equality, or a commingling of
the two races upon terms unsatisfactory to either.254

In his concurrence, Justice Kennedy rejects the plurality’s notion that there
is a clear divide between legally imposed discrimination and societal discrimi-
nation, and between *de jure* and *de facto* segregation. “The distinction between
government and private action, furthermore, can be amorphous both as a
historical matter and as a matter of present-day finding of fact. Laws arise from
a culture and vice versa. Neither can assign to the other all responsibility for
persisting injustices.”255 Justice Kennedy’s insight is well-founded as a factual,
historical matter. Law has been used to express existing racial antipathy as well
as engender it.256 The notion that extra-legal societal discrimination is ‘natural,’ a product of the broader society, camouflages the ways in which
public policy and law have contributed to societal discrimination. For example,
the notion that residential segregation is “natural” or a product of individual
‘choice’ masks decades of public policy choices that have influenced those
patterns while insulating those patterns from intervention. Although schools
were segregated in the South as a matter of law, Northern schools were segre-
gated as a matter of practice and custom. In both cases, school segregation
resulted from policy decisions that emanated from social norms and mores.257
In the North and the West, those decisions were masked as episodic and
discretionary or ostensibly race-neutral, yet no less real.258

Contrary to the logic of the Chief Justice or Justice Thomas, the distinction
between *de jure* and *de facto* segregation developed not so much as a distinc-
tion that recognizes some inherent difference in the harms, but more as a
limitation on potential remedies. Specifically, the distinction served as a break
on court intervention, reflecting both federalism concerns and judicial sensibili-
ties with respect to the relationship between cause and remedy.259 In the early

254 Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
255 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2795
(2007) (Kennedy, J., concurring in part and concurring in the judgment).
256 See STEVE MARTINOT, THE RULE OF RACIALIZATION: CLASS, IDENTITTY, GOVERNANCE 55
(2003) for the proposition that early colonial anti-miscegenation statutes were an important step
toward the biologization of “English/African difference,” and a mechanism to foster racial
divisions in colonial labor. Id. at 57.
257 See Michael H. Sussman, Discrimination: A Pervasive Concept, in IN PURSUIT OF A
DREAM DEFERRED: LINKING HOUSING & EDUCATION POLICY 209, 219 (john a. powell, Gavin
Kearney & Vina Kay eds. 2001).
258 Id.
259 Liu, supra note 230.
1970s, courts were increasingly concerned with preserving local autonomy in the wake of a shifting political landscape fostered by President Nixon's "southern strategy." The American public, including the North, seemed to feel that greater comity should be given to whites' desire not to be bused across town. Where the causes were more attenuated from the harm of segregation or where findings of de jure segregation were more remote, courts were less likely to intervene in local decision-making and impose a remedy. However, the development of judicial restraint ushered in by the advance of the de jure and de facto dichotomy was not understood to imply a similar restraint on voluntary measures designed by local government to address harms regnant in segregation.

The Court in Parents Involved, as in Plessy, not only drew a distinction between societal discrimination and legally imposed civil or political disabilities, but it is also skeptical that there is a role for government in addressing societal discrimination. As the Chief Justice wrote, "in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action." The Court in Plessy also rejected the notion that "social prejudices," as distinct from civil or political disabilities, "may be overcome by legislation." In its view, "if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."

The reason Chief Justice Roberts rejects the idea that societal discrimination can be a basis for race-conscious government action is that, in his view, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." Justice Thomas raises a similar concern. In his view, segregated housing patterns are "natural," a "continuous process" with "no identifiable culpable party and no discernable end point."

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260 This principle is uniformly recognized in law. Think of torts and the difference between proximate and but-for causation. The more attenuated a particular cause, the less likely the courts are to require remedy. That does not mean that the harm is any less severe or that the cause is not traceable; it's a question of the strength of the cause.

261 Parents Involved, 127 S. Ct. at 2758.

262 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

263 Id.


265 Id. at 2773.
Consequently, "school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy." The Court in *Plessy* also thought that there were distinct limits for the role of government: "When the government . . . has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed."  

The Court in *Plessy* also expressed concern that attempts to redress social prejudice may create just as much harm as good, a concern reminiscent of the plurality's assumptions in *Parents Involved*, and one that mimics Justice Thomas's racial paternalism concerns: "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." Even as Justice Thomas holds up Justice Harlan's dissent in *Plessy*, his reasoning has much in common with the majority in *Plessy*.  

Under the modern form of *Plessy* that Chief Justice Roberts and others embrace, the plurality not only adopts an a-contextual formalism that would limit the ability to address racial hierarchy and subordination, it does not even make a nod toward the value of equality. It is doubtful the Court in *Plessy* would have gone this far. Although the Court in *Plessy* did not further what we would understand today as equality, the Court approached the question from "a paradigm and rhetoric of 'equality.'" Chief Justice Roberts's focus on anticlassification is not only an anti-*Brown* reading, it is more narrow than *Plessy*. If we divide constitutional decision-making into three steps, we can see how this might be true. The first step is the determination of meaning. The Supreme Court must interpret a given constitutional provision. Secondly, the Court has to create a doctrinal test to implement this meaning. For instance, the doctrinal framework of strict scrutiny, intermediate, and rational basis review holds that discrimination against racial minorities must be held to

266 Id. at 2775.
267 *Plessy*, 163 U.S. at 551 (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).
268 Id. at 551.
269 Black, *supra* note 185, at 543.
271 Id.
272 Id.
strict scrutiny, but disability discrimination only requires rational basis re-
view.273 Finally, the Court must apply its test to a particular set of facts.274

At steps one and two, Plessy and Brown are consistent. The Equal Pro-
tection Clause in both Plessy and Brown is understood to “forbid discrimination if it is stigmatizing or intended to oppress.”275 This articulation is visible in Strauder and Plessy up through Brown and Brown II.276 Likewise, the doctrinal test is the same in Plessy and Brown. The Court asks if the legislation mandating segregation is oppressive or stigmatizing. The difference between Plessy and Brown is in step three, their application of the doctrinal test to particular facts. Plessy says that if segregation is stigmatic, that is only “because the colored race chooses to put that construction upon it.”277 Conversely, Brown asserts that segregation is stigmatic in effect—it generates “a feeling of inferiority”—and cites Kenneth Clark’s doll study in the famous footnote eleven as evidence.278 In the application of the legal standard to particular facts, Plessy is deferential to the state, whereas Brown is not.279

Parents Involved marks a departure from both Plessy and Brown in terms of the meaning of the Equal Protection Clause and the doctrinal test that implements it. Parents Involved applies strict scrutiny review. This test makes little sense if the understanding of the Equal Protection Clause is to protect against stigmatic or oppressive discrimination. Under an anticlassification test as articulated by the plurality, motive is irrelevant.280 Now, racial classifications are forbidden because, according to the reasoning of the plurality, it carries costs that should be borne only if absolutely necessary. This represents the final stage of the development for the anticlassification principle as the operative meaning of the Equal Protection Clause. Although Grutter appears to have applied the same doctrinal test, the difference between Grutter and Parents Involved is in the last step—the application of law to facts. The Court in Grutter was not only more deferential to the government, it also determined that the racial classifications in Grutter were less troubling because they were

273 How the Court arrives at this particular formulation is beyond the scope of our inquiry.
274 Id.
275 Id.
276 Strauder v. West Virginia, 100 U.S. 303, 310 (1897).
277 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
279 However, Brown II is deferential at the remedial stage.
not exclusively racial classifications. No individual was defined or sorted solely on the basis of race.

Earlier decisions of the Court applying strict scrutiny to racial classifications suggested that one of the purposes of strict scrutiny standards to all racial classifications was to screen for illegitimate motives as much as to balance costs against benefits. In Croson, the Court held that: "Absent searching judicial inquiry into the justification for such race-based measures, [we have no way to determine which] classifications are 'benign' or 'remedial' and what are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."\(^281\) In Adarand, the Court stated that strict scrutiny applies to all racial classifications to "smoke out" illegitimate uses of race.\(^282\) These articulations of the reasons for strict scrutiny review suggest that strict scrutiny review is primarily a mechanism to assure that the interest asserted by the government is, in the words of the Grutter Court, both "important and sincere."\(^283\)

*Parents Involved* seems to mark a departure from those applications of strict scrutiny review in a way that is reminiscent of Plessy's legal formalism and a-contextual analysis, even by comparison to Grutter or Adarand. The plurality's refusal to investigate the interests asserted by the school districts, on the ground that the integration plans at issue are not narrowly tailored anyway, suggests that strict scrutiny is now being applied not to balance costs against benefits or even to smoke out illegitimate purposes, but to ensure that individuals are not classified on the basis of race. In effect, strict scrutiny review now functions as a complete ban on race-conscious efforts which rely on racial classifications as a means to achieve important, or even compelling, government interests. The interest asserted appears now to be irrelevant so long as narrow tailoring requires that no individual be defined exclusively on the basis of race. Although Adarand cautioned that strict scrutiny is not "strict in theory, but fatal in fact," this promise appears to be illusory whenever express racial classifications are at issue. This is the logical end-point of the anticlassification principle and marks its full ascendancy.

\(^{282}\) Adarand Contractors, Inc. v. Peña 515 U.S. at 205.
\(^{283}\) "[S]trict scrutiny review is designed to provide a framework for examining the importance and sincerity of the reasons advanced by the government." Grutter v. Bollinger, 539 U.S. 306, 327 (2003).
IV. THE COMMON SCHOOLS DEMOCRACY REQUIRES

The five opinions in Parents Involved reflect not only deep disagreement over the cases, but more profoundly a clash over the meaning of the Equal Protection Clause of the Fourteenth Amendment. Without being exhaustive, some of the issues in sharp disagreement in these cases include, the standard of review for racial classifications, the validity of the asserted government interests, the requirements of narrow tailoring, the application of a strict scrutiny to the facts, the relevance of the de jure/de facto distinction, the use of social science evidence, the role of the Court in a democratic society and the meaning of Brown and its progeny. It is not just that these and other issues are raised, it is the intensity with which these important issues are addressed by a deeply divided Court. To put this division in context, it might be useful to remember how important the Court believed it was to avoid having even a concurring opinion in Brown. Our goal has been to highlight the deep disagreement that persists over its meaning and the ever shifting constellation of values that it is marshaled to serve. Parents Involved crystallizes many of the points of disagreement that have been developing through the Court's jurisprudence since Brown, as much as it signals the emergence of fresh points of contention.

While we have noted the new, arguably radical, terrain trod by the plurality and the even more extreme path taken by Justice Thomas, we must also recognize the fresh terrain being staked out by the dissent. As described in some

284 It should also be remembered that the Court unanimously reaffirmed that decision in Cooper v. Aaron in response to a flagrant disobedience to its authority. The Court spoke terms that unmistakably reinforce the Court's own understanding of the importance of that reaffirmation:

Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

Cooper v. Aaron, 358 U.S. 1, 19-20 (1958). Robert Burt describes the Court's rhetoric and action in Cooper in terms of its recognition of its own vulnerability as an institution—its incapacity to enforce its own decisions and its need for legitimacy and continuity "because it was composed of men who might fall weary and resign, of men who might die." Robert Burt, Constitutional Law and the Teaching of Parables, 93 Yale L.J. 455, 477 (1984). "An open admission of [the threat from dissent] might only tempt dissenters by alerting them to the fragility of their own disruptive strength." Id. at 482.
Chief Justice Roberts tries to claim the mantle of Brown, and Justice Thomas continues to lift up Justice Harlan's dissent in Plessy. Justice Breyer wishes also to claim the mantle of Brown. Our reading of Brown suggests that he is much closer to Brown than the plurality opinion or even Justice Kennedy.

Unlike Justice Thomas's focus on racial balancing and colorblindness, or Chief Justice Roberts's focus on a-contextual racial classifications, Justice Breyer's opinion approving the use of race-based voluntary integration measures rests on three critical claims. The first claim acknowledges the legacy of segregation in American society. Justice Breyer speaks of the importance of "setting right" the remnant and lingering effects of the prior condition of segregation, not simply in terms of schools, but also in terms of "housing patterns, employment practices, economic conditions, and social attitudes.

The second claim advanced by Justice Breyer is a recognition of the harm of segregation itself, whether imposed by law or not, on educational opportunity. Justice Breyer draws upon the vast social science literature demonstrating the importance of diverse learning environments for all children and the detrimental effects of racially isolated learning environments, especially for black children.

Justice Thomas and, to a lesser extent, Chief Justice Roberts reject both of these claims.

The position of Chief Justice Roberts is that there is no constitutionally cognizable harm of segregation in the absence of de jure segregation. Similarly, Justice Thomas asserts there can be no such thing as segregation and certainly no resegregation unless it is explicitly state-sponsored. With respect to the claim that segregation, whether de jure or de facto is harmful, Justice Thomas disputes the social science data, describes its gaps, highlights confusion and disagreement, and concludes that the mixed verdict cannot justify these plans under proper strict scrutiny analysis.

But Justice Thomas goes further than simply questioning the educational benefits of integrated education and the harms of racial isolation. He even suggests that blacks may be better off in "racially isolated" environments. Justice Thomas ignores the mountain of contrary evidence, and describes at length the success of Dunbar High School and anecdotal evidence of student achievement at historically black colleges under oppressive conditions. Justice Thomas is not alone.

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285 Parents Involved, 127 S. Ct. at 2820 (Breyer, J., dissenting).
286 Id. at 2821.
287 See id. at 2765 (plurality opinion).
288 Id. at 2777 (Thomas, J., concurring).
289 Id.
There is a popular narrative that mythologizes segregation, a narrative imbued with poignant examples of outstanding achievement and success within all-black institutions suffering under Jim Crow. Nor is this narrative new. It harkens as far back as Booker T. Washington. This narrative implies that perhaps segregation, under the right conditions and with proper support, is not such a harmful arrangement. As Justice Thomas suggested, perhaps students in all black or historically black schools or all women’s schools might perform better in those schools. To suggest that these students must be integrated, in view of those who subscribe to this narrative, is to imply that the black school or perhaps black students are inherently inferior and incapable of success without a white presence.

Maybe it is only fitting that Justice Thomas and others, like the southern segregationists, assert that segregation is not necessarily harmful. Many southerners, including judges, argued that segregation was not harmful or even if it was, forcing the races to mix was even more harmful. Justice Thomas’s rejection of the harmful effects of segregation is both a direct repudiation of Brown and tacit acceptance of southern segregation.

Ultimately, Justice Thomas is dismissive of integration, calling it racial balancing. And while he is expressly distrustful of elites that would engage in racial balancing, he does not explain how this concern relates to these cases, especially in Louisville where the system was adopted by officials endorsed by voters. If the Supreme Court is not the elite, then one must assume there is not an elite seeking racial balancing.

Justice Breyer, on the other hand, accepts the importance of integration. Justice Breyer’s third claim for the role of integrated education is in support of
our pluralist democracy. It is this explicit linkage, a connection firmly rooted in constitutional provision and powerfully reiterated through the body of case law, which is most significant. It heralds the regeneration of the moral imperatives that lay beneath the Reconstruction Amendments and provides the foundation for future iterations of the Court to reclaim that legacy.

To the Fourteenth Amendment’s framing generation, education was a necessary requisite to exercising the “new rights and duties” extended by that instrument. As the Court in Brown described it, “[education] is required in the performance of our most basic public responsibilities, even service in the armed forces.” Even Justice Thomas has expressly recognized the connection between public education and Fourteenth Amendment. Concurring in a decision to uphold the use of school vouchers, Justice Thomas stated that education is a vital component in securing the “civic, political, and personal freedoms conferred by the Fourteenth Amendment.” In doing so, Justice Thomas explicitly made the connection that Justice Breyer now advances: “one of the purposes of public schools was to promote democracy and a more egalitarian culture.”

The importance of integrated education to our democracy goes beyond the capacity to exercise duties and responsibilities of citizenship, such as the ability to serve on a jury. The function of public education is not just the dissemination of academic knowledge or the development of life skills. It is a site for constitution of our political identity as U.S. citizens and the meaning of that citizenship. It is the domain in which our society transmits shared cultural values articulated in civic terms. Compulsory public education is perhaps the only place where government can accomplish this objective.

All schools teach civics, and many instill these values and ideas through student government as well as course work. Justice Breyer is well aware of the role that education plays in defining citizenship. “Primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.”

293 Id. at 2821.
295 Brown, 347 U.S. at 493.
297 Id. at 681.
Students are taught the precepts of collective political action in a democracy by holding elections to select class officers and student government representatives. Schools even hold mock elections which parallel real-world elections, teaching the mechanics of casting a ballot. In addition, many schools have extra-curricular public service requirements, where students must volunteer in their community for a certain number of hours in order to graduate.

The great educator John Dewey wrote that "the purpose of education was to create, in our own students and in ourselves, the capacity of associative living." The experience of learning together fosters social cohesion. The problem-solving and collaborative learning skills produced by integrated learning environments are necessary to building community in a diverse democracy. Thus, one of the goals of integrated education is internal. By shaping the very identity of citizens and the meaning of citizenship, schools are constitutive of who we are individually as citizens and collectively as a nation. In so doing, they shape the hearts and minds of students and society. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together." In that sense, a critical part of the work of public education is community building. Dewey explained that "democracy is a community always in the making." It is the American community that is being ordered and defined by public education. As we wrote elsewhere:

Segregation undermines the project of community building, and by extension, nation building. The racial isolation of Whites in separate schools, reinforced by the lived experience of segregated neighborhoods, creates a sense of separateness and difference from people of a different color, who do not seem to be a part of the same community or share the same values.

School segregation is malevolent and destructive to not only the life chances of children, but to the acculturation of children, white and black, to
democratic values. As Dr. Martin Luther King Jr. explained, "Segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority."\textsuperscript{305} If we acknowledge that integrated education is a public good that serves the project of producing good citizens, strong communities, and our nation itself, we would allow state and local governments to pursue this good without hesitation, enhancing not only the life chances of all Americans, but the vitality and strength of our democracy as well.

For these reasons and more, the importance of education to our democracy is one of the operative principles in \textit{Brown}. In view of the \textit{Brown} Court, "education is perhaps the most important function of state and local governments."\textsuperscript{306} Proper education plays an essential role in acculturating citizens to the values and shared responsibilities of a democratic society and in preparing each child to contribute to the collective good of the country: "[E]ducation . . . is the very foundation of good citizenship."\textsuperscript{307} In view of the \textit{Brown} Court, segregated schooling was "inherently unequal," not because of the tangible differences between schools or even because of the indignity suffered in the act of classifying persons on the basis of race.\textsuperscript{308} Rather, in an era in which education had already become essential to citizenship, "separate education conferred full citizenship only on certain members of society."\textsuperscript{309} The Court in \textit{Brown} carefully emphasized that it was considering the issue of segregation in the context of public education, not as it existed at the framing of the Fourteenth Amendment or when \textit{Plessy} was decided a generation later, but in light of its "full development and its present place in American life throughout the nation."\textsuperscript{310} These purposes are no less important in the twenty-first century then they were in the 1950s. If the overriding purpose of the Reconstruction Amendments were to elevate the status of slaves and the descendants of slaves and make into full members of American society as US citizens, then segregated education is inimical to that end, more-so today than ever.

\textsuperscript{305} John A. Powell & Rebecca High, \textit{The Common Schools Democracy Requires: Expanding Membership Through Inclusive Education}, in \textit{Lessons in Integration: Realizing the Promise of Racial Diversity in American Schools} 265, 267 (Erica Frankenberg & Gary Orfield eds., 2007).


\textsuperscript{307} \textit{Id.}

\textsuperscript{308} \textit{Id.} at 495.

\textsuperscript{309} Powell & High, \textit{supra} note 305, at 266.

\textsuperscript{310} \textit{Brown}, 347 U.S. at 492–93.
The recognition of the overriding importance of education to our democracy was emphatically reiterated a half century later in *Grutter*. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." This participation is guaranteed by the critical role that education plays in "preparing students for work and citizenship." Thus, Justice O'Connor explained in *Grutter* that the legitimacy of our democracy in a racially diverse, pluralist society is called into question if virtually all the elite are white. Majoritarian institutions require a measure of equality and community for legitimacy. It is the existence of community that unites winners and losers in any dispute whether judicial or political.

Even as he acknowledges the democratic function of the Fourteenth Amendment, Justice Thomas nonetheless completely rejects the democratic claim in support of race-conscious student assignment policies. He first invokes a slippery slope argument, that if the federal government may use race to inculcate values into its citizens, then the use of race may be used to achieve similar goals at every level. Second, he dredges up the durational argument—that such an interest has no logical endpoint. Third, he argues that the social science data may not support the evidence that Justice Breyer cites. For example, although inter-group contact may diminish negative racial attitudes, there is no guarantee that students of different races will interact in a diverse school. He cites studies showing that not only are different races tracked within the same schools into different classrooms, but that the races may separate themselves socially. "Simply putting students together under the same roof does not necessarily mean that the students will learn together or

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312 *Id.* at 331.
313 "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Id.* at 332.
314 See generally *Burt*, supra note 284.
315 *Id.* at 456.
316 *Id.* at 2779.
317 *Id.*
318 *Id.* at 2779–80.
319 *Id.* at 2780.
320 *Id.*
even interact." Of course, the interest described by Justice Breyer is broader than simply promoting positive inter-group contact.

Although it is not surprising that Justice Thomas is completely dismissive of this position, he does not have a democratic alternative. Justice Thomas's view of the Constitution suggests that he views it as a backstop rather than a document that provides meaning and vitality to the society in which it operates. Even as he sounds an anti-elitist claim, his position is not only anti-democratic, it asserts that democracy is too amorphous to support race-conscious measures under the Equal Protection Clause. The Constitution is a framework in which government is for the people and by the people, yet Thomas would impute an empty shell. Given that the authors of the Civil War Amendments sought to accomplish a restructuring of society and citizenship, it suggests that Thomas's position amounts not only to a rejection of *Brown*, but of the Fourteenth Amendment as conceived by the drafters.

It is not that Justice Breyer believes that contours of our democratic aspirations are clear, or that it is up to the Court to define these boundaries. Instead, he would grant some deference to local communities, especially as they strive for inclusion. In Breyer's view, the Constitution is a framework that trusts in people to solve problems themselves rather than through litigation and judicial determinations based upon tenuous readings of constitutional text. With that, Justice Breyer argues that this is an easier case than *Grutter* since there is no apparent scarcity of resources at stake or a claim of merit. Even though Chief Justice Roberts and Justice Kennedy cite *Grutter* with approval, it is not clear why *Grutter* is acceptable and this case is not. The reason both Justices give is the individualized approach in *Grutter*’s narrow tailoring analysis. But this requirement was in large part a limitation to ensure fairness in the distribution of scarce resources. Here, the only harm that the plurality seems to be concerned about is the harm of racial classification. Even as the plurality contests the manifest harms of segregation and racial isolation in spite of substantial research to the contrary, they assert with little support other than self-referential, that classification is harmful, even for benign purposes.

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321 Id.
322 *See supra* text accompanying notes 104–107.
324 *Parents Involved*, 127 S. Ct. at 2835 (“These plans are more “narrowly tailored” than the race-conscious law school admissions criteria at issue in *Grutter*.”).
325 *See id.* at 2742–44.
In ringing language, Nixon appointee Justice Lewis F. Powell rejected that position in rhetoric that echoes the spirit of Justice Breyer's forceful dissent. "In a pluralistic society such as ours, it is essential that . . . that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors." Justice Powell, a conservative Justice, is picking up on a critical thread found in *Brown* and needled later through *Grutter*. Schools cannot fulfill the dream of full citizenship for all "in isolation from each other or from the larger society." Communities striving to ensure integrated education encourage community support for educational excellence in the district as a whole, not simply in the school of a particular child. Accordingly, Justice Powell was of the view that school boards were empowered to pursue voluntarily race-conscious integration measures as a policy matter.

It is notable that Justice Powell came to this conclusion in light of his pedigree as a southern school board chairman who fought implementation of *Brown*. As the chairman of the Richmond School Board from 1952 to 1961, Justice Powell was intimately involved with the lack of desegregation in the Richmond city schools. As Powell's biographer pointed out, by 1961 "only two of Richmond's 23,000 black children attended school with whites." In addition to personal opposition and public obstruction to the *Brown* decision at the time it came down, "Powell's law firm represented Prince Edward County

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327 *powell & High*, *supra* note 305, at 267.
328 This is a position he explicitly made in his dissent in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). There he wrote:

As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—is the best qualified agency of a state government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program.

*Id.* at 501 n.17. Justice Powell would also reject the *de jure/de facto* distinction as a distinction that "no longer can be justified on a principled basis." *Keyes*, 413 U.S. at 224. In his view, "[p]ublic schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." *Id.* at 227. Given his experience as a school board member, he would certainly be in a position to know.

329 *Snyder*, *supra* note 98, at 438.
330 *Id.* (citing *JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.* 232 (Scribner 1994)).
in its effort to keep its schools closed.” The fact that Justice Powell later expounded on importance of education in our democratic society should be regarded as the acquired wisdom of a man who understood the issue from both the rarified heights of the bench as well as the lived experience of an elected school board policymaker.

The “democratic element” that supports efforts to promote integrated education recognizes the essential role of education to citizenship and democratic participation, the legitimacy of that democracy, and the constitution of the citizen-self and the nation-community in a diverse, pluralistic democracy. The United States—and indeed the world at the time of Brown—was a much smaller place. Driven by globalizing technological advances in communications and science, America has transformed since the 1950s. At the same time, the United States is far more diverse. The demographic landscape of the United States has changed considerably since 1956, with further shifts in store. Educating students for economic self-reliance as well as civic life requires greater racial and cultural fluency that accompanies diverse educational experiences. The compelling interest in an integrated educational environment envisioned by Justice Breyer includes “an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees.” This interest is an interest in bringing together children from all racial backgrounds, teaching them “to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation.”

Justice Breyer is a constitutional prophet in Parents Involved. Justice Breyer’s forceful dissenting opinion forebodingly portends the consequences of the plurality’s decision even as it elevates the civic virtues of racial integration to our democracy. He spins the thread first woven by the Court in Brown and sewn by the plurality in Grutter into a tapestry dreamed up by the framers of the Fourteenth Amendment. The wake up call for integration in service of demo-

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333 Parents Involved, 127 S. Ct. at 2823 (Breyer, J., dissenting).
334 Id. at 2821.
cracy and national community that contests the colorblind impulse has never been more powerfully expressed. While Justice Kennedy does not state the democratic connections as clearly, he is alarmed by the plurality's reading of the Equal Protection Clause and is hopeful that school boards and administrators can find ways to fulfill "the historic commitment to creating an integrated society." He therefore arrives at the same conclusion as Justice Breyer and the dissenters in holding that the state has a compelling interest in addressing racial isolation, regardless of its cause. Both this finding and the fastening of it to democracy and the democratizing function of the Reconstruction Amendments is no small matter. Our hope is that the Court, and our nation, heeds their call.

335 Id. at 2792 (Kennedy, J., concurring).
336 We have already suggested that this is closer to Brown than Chief Justice Roberts's opinion. But while Brown acknowledges the importance of education in our democratic society, it was decided before the strict scrutiny doctrine had been fully developed and so did not speak with the same clarity as Justice Breyer.