



## ***Brown v. Brown: Will the Supreme Court Interpret the Equal Protection Clause to Invalidate Measures Designed to Promote Equal Opportunity and Redress Our Nation's Long History of Racial Discrimination?***

### ***The Constitution at a Crossroads***

#### **Introduction**

"Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts . . . have not carried the heavy burden of demonstrating that we should allow this once again . . ."

Chief Justice John Roberts<sup>1</sup>

"The Equal Protection Clause . . . has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races. . . [I]t is a cruel distortion of history to compare Topeka, Kansas in the 1950s to Louisville and Seattle in the modern day . . ."

Justice Stephen Breyer<sup>2</sup>

*Brown v. Board of Education*,<sup>3</sup> the Supreme Court's 1954 ruling striking down racial segregation, has been called "the crown jewel of the U.S Reports"<sup>4</sup> and the "single most honored opinion in the Supreme Court's corpus."<sup>5</sup> It is accurate to say that "[n]o federal judicial nominee, and no mainstream national politician today would dare suggest that *Brown* was wrongly decided."<sup>6</sup> But *Brown*'s iconic status has only intensified the fight over its meaning and legacy. This fight broke out into the open in 2007 in the Supreme Court's 5-4 ruling in *Parents Involved in Community Schools v. Seattle School District*. In *Parents Involved*, Chief Justice Roberts claimed *Brown* as supportive of his majority ruling that prevented state and local governments from using race, even in minimal ways, to halt the re-

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<sup>1</sup> *Parents Involved in Community Schools v. Seattle School Dist.*, 551 U.S. 701, 747 (2007).

<sup>2</sup> *Id.* at 864, 867 (Breyer, J., dissenting).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> Pamela S. Karlan, *What Can Brown® Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

<sup>5</sup> JACK M. BALKIN ED., *WHAT BROWN SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3* (2001).

<sup>6</sup> *Id.*

segregation of public schools. The dissenters, in opinions written by Justice John Paul Stevens and Stephen Breyer, forcefully took issue, accusing the majority of “rewrit[ing] the history of one of this Court’s most important decisions” and “undermin[ing] *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality.”<sup>7</sup>

At its core, this fight is a battle about whether *Brown* sets a constitutional minimum floor, or more of a maximum limit, in terms of what federal, state, and local governments can do to redress our nation’s long history of racial discrimination and ensure that the Constitution’s promise of equal opportunity is a reality for all Americans regardless of race. In the decades after *Brown*, under the leadership of Chief Justices Earl Warren and Warren Burger, the Supreme Court upheld and broadly interpreted civil rights statutes such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 that built off *Brown*, as well as race-conscious measures that sought to bring *Brown*’s promise of racial equality to life.<sup>8</sup> But over the last quarter of a century, in a string of bitterly divided rulings – most decided by a 5-4 margin – conservatives on the Rehnquist and Roberts Courts have redefined the meaning of *Brown* and of the Equal Protection Clause, invoking the constitutional guarantee of equality to strike down virtually every race-conscious government action the Court has reviewed.<sup>9</sup> Insisting that an identical form of strict scrutiny applies whenever the government uses race – whether to oppress racial minorities or to assist them – the Court’s rulings have dramatically limited the power of government to redress racial isolation in schools, enact affirmative action programs, and draw legislative districts in which minorities have a fair chance of electing their candidate of choice. Next Term, in *Fisher v. University of Texas*, the Roberts Court has the opportunity to extend these precedents to strike down the race-conscious admission policy at Texas’ flagship public university.

*Brown*’s command, Chief Justice John Roberts has written, “is to stop discriminating on the basis of race.”<sup>10</sup> In his hands, *Brown* has become a potent weapon against statutes intended to realize the promise of true racial equality. The Constitution’s Equal Protection Clause, and the meaning of *Brown*, are at a Crossroads.

## Race-Conscious Measures and the History of the Fourteenth Amendment

Conservatives like to call the Constitution generally, and the Equal Protection Clause, in particular, “colorblind,” and it certainly is, at least to an extent. The framers of the Fourteenth Amendment very deliberately rejected limitations on the Equal Protection Clause, sweeping men and women of all races and groups into its coverage. In particular, the Equal Protection Clause was drafted

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<sup>7</sup> *Parents Involved*, 551 U.S. at 799 (Stevens, J., dissenting); *id.* at 803-04 (Breyer, J., dissenting).

<sup>8</sup> See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *City of Rome v. United States*, 446 U.S. 156 (1980); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>9</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Community Schools v. Seattle School Dist.*, 551 U.S. 701 (2007). But see *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>10</sup> *Parents Involved*, 551 U.S. at 748.

as a broad, all-encompassing guarantee of equality in order to protect, among other people, newly freed slaves, white union sympathizers residing in the South after the Civil War, and Chinese immigrants in the West from state-sponsored discrimination.<sup>11</sup> In choosing this broad language, the Framers of Fourteenth Amendment made certain that every person in this country can invoke the universal guarantee of equality contained in the Equal Protection Clause. As Justice Kennedy summarized this history, “[t]hough in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against ‘persons because of race, color, or previous condition of servitude,’ the Amendment submitted for consideration and later ratified contained more comprehensive terms: ‘No State shall . . . deny to any person the equal protection of the laws.’”<sup>12</sup>

One of the reasons that the Framers wrote the text as a guarantee of the equal protection of the laws instead of as a prohibition on all forms of racial discrimination was that they did not view efforts to ensure equal opportunity, even race-based efforts, as a violation of the constitutional principle of equality. During debates over the Fourteenth Amendment, the Framers explained that the Equal Protection Clause “abolishes all class legislation,” “does away with the injustice of subjecting one caste of persons to a code not applicable to another,” and “establishes equality before the law,”<sup>13</sup> but they did not believe that laws designed to assist minorities seeking to overcome our nation’s long legacy of racial discrimination were in any way legally equivalent to the Black Codes, the South’s effort to oppress the newly freed slaves which inspired the Fourteenth Amendment.

On the contrary, they recognized a basic distinction between oppression and assistance, between laws designed to subordinate and laws designed to make equal opportunity a reality for all. At the same time they passed the Fourteenth Amendment, the Framers enacted race-conscious legislation designed to help ensure that the Amendment’s promise of equality would become a reality for African Americans seeking to make the transformation from slavery to citizenship. The Freedmen’s Bureau Acts, as well as a host of other race-conscious legislation enacted during Reconstruction, gave financial and educational benefits to African Americans, who needed the affirmative assistance of the federal government to enjoy meaningfully the Constitution’s new guarantees of freedom and equality.<sup>14</sup> Efforts to ensure equal opportunity and redress discrimination were consistent with, not contrary to, the new constitutional guarantee of equality.

Building on this understanding, in the 1960s, 1970s, and 1980s – in the wake of *Brown* and other rulings dismantling Jim Crow’s oppressive regime – federal, state, and local governments enacted affirmative action programs to ensure that equality of opportunity was actually enjoyed by all Americans regardless of race and to attack, root and branch, the vestiges of nearly a century of Jim Crow segregation, during which the nation turned a blind eye to the Fourteenth Amendment’s guarantee of equality. As President Lyndon Johnson explained in a 1965 speech, “[y]ou do not take a person who, for

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<sup>11</sup> See DAVID H. GANS, *PERFECTING THE DECLARATION: THE TEXT AND HISTORY OF THE EQUAL PROTECTION CLAUSE* 8-9 (2011).

<sup>12</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring). For further discussion, see GANS, *PERFECTING THE DECLARATION*, *supra*.

<sup>13</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2766 (1866).

<sup>14</sup> See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."<sup>15</sup> In short, "[i]n order to get beyond racism, we must first take account of race. There is no other way."<sup>16</sup> In the late 1970s and early 1980s, the Court approved the constitutionality of race-conscious remedies as a solution to the present effects of past and continuing racial discrimination, upholding the constitutionality of a federal statute providing that a certain percentage of public works contracts be set-aside for minority groups and blessing the notion that race could be considered by public universities in selecting a diverse group of students for admission.<sup>17</sup> The Constitution did not require legislatures to act "in a wholly 'color blind' fashion,"<sup>18</sup> but permitted Congress, the body "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees,"<sup>19</sup> as well as the states, to "mov[e] our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric."<sup>20</sup>

## From *Croson* to *Grutter*: The Rehnquist Court Takes on Affirmative Action and other Race-Conscious Measures

The Supreme Court's treatment of civil rights legislation and *Brown* began to shift dramatically in the late 1980s as the Court – then under the leadership of Chief Justice William Rehnquist – launched an aggressive attack on affirmative action and other race-conscious measures. In 1989, in *City of Richmond v. J.A. Croson Co.*, the Court struck down a Richmond affirmative action plan to redress racial discrimination in the local construction industry, holding that strict scrutiny applies to all state and local affirmative action plans. The lead opinion, authored by Justice Sandra Day O'Connor, explained that "racial classifications are suspect" and that, without strict scrutiny, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority . . . ."<sup>21</sup>

In a concurring opinion, Justice Anthony Kennedy argued that "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause" and hence "any racial preference must face the most rigorous scrutiny by the courts."<sup>22</sup> While the majority recognized that state and local governments could enact narrowly-tailored plans to remedy past, proven racial discrimination if the government came forward with a "strong basis in evidence,"<sup>23</sup> Justice Antonin Scalia would have gone

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<sup>15</sup> Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights,"* June 4, 1965 (available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>).

<sup>16</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

<sup>17</sup> See *Bakke*, *supra*; *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>18</sup> *Fullilove*, 448 U.S. at 482 (plurality opinion of Burger, C.J.);

<sup>19</sup> *Id.* at 483.

<sup>20</sup> *Id.* at 522 (Marshall, J., concurring).

<sup>21</sup> *Croson*, 488 U.S. at 500, 493.

<sup>22</sup> *Id.* at 518, 519 (Kennedy, J., concurring).

<sup>23</sup> *Id.* at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

even further to restrict state affirmative action plans, holding that states may not use race at all to remedy past discrimination unless it is “necessary to eliminate their own maintenance of a system of unlawful racial classification.”<sup>24</sup> The lesson of *Brown*, he argued, is that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”<sup>25</sup>

*Croson* suggested that Congress possessed greater power, pursuant to Section 5 of the Fourteenth Amendment, to formulate affirmative action plans than state or local governments,<sup>26</sup> but in 1995, in *Adarand Constructors, Inc. v. Peña*,<sup>27</sup> the Court ruled that strict scrutiny also applies to federal affirmative action plans. While the Court observed that the Fifth Amendment’s Due Process Clause “is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment,” Justice O’Connor’s opinion for the Court held that, under past precedent, “the equal protection obligations imposed by the Fifth and Fourteenth Amendment a[re] indistinguishable.”<sup>28</sup> By a 5-4 vote, *Adarand* held that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”<sup>29</sup> Once again, Justice Scalia went further than his colleagues, arguing that “government can never have a ‘compelling interest’ in discriminating on the basis of race to ‘make up’ for racial discrimination in the opposite direction . . . . [U]nder our Constitution, there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution’s focus on the individual.”<sup>30</sup>

*Croson* and *Adarand* provoked stinging dissents, arguing that the Court had profoundly erred by invoking the Fourteenth Amendment’s guarantee of the equal protection of the laws to limit the power of state and federal governments to remedy our nation’s long history of discrimination. Justice Thurgood Marshall’s dissent in *Croson* took the majority to task, arguing that to apply strict scrutiny ignored both “constitutional history and social reality”: “Congress’ concern in passing the Reconstruction Amendments . . . was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret . . . these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their head.”<sup>31</sup> In Marshall’s view, *Brown* and the remedial cases that followed it recognized that “all persons have equal worth and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality.”<sup>32</sup> Dissenting in *Adarand*, Justice John Paul Stevens, too, emphasized that the Court had badly erred by ignoring the basic constitutional difference between “oppression and assistance”: “Invidious

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<sup>24</sup> *Id.* at 524 (Scalia, J., concurring).

<sup>25</sup> *Id.* at 521 (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

<sup>26</sup> *Id.* at 490 (explaining that, under Section 5 of the Fourteenth Amendment, “Congress may identify and redress the effects of society-wide discrimination”); *id.* at 521 (Scalia, J., concurring) (distinguishing state affirmative action plans from those enacted “by the Federal Government whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment”).

<sup>27</sup> 515 U.S. 200 (1995).

<sup>28</sup> *Id.* at 213, 217.

<sup>29</sup> *Id.* at 224.

<sup>30</sup> *Id.* at 239 (Scalia, J., concurring).

<sup>31</sup> *Id.* at 558, 559 (Marshall, J., dissenting).

<sup>32</sup> *Id.* at 559 (Marshall, J., dissenting).

discrimination is an engine of oppression . . . Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to 'govern impartially' should ignore this distinction."<sup>33</sup> The dissenters agreed that legislatures should have the authority to remedy the lingering effects of "a system of racial caste only recently ended," in order to "help to realize, finally, the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868."<sup>34</sup>

At the same time the Court was dividing bitterly in affirmative action cases, the Court's conservative majority extended those precedents, applying *Croson's* strict scrutiny standard to strike down majority-minority districts drawn to ensure the representation of African Americans in Congress and fulfill the mandate of the Voting Rights Act. In 1993, in *Shaw v. Reno*,<sup>35</sup> the Court, by a vote of 5-4, held that white voters "may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."<sup>36</sup> Although the district attacked did not classify voters based on race,<sup>37</sup> did not, in fact, segregate voters in any manner,<sup>38</sup> or result in any dilution of the votes of white citizens,<sup>39</sup> *Shaw* applied strict scrutiny anyway, reasoning that the shape of the district was so irregular that "it could not be explained on grounds other than race."<sup>40</sup> Later 5-4 rulings expanded *Shaw's* reach, holding that the Equal Protection Clause requires the strictest judicial scrutiny where "race was the predominant factor motivating the drawing" of a district's lines.<sup>41</sup>

Applying these principles, the Court struck down majority-minority districts in North Carolina, Georgia, and Texas, concluding that the districts were impermissibly race-based and could not survive strict scrutiny, even taking into consideration the Voting Rights Act.<sup>42</sup> In so doing, the *Shaw* line of cases created a serious conflict between the commands of the Fourteenth Amendment and the requirements of the Voting Rights Act, which in certain circumstances mandates that legislatures draw majority-

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<sup>33</sup> *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)); see also *Gratz* 539 U.S. at 301 (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.").

<sup>34</sup> *Id.* at 273, 274 (Ginsburg, J., dissenting).

<sup>35</sup> 509 U.S. 630 (1993).

<sup>36</sup> *Id.* at 649.

<sup>37</sup> *Id.* at 646 ("A reapportionment plan does not classify person at all; it classifies tracts of land, or addresses.").

<sup>38</sup> While the majority in *Shaw* raised the specter of "political apartheid," *id.* at 648, in fact, the district at issue in *Shaw* was quite integrated, comprising a voting age population of 56.6% African Americans and 41.8% whites. See Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 S. CT. REV. 245, 282.

<sup>39</sup> *Shaw*, 509 U.S. at 641 ("In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength."). Indeed, "since whites constituted decisive majorities in 83 percent of the state's congressional district (10 of 12), although they were only 75 percent of the state's population," Karlan, *supra*, at 276, any claim of vote dilution would have been frivolous.

<sup>40</sup> *Shaw*, 509 U.S. at 644.

<sup>41</sup> See *Miller v. Johnson*, 515 U.S. 900, 918 (1995); *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality opinion).

<sup>42</sup> See *Miller, supra*; *Bush, supra*; *Shaw v. Hunt*, 517 U.S. 1899 (1996). But see *Easley v. Cromartie*, 532 U.S. 234 (2001) (5-4 ruling rejecting *Shaw* challenge on ground that legislature's predominant motive was politics, not race).

minority districts to ensure that racial minorities have an equal right to elect representatives of their choosing.<sup>43</sup> As Justice Kennedy has written, “[r]ace cannot be the predominant factor in redistricting . . . . Yet considerations that would doom a redistricting plan under the Fourteenth Amendment . . . seem to be what save it under § 5 of the Voting Rights Act.”<sup>44</sup> Citing these concerns, the Justices have invoked *Shaw* to narrow the scope of the Voting Rights Act.<sup>45</sup>

The dissenters in *Shaw* argued that there was no basis, either in constitutional first principles or the Court’s precedents, to create a new cause of action for white voters, whose only injury was to be placed in a district designed to increase representation of minority voters. As the lead dissent argued, “the notion that North Carolina’s plan, under which whites remain a voting majority in a disproportionate number of congressional districts, and pursuant to which the State has sent its *first* black representatives since Reconstruction to the United States Congress, might have violated appellants’ constitutional rights is both a fiction and a departure from settled equal protection principles.”<sup>46</sup> The dissenters argued there was no basis for judicial intervention when a legislature increases minority representation in the political process without diluting the votes of others. “Remedying a Voting Rights Act violation does not involve preferential treatment. It . . . attempt[s] to *equalize* treatment, and to provide minority voters with an effective voice in the political process. The Equal Protection Clause, surely, does not stand in the way.”<sup>47</sup> Indeed, as Justice Stevens observed in his separate dissenting opinion, “[i]f it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history gave birth to the Equal Protection Clause.”<sup>48</sup> In later cases, the dissenters argued that *Shaw* was not entitled to *stare decisis*, attacking *Shaw* as inconsistent with fundamental constitutional principles and unworkable in practice, and called for the ruling to be overruled.<sup>49</sup>

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<sup>43</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 186 (1986); Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 678-79 (2002) (“[S]ections two and five of the Voting Rights Act of 1965 as amended represent a national, democratically generated break from tradition that essentially requires race-conscious redistricting because both sections forbid jurisdictions from adopting plans with certain kinds of discriminatory impact, regardless of the jurisdiction’s intent.”)

<sup>44</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring).

<sup>45</sup> See *LULAC v. Perry*, 549 U.S. 399, 446 (2006); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1247-48 (2009) (plurality opinion); see also *Johnson v. DeGrandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring) (“[T]he sorting of persons with intent to divide based on race raises the most serious constitutional questions”).

<sup>46</sup> *Shaw*, 509 U.S. at 659 (White, J., dissenting).

<sup>47</sup> *Id.* at 675 (White, J., dissenting).

<sup>48</sup> *Id.* at 679 (Stevens, J., dissenting).

<sup>49</sup> *Miller*, 515 U.S. at 933 (Stevens, J., dissenting) (calling *Shaw*’s “refusal to distinguish an enactment that helps a minority group from enactments that cause it harm . . . especially unfortunate at the intersection of race and voting, given that African Americans . . . have struggled so long and hard for inclusion in that most central exercise of democracy”); *Bush*, 517 U.S. at 1005 (Stevens, J., dissenting) (“*Shaw v. Reno* struck out into a jurisprudential wilderness that lacks a constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts.”); *id.* at 1053 (Souter, J., dissenting) (arguing that *Shaw* “broke abruptly” with settled constitutional principles “including the very understanding of equal protection as a practical guarantee against harm to some class singled out for disparate treatment”).

In *Adarand, Shaw* and other cases, Justice O'Connor wrote for the Court to limit race-conscious remedies, but in 2003, she split from the Court's conservatives in upholding the use of race in graduate school admissions. In *Grutter v. Bollinger*,<sup>50</sup> yet another bitterly divided 5-4 ruling, the Supreme Court upheld the University of Michigan's policy of using race as one of many factors in selecting applicants for admission to its law school, following the teachings of Justice Powell's opinion 25 years earlier in *Bakke*. In her opinion for the Court, Justice O'Connor concluded that the law school policy satisfied strict scrutiny, reasoning that "student body diversity is a compelling state interest that can justify the use of race in university admissions" so long as it provides "truly individualized consideration" to all applicants and uses race "in a flexible, non-mechanical way."<sup>51</sup> By taking race in account in admissions, Justice O'Connor wrote, universities "help[] to break down racial stereotypes" in the classroom and ensure "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation," an "essential" goal "if the dream of one Nation, indivisible is to be realized."<sup>52</sup> Using race in the admissions process to ensure a diverse student body furthered, not compromised, the Constitution's promise of equality.

Each of the four dissenters filed a separate dissenting opinion, with Chief Justice Rehnquist's dissent joined by all four. Justices Scalia and Thomas took the most extreme position, arguing for a rule of absolute colorblindness. In their view, "the Constitution proscribes governmental discrimination on the basis of race"<sup>53</sup> 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."<sup>54</sup> Hence, they argued, "racial discrimination is not a permissible solution to the self-inflicted wounds of [Michigan's] elitist admissions policy."<sup>55</sup> Justice Kennedy took the narrowest view of the four dissenters, rejecting the colorblindness principle advocated by Justices Scalia and Thomas. Justice Kennedy accepted that "a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual" so long "as the program can meet the test of strict scrutiny by the judiciary."<sup>56</sup> He would have invalidated Michigan's program under strict scrutiny because, in application, Michigan had sought "to make race an automatic factor and to achieve numerical goals indistinguishable from quotas."<sup>57</sup>

## The Battle over *Brown* in the Roberts Court

As many *Crossroads* chapters demonstrate, the retirement of Justice O'Connor, and the appointment of Chief Justice Roberts and Justice Samuel Alito, have proved pivotal to the evolution of the Court's cases interpreting the Equal Protection Clause. Since early 2006, when Chief Justice Roberts

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<sup>50</sup> 539 U.S. 306 (2003).

<sup>51</sup> *Id.* at 325, 334. In a companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court, again by a 5-4 vote, struck down a separate policy applicable to undergraduate admissions, concluding that it failed the requirement of individualized consideration. *Id.* at 270-72.

<sup>52</sup> *Grutter*, 539 U.S. at 330, 332.

<sup>53</sup> *Id.* at 349 (Scalia, J., dissenting).

<sup>54</sup> *Id.* at 353 (Thomas, J., dissenting).

<sup>55</sup> *Id.* at 350 (Thomas, J., dissenting);

<sup>56</sup> *Id.* at 387 (Kennedy, J., dissenting).

<sup>57</sup> *Id.* at 389 (Kennedy, J., dissenting).



and Justice Alito joined the Court, the Court’s conservative majority has created new limits on the authority of governments to promote equal opportunity and redress racial isolation in schools, insisting that the Equal Protection Clause, as well as the Court’s landmark ruling in *Brown*, preclude any use of race, even to ensure that African Americans and whites attend school together. Both Chief Justice Roberts and Justice Alito have joined Justices Thomas and Scalia in staking out an absolutist, colorblind reading of the Equal Protection Clause.

In 2007, in *Parents Involved in Community Schools v. Seattle School Dist.*, Chief Justice Roberts invoked *Brown* to prevent state and local governments from using race, even in minimal ways, to prevent the re-segregation of public schools. Reaffirming that all racial classifications must be subject to strict scrutiny, without exception, the Chief Justice drew on *Brown* to explain why school districts could not consider race to prevent racial isolation of African Americans and other minorities in public schools around the nation. “[W]hen it comes to using race to assign children to schools, history will be heard”<sup>58</sup>: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts . . . have not carried the heavy burden of demonstrating that we should allow this once again . . . . The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”<sup>59</sup>

Justice Kennedy cast the deciding vote in the 5-4 ruling. He rejected Chief Justice Roberts’ principle of absolute colorblindness as a constitutional rule, calling the Chief Justice’s sweeping reasoning inconsistent “with the history, meaning and reach of the Equal Protection Clause.”<sup>60</sup> In line with the history of the Fourteenth Amendment, Justice Kennedy recognized the government’s compelling interest in “reach[ing] *Brown*’s objective of equal educational opportunity” and rejected the notion that “the Constitution mandates that state and local authorities must accept the status quo of racial isolation in the schools.”<sup>61</sup> Nevertheless, Justice Kennedy concurred in the judgment invalidating the challenged policies because they used race in what he considered a heavy-handed, balkanizing manner – “reduc[ing] children to racial chits” – and thus could not satisfy strict scrutiny.<sup>62</sup>

In dissents authored by Justice Breyer and Justice Stevens, the Court’s four liberal Justices argued that the conservative majority had perverted the meaning of the Equal Protection Clause by striking down “local efforts to bring about the kind of racially integrated education that *Brown* . . . long ago promised,”<sup>63</sup> effectively “rewrit[ing] the history of one of this Court’s most important decisions.”<sup>64</sup> *Brown* held Jim Crow segregation laws unconstitutional because “they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. . . . [I]t is a cruel distortion of history to compare Topeka, Kansas in the 1950s to Louisville and Seattle in the modern day . . . .”<sup>65</sup>

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<sup>58</sup> *Id.* at 746.

<sup>59</sup> *Id.* at 747-48.

<sup>60</sup> *Id.* at 782-83 (Kennedy, J., concurring).

<sup>61</sup> *Id.* at 788 (Kennedy, J., concurring).

<sup>62</sup> *Id.* at 798 (Kennedy, J., concurring).

<sup>63</sup> *Id.* at 803 (Breyer, J., dissenting).

<sup>64</sup> *Id.* at 799 (Stevens, J., dissenting).

<sup>65</sup> *Id.* at 867 (Breyer, J., dissenting).

The Equal Protection Clause, the dissenters argued, “has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.”<sup>66</sup> The dissenters argued that the challenged government action should be upheld, even under strict scrutiny, as a governmental effort to “overcome a history of segregation” consistent with *Brown’s* promise of “true racial equality – not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools.”<sup>67</sup>

In 2009, in *Ricci v. DeStefano*,<sup>68</sup> the Supreme Court, again by a 5-4 vote, held that New Haven had violated the rights of white firefighters in refusing to certify test results, used by the city to promote firefighters, on the ground that the test had a disparate impact on African American firefighters. Incorporating the “strong basis in evidence” standard from the Court’s affirmative action cases into Title VII of the Civil Rights Act of 1964,<sup>69</sup> the *Ricci* Court held that New Haven’s actions to avoid a disparate impact on African American fire fighters was a form of race-based discrimination and that the city could only escape liability if it had a “strong basis in evidence” that the test it used had resulted in an unjustified disparate impact prohibited by Title VII. Finding “no evidence – let alone the strong basis in evidence – that the tests were flawed,” the Court’s five-Justice majority concluded that the city had violated Title VII by rejecting the test “solely because the higher scoring candidates were white.”<sup>70</sup> In a concurring opinion, Justice Scalia went even further, strongly suggesting that Title VII’s disparate impact provisions violate the Fourteenth Amendment’s constitutional guarantee of equal protection by licensing racial discrimination, not simply in *Ricci*, but in all cases. “Title VII’s disparate impact provisions,” Justice Scalia argued, “place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decision based on . . . those racial outcomes. That type of racial decisionmaking is . . . discriminatory.”<sup>71</sup>

In a bitter dissent, authored by Justice Ruth Bader Ginsburg, the four dissenters lambasted the majority for redefining the meaning of discrimination, equating efforts to avoid a disparate impact with disparate treatment on account of race. Title VII’s prohibition on disparate treatment and disparate impact, she wrote, are “twin pillars” that “advance the same objective: ending workplace discrimination and promoting genuine equal opportunity.”<sup>72</sup> Accordingly, the dissenters would have held that “an employer who jettisons a selection device when its disproportionate racial impact becomes apparent” has not discriminated on account of race, so long the employer had “good cause to believe the device would not withstand examination for business necessity.”<sup>73</sup> The dissenters rejected the majority’s reliance on affirmative action cases decided under the Equal Protection Clause, explaining that “[o]bservance of Title VII’s disparate impact provision . . . calls for no racial preference . . . . The very purpose of the provision is to ensure that individuals are hired and promoted based on . . . qualifications

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<sup>66</sup> *Id.* at 864 (Breyer, J., dissenting).

<sup>67</sup> *Id.* at 835, 867 (Breyer, J., dissenting).

<sup>68</sup> 129 S. Ct. 2658 (2009).

<sup>69</sup> *Id.* at 2675 (explaining that “constitutional principles can provide helpful guidance in the statutory context”).

<sup>70</sup> *Id.* at 2681, 2674.

<sup>71</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

<sup>72</sup> *Id.* at 2699 (Ginsburg, J., dissenting).

<sup>73</sup> *Id.*

that do not screen out members of any race.”<sup>74</sup> On the merits, the dissenters would have dismissed Ricci’s suit, finding abundant evidence that New Haven had refused to certify the test results because of the disparate impact of the flawed test.<sup>75</sup>

## Possible Developments in the Future

As this review of the Court’s cases makes clear, there is now on the Court a very solid majority for striking down affirmative action policies and other race-conscious measures as a violation of the constitutional guarantee of the equal protection of the laws. Four Justices, including the Chief Justice, embrace a principle of colorblindness, making them reliable votes to strike down virtually any use of race by the government. While Justice Kennedy has refused to go that far, he has consistently taken the view that “the moral imperative of racial neutrality is the driving force of the Equal Protection Clause”<sup>76</sup> and voted to strike down every affirmative action program or other governmental use of race he has reviewed during his tenure on the Court. Thus, in the years to come, the Roberts Court stands poised to impose new limits on the power of state and federal governments to use race to redress our nation’s long history of racial discrimination and ensure equal opportunity for all persons regardless of race. Still, much depends on how much daylight exists between Chief Justice Roberts’ sweeping view that *Brown* requires absolute colorblindness and Justice Kennedy’s position that there is some room under the Equal Protection Clause for government to “seek to reach *Brown*’s objective of equal educational opportunity.”<sup>77</sup>

First, the Court could overrule *Grutter*, the only case decided in recent years that upheld an affirmative action program against an equal protection challenge. Against the long line of cases that apply strict scrutiny, *Grutter* stands out as a sore thumb, the only case in which the Court concluded that the government had demonstrated that its use of race satisfied strict scrutiny. Next Term, the Justices will hear *Fisher v. University of Texas*, in which the United States Court of Appeals for the Fifth Circuit applied *Grutter* to uphold the University of Texas’ use of race in undergraduate admissions. *Fisher* will give the Court’s conservatives a vehicle for further limiting the use of race in making admissions decisions and possibly even overruling *Grutter*. With three *Grutter* dissenters still on the Court, joined by Chief Justice Roberts and Justice Alito, *Fisher* could produce a landmark opinion limiting affirmative action in undergraduate admissions.

The key question, of course, is where Justice Kennedy will come out, given that his dissent in *Grutter* and his separate concurring opinion in *Parents Involved* accepted a compelling interest in achieving racial diversity in order to ensure that “all people have equal opportunity regardless of their race.”<sup>78</sup> In *Parents Involved*, Justice Kennedy observed that the “Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal

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<sup>74</sup> *Id.* at 2701 (Ginsburg, J., dissenting).

<sup>75</sup> *Id.* at 2703 (Ginsburg, J., dissenting) (finding that “New Haven had ample cause to believe its selection process was flawed and not justified by business necessity”).

<sup>76</sup> *Croson*, 488 U.S. at 518 (Kennedy, J., concurring).

<sup>77</sup> *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring).

<sup>78</sup> *Id.*

opportunity for all its children.”<sup>79</sup> If Justice Kennedy heeds these words, he may vote to uphold the Texas policy at issue in *Fisher* on the ground that the University’s policy represents a tailored effort to redress racial isolation that both respects the equality of all persons while taking modest steps to break down the lingering vestiges of our long history of racial discrimination. Indeed, Justice Kennedy could vote to overrule *Grutter*’s version of strict scrutiny as too deferential but still hold that the Texas policy properly ensures individualized consideration of all prospective students and comports with the demands of strict scrutiny.

Second, even if Justice Kennedy breaks with the conservatives in *Fisher*, he is likely to join them in other areas, such as the meaning and scope of the Voting Rights Act. Justice Kennedy has already explained his belief that there is now a deep tension between the racial neutrality required by the Equal Protection Clause and the requirements of the Voting Rights Act, which in certain circumstances requires state and local governments to take race into account in drawing district lines to ensure that racial minorities have an equal opportunity to elect candidates of their choice. The Court could resolve this tension by severely limiting the Act’s results test and holding that the Act does not require states to redraw their district lines absent a showing that racial minorities were subject to purposeful racial discrimination that diluted their right to vote.<sup>80</sup> Alternatively, the Court could go even further and strike down the preclearance requirement of the Voting Rights Act as impermissibly race-based, citing Justice Kennedy’s concern that “considerations of race that would doom a redistricting plan under the Fourteenth Amendment . . . seem to be what save it under § 5.”<sup>81</sup>

Third, with the addition of another conservative Justice or two, the Roberts Court might adopt the reasoning of Justice Scalia’s *Ricci* concurrence and hold that federal laws that prohibit employment, voting and other practices that have a disparate impact on racial minorities are impermissibly race-based and violate the constitutional guarantee of equal protection, requiring governments to “evaluate

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<sup>79</sup> *Id.* at 797 (Kennedy, J., concurring).

<sup>80</sup> Compare *LULAC v. Perry*, 548 U.S. 399, 440 (2006) (opinion of the Court authored by Kennedy, J.) (finding violation of the Voting Rights Act where “the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears all the mark of intentional discrimination that could give rise to an equal protection violation”) with *Bartlett v. Strickland*, 129 S. Ct. 1231, 1247 (2009) (plurality opinion of Kennedy, J.) (holding that states were not required under the Act to draw cross-over districts, in which minorities could join with white voters to elect candidates of their choice, because “[i]f §2 were interpreted to require cross-over districts throughout the Nation, ‘it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.’”) (quoting *LULAC*, 548 U.S. at 446). Indeed, some lower courts have already read the Act’s results test to make proof of racial bias critical. See *Nipper v. Smith*, 39 F.3d 1494, 1515 (11<sup>th</sup> Cir. 1994) (en banc) (“[S]ection 2 prohibits those voting systems that have the effect of allowing a community motivated by racial bias to exclude a minority from participation in the political process. Therefore, if the evidence shows . . . that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made out.”); *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1<sup>st</sup> Cir. 1995) (holding that “plaintiffs cannot prevail on a VRA §2 claim if there is significantly probative evidence that whites voted as a bloc for reasons unrelated to racial animus”); see also *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9<sup>th</sup> Cir. 2010) (en banc) (holding that a plaintiff challenging a felon disenfranchisement statute under the VRA based on racial discrimination in the criminal justice system must establish that “the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent”) (emphasis in original).

<sup>81</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring).

the racial outcomes of their policies, and to make decision based on . . . those racial outcomes.”<sup>82</sup> These statutes have long been recognized as critically important safeguards against purposeful discrimination,<sup>83</sup> but, to Justice Scalia and other conservative Justices, these historic civil rights measures do not protect equality, they flout it.<sup>84</sup>

Under the Roberts Court, the notion of a colorblind Constitution – offered by the first Justice Harlan in his dissent in *Plessy v. Ferguson*<sup>85</sup> to explain why enforced racial segregation violates the Constitution – may be used to strike down or limit the very civil rights statutes that have helped the nation end the vestiges of Jim Crow and more than a century of racial discrimination. Chief Justice Roberts is nearing his goal of ending all forms of race-conscious legislation. The question is whether this is bringing us closer to achieving the promise of *Brown* or moving us further away.

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<sup>82</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

<sup>83</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>84</sup> See *Holder v. Hall*, 512 U.S. 974, 905-06 (1994) (Thomas, J., concurring) (“The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”); *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part) (“It is a sordid business, this divvying us up by race.”).

<sup>85</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).