2009

The Conscience of a Court

Girardeau A. Spann
Georgetown University Law Center, spann@law.georgetown.edu

63 U. Miami L. Rev. 431-474 (2009)

University of Miami Law Review

VOLUME 63 JANUARY 2009 NUMBER 2

ARTICLES

The Conscience of a Court

GIRARDEAU A. SPANN†

TABLE OF CONTENTS

† Professor of Law, Georgetown University Law Center. I would like to thank Richard Chused, Steven Goldberg, Lisa Heinzerling, Patricia King, Marty Lederman, Louis Seidman, and David Vladeck for their help in developing the ideas expressed in this article. Research for this article was supported by a grant from the Georgetown University Law Center.

INTRODUCTION

I have been driven to the conclusion that the Supreme Court, as a matter of conscience, considers racial discrimination to be good for America. That conclusion offers the only plausible account of the Court's repeated insistence on displacing populist efforts to promote racial equality with the Court's own, more-regressive, version of expedient racial politics. Although the Court has had what is at best a checkered history when called upon to adjudicate claims of racial injustice, until now, the contemporary Court might arguably have been accorded the benefit of the doubt. But after its five-to-four ruling in the 2007 *Resegregation* case,[1] the need to acknowledge the influence of intentional discrimination on the Court's racial decisions seems inescapable.

Parents Involved in Community Schools v. Seattle School District No. 1,[2] gave the Supreme Court an opportunity to make a strong statement about race. Seizing upon that opportunity, a five-Justice conservative majority held that the Constitution not only *permitted* the passive resegregation of Louisville and Seattle public schools, but effectively *required* it. Moreover, the Court depicted the landmark school desegregation case of *Brown v. Board of Education*[3] as compelling, rather than precluding, such a counterintuitive result. The Court's *Resegregation* ruling is doctrinally so bizarre that it is difficult to view the decision as having emanated from any genuine constitutional principle. Rather, it appears to be simply the product of conservative racial politics being practiced by a conservative Supreme Court voting bloc. My hope is that the *Resegregation* decision will make the racial politics of the Court so palpable that it can no longer be ignored. This, in turn, may cost the Court the legitimacy that it needs to command continued public support for its partisan racial policies.

Brown notwithstanding, the Supreme Court has historically served as more of an impediment than an aid to the achievement of racial equality in the United States. But it has never been clear to me *why* the Court would be racially more iniquitous than the population at large. However, Princeton economics professor Paul Krugman has had an insight that may help provide an answer. In his recent book *The Conscience of a*

1. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (invalidating race-conscious efforts to prevent resegregation of public schools in consolidated cases involving the Seattle, Washington and Louisville/Jefferson County, Kentucky school systems).

2. *Id.*

3. 347 U.S. 483, 493–95 (1954) (rejecting separate-but-equal doctrine and declaring official school segregation to be unconstitutional); *see also* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (tempering effect of *Brown* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed").

Liberal,[4] Krugman argues that a small, wealthy elite in the United States devised a political strategy, known as "movement conservatism," that has now come to dominate the Republican party. The goal of the strategy is to undo the trend toward economic equality that was begun by the New Deal welfare state, and to increase dramatically the divergence of wealth that exists between the middle class and the rich. Because such a divergence works to the disadvantage of average citizens and voters, movement conservatives had to find some way of creating a sympathetic political coalition that would include the middle class. (Apparently, the poor are neither politically active enough nor ideologically sympathetic enough to target for inclusion in this coalition.[5]) Movement conservatives appealed to middle-class voters by exploiting the issue of race. Because race is something that many voters care about even more than their own economic interests, tacit appeals to racial prejudice can often serve as a useful political organizing tool. By associating progressive economic policies with xenophobic racial fears in the minds of white middle-class voters, an ideologically strident, movement-conservative plutocracy has been able to convince ordinary citizens to resist redistributive efforts that would have benefited whites and racial minorities alike. Moreover, the Supreme Court has been particularly well-positioned to help in this endeavor.

I think the present conservative majority on the Supreme Court can best be viewed as the judicial branch of the movement-conservative political campaign to dismantle the New Deal welfare state. When in power, movement-conservative Supreme Court Justices are able to invalidate on constitutional grounds progressive legislation that seeks to promote income redistribution.[6] But a movement-conservative Supreme Court majority can also do much more. Although white middle-class voters may have racial attitudes that cause them to be apprehensive about benefiting or even interacting with racial minorities, most contemporary voters do not think of themselves as overtly racist. A conservative Supreme Court majority can, therefore, provide aid and comfort to those voters through the use of constitutional exposition. By re-characterizing policies that disadvantage racial minorities as policies that are consistent with the constitutional concept of equality, the conservative

4. PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL (2007).

5. *See id.* at 192–94.

6. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57–64 (1905) (invalidating as constitutional-due-process violation New York maximum-hours health-and-safety legislation for bakers); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244–51 (1978) (invalidating as violation of Contract Clause state statute imposing pension funding requirements for employees without contractually vested pension rights); *cf.* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838–42 (1987) (invalidating as uncompensated regulatory taking imposition of public easement across private beachfront property as condition on issuance of building permit).

Supreme Court majority is able to convince white citizens that they are behaving honorably rather than discriminatorily when they succumb to their baser, racially parochial instincts. That is precisely what happened in the *Resegregation* case. And that strategy, in turn, has enhanced the ability of movement conservatism to use coded appeals to racial prejudice as the glue that holds its pluralist political coalition together. Ironically, movement-conservative leaders discriminate against racial minorities not so much out of racial hostility as out of the recognition that exploiting minorities provides a politically expedient way to exploit middle-class whites.

Part I of this Article discusses the *Resegregation* case and describes how difficult it is to view that case as anything other than a deliberately disingenuous distortion of *Brown*. Part II describes Krugman's account of the ways in which movement conservatism has enlisted tacit appeals to white racial prejudice as a strategy for prompting white middle-class citizens to vote in ways that are consistent with the interests of the rich rather than the interests of the middle class. Part III describes my view of the interaction between movement conservatism and Supreme Court constitutional hegemony, arguing that this interaction creates a judicial plutocracy that can use race to advance the political agenda of the wealthy. The article concludes by expressing the hope that the Supreme Court so overplayed its hand in the *Resegregation* case that the Court will no longer be able to pass off its conservative racial agenda as the product of detached constitutional exposition. However, I offer this conclusion with a healthy dose of pessimism, rather than the sense of pragmatic anticipation that I wish I could muster.

I. THE *RESEGREGATION* CASE

Parents Involved in Community Schools v. Seattle School District No. 1 squarely presented the Supreme Court with the issue of whether local school boards—motivated by the desire to preserve the racial integration that they had achieved after lengthy efforts to comply with the desegregation mandate of *Brown*—could voluntarily consider race in assigning particular students to particular schools.[7] The Louisville and Seattle school systems involved in the case both had long histories of alleged de jure discrimination, and both had been required to use race-conscious student assignments in order to comply with *Brown*. Louisville had been required to do so by a federal-court desegregation order, and Seattle had been required to do so as part of a settlement agreement that resolved a federal desegregation suit.[8]

7. *See* 127 S. Ct. at 2746.

8. *See id.* at 2809–11 (Breyer, J., dissenting).

The two school systems eventually achieved sufficient post-*Brown* integration to be characterized as unitary and were therefore beyond the scope of federal court desegregation jurisdiction. However, both school systems chose voluntarily to continue some of their race-conscious student assignments in order to combat the post-*Brown* school *resegregation* that was occurring as a result of residential population shifts.[9] Under the voluntary-integration plans that the school boards adopted, race could be considered only in isolated cases to deny a student's preferred school assignment, and then only when that assignment would exacerbate the school's racial imbalance badly enough to move the school outside of its specified integration range.[10] The school boards did not rely on race lightly. They did so only after they became convinced that race-neutral efforts to maintain integration were proving ineffective.[11] Moreover, both the Louisville and Seattle plans were narrow enough that they ended up permitting the consideration of race in only a small number of cases.[12]

Despite the narrowness of the voluntary-integration plans, a disappointed white parent in Louisville, and an organization representing disappointed parents in Seattle, challenged the constitutionality of the plans on Equal Protection grounds. The lower courts upheld the plans, concluding that the Supreme Court's 2003 decision in *Grutter v. Bollinger*[13] had established that the narrowly tailored consideration of race as a means for advancing a state's compelling interest in educational diversity was constitutionally permissible.[14] In 2006, the Supreme Court itself had even denied certiorari in another post-*Grutter* case, where the lower courts had upheld the consideration of race as a means of resisting resegregation.[15] But a few months later, there were two changes in Supreme Court personnel. Chief Justice Roberts replaced Chief Justice

9. *See id.* at 2746–47, 2749–50 (majority opinion).

10. *See id.* at 2809–11 (Breyer, J., dissenting).

11. *See id.* at 2824–30.

12. *See id.*; *cf. id.* at 2759–61 (majority opinion) (arguing that small number of affected students suggested that race-neutral alternatives might suffice); *id.* at 2792–93 (Kennedy, J., concurring in part and concurring in the judgment) (same).

13. 539 U.S. 306, 328 (2003) (upholding Michigan Law School's affirmative-action plan as a narrowly tailored means of advancing compelling interest in student diversity). *But see* Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (invalidating affirmative-action plan for undergraduate student admissions at the University of Michigan as not narrowly tailored).

14. *See Parents Involved*, 127 S. Ct. at 2746, 2749–50; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc) (relying on *Grutter* to uphold school district's plan), *rev'd*, 127 S. Ct. 2738; McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004) (relying on *Grutter* to uphold school district's plan), *aff'd*, 416 F.3d 513 (6th Cir. 2005) (per curiam), *rev'd*, 127 S. Ct. 2738.

15. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 5–6 (1st Cir.) (en banc) (upholding Massachusetts school-integration plan), *cert. denied*, 546 U.S. 1061 (2005).

Rehnquist, and Justice Alito replaced Justice O'Connor. Those changes gave the Court a more conservative five-Justice majority on racial issues than it previously had, and the new Roberts Court then granted certiorari in the Louisville and Seattle cases.[16] A consolidated five-tc-four Supreme Court decision resolving both cases ultimately reversed the lower courts, and held that the two integration plans were unconstitutional because their consideration of race to prevent resegregation violated the Equal Protection Clause.[17]

Doctrinally, what the Supreme Court did in the *Resegregation* case is difficult to comprehend. It requires a very tortured reading of *Brown* and its progeny to reach the conclusion that the Equal Protection Clause of the Constitution requires public schools to be resegregated rather than integrated. As I have argued more extensively elsewhere,[18] however, the *Resegregation* case was *not* a doctrinal decision. It was a political one. And viewed politically, the case becomes easier to understand. The new five-justice conservative majority on the Roberts Supreme Court simply used the *Resegregation* case to nullify a progressive equality gain that racial minorities were able to secure through the political process. In so doing, the majority once again replicated the racially oppressive practices that were engaged in repeatedly by prior Supreme Court majorities throughout the nation's history—a history marked by cases such as *Dred Scott v. Sandford*,[19] *Plessy v. Ferguson*,[20] and *Korematsu v. United States*,[21] which have become so infamous that they are now widely discredited. In the *Resegregation* case, however, the Roberts Court's manipulation of constitutional doctrine for political purposes was so transparent that it may end up causing the Court to lose legitimacy even in its own time.

A. *Political Opinions*

The majority opinion invalidating the integration plans at issue in

16. Linda Greenhouse, *Justices, Voting 5–4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1 (discussing political change in Court membership); *see also* Joan Biskupic, *Few Big Rulings as Justices Felt Out New Roles*, USA TODAY, June 30, 2006, at 9A (discussing political leanings of new Supreme Court Justices).

17. *See Parents Involved*, 127 S. Ct. at 2746; *id.* at 2767–68 (plurality opinion).

18. *See* Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. (forthcoming 2009).

19. 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).

20. 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

21. 323 U.S. 214, 215–19 (1944) (upholding World War II exclusion order that led to Japanese American internment).

the *Resegregation* case was written by Chief Justice Roberts, and Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito. Relying heavily on *Brown*, Chief Justice Roberts argued that strict Equal Protection scrutiny precluded the consideration of race in the Louisville and Seattle student-assignment plans.[22] A plurality portion of the Roberts opinion, arguably suggesting that race could *never* be used to achieve de facto integration, was joined by Justices Scalia, Thomas, and Alito, but not by Justice Kennedy.[23] Justice Thomas wrote a concurring opinion, asserting that the Constitution required colorblindness even in the face of resegregation.[24] Justice Kennedy—who now appears to be the swing vote on this issue—wrote a separate concurring opinion, explaining that he parted company with the Roberts plurality because he thought that facially neutral, race-conscious remedies for de facto segregation might be a constitutionally permissible means of promoting integration if race-neutral means were first shown to be inadequate.[25] Justice Stevens wrote a brief dissenting opinion, chastising the majority for suggesting that its result followed from *Brown*.[26] Justice Breyer wrote a long dissent, joined by Justices Stevens, Souter, and Ginsburg, arguing that the Roberts majority and plurality opinions misapplied *Brown* in a way that would frustrate the possibility of achieving racially integrated education in the future.[27] All of the opinions written in the *Resegregation* case seem to have been motivated by the political views of the Justices who joined them.

1. THE CONSERVATIVE BLOC

The five Justices who found the Louisville and Seattle integration plans to be unconstitutional comprise a conservative Supreme Court voting bloc on the issue of race.[28] Chief Justice Roberts and Justice Alito were recently appointed to the Supreme Court by President George W. Bush, largely because of their conservative political views.[29] Prior to the *Resegregation* decision, they participated in only one other Supreme Court race case—a statutory, Texas redistricting case under the Voting Rights Act, in which both Justices voted to reject the black and Latino

22. *See Parents Involved*, 127 S. Ct. at 2746, 2751–54, 2759–61.

23. *See id.* at 2755–59, 2761–68 (plurality opinion); *id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

24. *See id.* at 2768 (Thomas, J., concurring).

25. *See id.* at 2791–93 (Kennedy, J., concurring in part and concurring in the judgment).

26. *See id.* at 2797–98 (Stevens, J., dissenting).

27. *See id.* at 2800–01 (Breyer, J., dissenting).

28. This argument is developed more fully in Spann, *supra* note 18. That article also discusses the facts and various opinions in the *Resegregation* case in greater detail. *See id.*

29. *See* Biskupic, *supra* note 16 (discussing political leanings of new Supreme Court Justices).

racial-minority-voting interests that were at issue.[30] Justices Scalia, Kennedy, and Thomas have longer Supreme Court histories of opposition to racial-minority interests. All three have consistently voted against the racial-minority interest presented in *every* constitutional affirmative-action, majority-minority redistricting, and integration case they have considered while on the Supreme Court.[31] Accordingly, no Justice in the *Resegregation* case majority has *ever* voted in favor of a racial-minority interest in any such affirmative-action case.[32]

The majority opinion of Chief Justice Roberts in the *Resegregation* case—which was joined by Justices Scalia, Kennedy, Thomas, and Alito—forcefully reiterates the now-established view that all racial classifications are subject to strict scrutiny under the Equal Protection Clause, regardless of whether they are benign or invidious in nature.[33] The Louisville and Seattle integration plans failed to survive strict scrutiny, because Justice Roberts concluded that they neither advanced a compelling governmental interest, nor were narrowly tailored efforts to do so. Because the racial imbalances that the integration plans sought to correct were de facto rather than de jure in nature, the school boards lacked any compelling interest in eliminating the resegregation that was producing those racial imbalances.[34] Moreover, the state interest in educational diversity that the *Grutter* Court had found to be compelling four

30. After *Grutter* was decided, the Supreme Court invalidated, five to four, under the Voting Rights Act, a mid-decade Texas redistricting plan that eliminated a majority-Latino voting district. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 423–42 (2006) (upholding Latino vote-dilution claim). Chief Justice Roberts, joined by Justice Alito, voted to reject this claim. *See id.* at 492–511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part, joined by Alito, J.). Justices Scalia and Thomas also voted to reject this claim. *See id.* at 511–12 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.). In addition, a majority of the Court rejected a Voting Rights Act claim asserting dilution of black voting strength. *See id.* at 443–47 (plurality opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.); *id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part, joined by Alito, J.); *id.* at 511–12 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J.).

31. *See* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION 159–63 (2000) (discussing Supreme Court voting blocs and voting records on affirmative action and redistricting). Since the statistics in that book were published, Justices Scalia, Kennedy, and Thomas have also voted against racial-minority interests in the *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 247 (2003), affirmative-action cases, as well as in the *League of United Latin American Citizens v. Perry*, 548 U.S. at 405, voter-redistricting case. *See supra* note 30. And they, of course, voted against the racial-minority interest in the *Resegregation* case, 127 S. Ct. at 2746. For reasons of convenience, I will refer to affirmative-action cases, majority-minority-redistricting cases, and integration cases such as *Parents Involved* collectively as "affirmative action" cases.

32. *See supra* note 31.

33. *See Parents Involved*, 127 S. Ct. at 2751–52 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 227 (1995)).

34. *See id.*

years earlier, applied only to individualized and holistic efforts to achieve diversity in higher education. It did not apply to the single-factor racial diversity in primary and secondary education that the Louisville and Seattle integration plans sought to achieve.[35] Although the Louisville and Seattle school boards had tried to make their integration plans no broader than necessary to curtail resegregation, Chief Justice Roberts found that the plans were still not narrowly tailored enough to survive strict scrutiny. The binary focus of the plans on only "black" and "white" racial imbalance, plus the very fact that the plans affected only a small number of students, ironically made the plans unconstitutionally overbroad.[36]

The plurality portion of the Roberts opinion—which was joined by Justices Scalia, Thomas, and Alito—concluded that the Louisville and Seattle integration plans were concerned primarily with promoting racial balance. Chief Justice Roberts reiterated the established view that the goal of "outright racial balancing" was "patently unconstitutional," because it treated people not as individuals, but as mere members of a racial group.[37] Roberts also asserted that the plans sought to remedy general "societal discrimination," which is a constitutionally impermissible objective.[38] Chief Justice Roberts finally asserted that *Brown* compelled the invalidation of the Louisville and Seattle integration plans because *Brown* prohibited the assignment of students to schools based on their race—an "odious"[39] governmental action conveying "notions of racial inferiority" that can lead to "a politics of racial hostility."[40] The post-*Brown* desegregation cases that did authorize the use of race-conscious desegregation remedies—such as *Swann v. Charlotte-Mecklenburg Board of Education*[41]—were not controlling. They concerned remedies for de jure segregation rather than the de facto segregation that was at issue in the *Resegregation* case.[42] Chief Justice Roberts ended his opinion by proclaiming that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[43]

---

35. *See id.* at 2753–54.

36. *See id.* at 2753–54, 2759–61.

37. *Id.* at 2757 (plurality opinion) (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

38. *Id.* at 2758.

39. *Id.* at 2767 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214 (1995)).

40. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

41. 402 U.S. 1 (1971).

42. *See Parents Involved*, 127 S. Ct. at 2761–64 (plurality opinion).

43. *Id.* at 2768. Chief Justice Roberts was not the first person to make such an assertion. In his Ninth Circuit dissent in the *Resegregation* case, Judge Bea had stated that "[t]he way to end racial discrimination is to stop discriminating by race." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1222 (9th Cir. 2005) (Bea, J., dissenting), *rev'd*, 127 S. Ct. 2738. Judge Bea also quoted Professor Van Alstyne's assertion that "one gets beyond racism by getting beyond it now." *Id.* at 1221 (quoting Price v. Civil Serv. Comm'n, 604 P.2d 1365, 1391 (Cal.

Justice Thomas wrote a concurring opinion that was aimed primarily at rebutting the arguments made in Justice Breyer's dissent.[44] Justice Thomas rejected the claim that "resegregation" was occurring in Louisville and Seattle, because the de facto racial imbalance caused by shifting residential patterns entailed only general "societal discrimination," rather than the de jure discrimination for which the Constitution permitted race-conscious remedies.[45] As a result, Justice Thomas agreed with Chief Justice Roberts that post-*Brown* precedents such as *Swann*, which permitted race-conscious desegregation remedies, were not controlling.[46] He also agreed that *Grutter*'s recognition of educational diversity as a compelling state interest was limited to the context of higher education.[47] Justice Thomas strongly endorsed the concept of "colorblindness" espoused by Justice Harlan in his *Plessy* dissent,[48] and asserted that Justice Breyer's dissent in the *Resegregation* case was arguing for the same deference to local racial preferences that the segregationists had argued for in *Brown*.[49]

Justice Kennedy sought to adopt a compromise position between the views expressed in the Roberts plurality opinion and the Breyer dissent. He agreed with Chief Justice Roberts that the Louisville and Seattle integration plans were unconstitutional because they were not narrowly tailored, but he also agreed with Justice Breyer that the state interest in educational diversity was compelling at the primary and secondary school levels.[50] The Louisville and Seattle plans could not survive the narrow-tailoring prong of strict scrutiny because they were confusing and self-contradictory; they focused only on "white" and "nonwhite" student diversity; and the number of students affected was too small to negate the possibility that race-neutral alternatives might suffice.[51] However, Justice Kennedy did believe that the nation's post-*Brown* history revealed that race still mattered in contemporary culture, and that race-conscious means of promoting educational diversity might therefore be constitutionally permissible if they did not define students by their race. Accordingly, facially neutral but race-conscious diversity strategies—

1980) (Mosk, J., dissenting) (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979))).

44. *See Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).

45. *See id.* at 2768–73.

46. *See id.* at 2771 nn.5–6.

47. *See id.* at 2775–79; 2781–82.

48. *See id.* at 2782 ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

49. *See id.* at 2783–86 (citing claims that racial segregation under *Plessy* was racially beneficial, and that the Supreme Court should not undo the progress that had already been made).

50. *See id.* at 2788–89 (Kennedy, J., concurring in part and concurring in the judgment).

51. *See id.* at 2788–93.

such as school-site selection, gerrymandered attendance zones, or magnet schools—might not be subject to strict scrutiny. Rather, they might be constitutionally permissible in the way that racial considerations are sometimes permissible in drawing facially neutral election district lines.[52] Nevertheless, *Grutter* did not authorize the Louisville and Seattle integration plans, because *Grutter* employed an individualized and holistic consideration of race along with other non-racial diversity factors. The dispositive way that race was used in the Louisville and Seattle plans was more analogous to the mechanical use of race that the Court had invalidated in the *Grutter* companion case of *Gratz v. Bollinger*.[53] Justice Kennedy also agreed with Chief Justice Roberts and Justice Thomas that post-*Brown* decisions such as *Swann*, which authorized the use of racial remedies, were limited to cases of de jure rather than de facto discrimination.[54]

2. THE LIBERAL BLOC

The four dissenting Justices who voted to uphold the Louisville and Seattle integration plans comprise a liberal Supreme Court voting bloc on the issue of race. Justices Stevens, Souter, Ginsburg, and Breyer have almost always voted to uphold the racial-minority interests at issue in the constitutional affirmative-action cases that they have considered while on the Supreme Court.[55] There are two interesting deviations from this pattern. The first consists of three early votes by Justice Stevens to invalidate the affirmative-action plans at issue in *Regents of the University of California v. Bakke*,[56] *Fullilove v. Klutznick*,[57] and *City of Rich-*

52. *See id.* at 2791–92. Although Justice Kennedy does not cite his work, Professor Goodwin Liu has argued that the Louisville and Seattle integration plans should be controlled by the Supreme Court's redistricting cases, rather than by the Court's affirmative-action decisions. *See* Goodwin Liu, Seattle *and* Louisville, 95 CAL. L. REV. 277, 301–09 (2007).

53. *See Parents Involved*, 127 S. Ct. at 2794 (Kennedy, J., concurring in part and concurring in the judgment) (citing Gratz v. Bollinger, 539 U.S. 244 (2003)).

54. *See id.* at 2794–96.

55. SPANN, *supra* note 31, at 159–63 (discussing voting patterns of Justices in affirmative-action cases); *see also Parents Involved*, 127 S. Ct. at 2797 (Stevens, J., dissenting) (voting for the racial-minority interest); *id.* at 2800 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (same); Grutter v. Bollinger, 539 U.S. 306, 310 (2003) (noting that Justices Stevens, Souter, Ginsburg, and Breyer joined Justice O'Connor's majority opinion upholding the University of Michigan Law School's affirmative-action plan at issue); *Gratz*, 539 U.S. at 282 (Stevens, J., dissenting) (dissenting from majority decision invalidating University of Michigan's undergraduate affirmative-action plan at issue); *id.* at 291 (Souter, J., dissenting) (dissenting from same majority opinion); *id.* at 298 (Ginsburg, J., dissenting) (dissenting from same majority opinion).

56. 438 U.S. 265, 408 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

57. 448 U.S. 448, 532 (1980) (Stevens, J., dissenting).

mond v. J.A. Croson Co.[58] Since 1990, however, Justice Stevens has consistently voted to uphold the racial-minority interest at issue in the constitutional affirmative-action cases that he has considered while on the Supreme Court.[59] The second deviation consists of the one vote by Justice Breyer to invalidate the affirmative-action plan at issue in *Gratz v. Bollinger*.[60] Justice Breyer has voted to uphold the racial-minority interest at issue in every other constitutional affirmative-action case that he has considered while on the Supreme Court.[61]

Justice Stevens wrote a brief dissenting opinion pointing out what he viewed as the "cruel irony" in the Chief Justice's reliance on *Brown* to invalidate a school-integration plan.[62] *Brown* was about the exclusion of black children from white segregated schools. Not only was no such exclusion involved in the *Resegregation* case, but there were not even any reports of white children complaining about their exclusion from black segregated schools. That important contextual factor was lost in the Chief Justice's attempt to equate racial discrimination against blacks with race-conscious efforts to secure the very integration that *Brown* sought to achieve.[63] Chief Justice Roberts also disregarded post-*Brown* precedents such as *Swann*, which authorized the use of race-conscious efforts to secure integration.[64] Justice Stevens then lamented that no Justice on the Supreme Court to which he had been appointed in 1975 would have agreed with the majority's *Resegregation* decision.[65]

Justice Breyer wrote the primary *Resegregation* case dissent—which was joined by Justices Stevens, Souter, and Ginsburg.[66] He argued that the Louisville and Seattle integration plans satisfied strict scrutiny as narrowly tailored efforts to advance the compelling state interest in educational diversity, because they were similar to numerous

58. 488 U.S. 469, 511 (1989) (Stevens, J., concurring in part and concurring in the judgment).

59. SPANN, *supra* note 31, at 159–63 (discussing voting patterns of Justices in affirmative-action cases); *see also Parents Involved*, 127 S. Ct. at 2797 (Stevens, J., dissenting) (voting for racial-minority interest); *Grutter*, 539 U.S. at 310 (noting that Justice Stevens joined Justice O'Connor's majority opinion upholding the University of Michigan Law School's affirmative-action plan at issue); *Gratz*, 539 U.S. at 282 (Stevens, J., dissenting) (dissenting from majority decision invalidating University of Michigan's undergraduate affirmative-action plan at issue).

60. 539 U.S. at 281 (Breyer, J., concurring in the judgment) (invalidating University of Michigan's undergraduate affirmative-action plan at issue).

61. SPANN, *supra* note 31, at 159–63 (discussing voting patterns of Justices in affirmative-action cases); *see also Parents Involved*, 127 S. Ct. at 2800 (Breyer, J., dissenting) (voting for racial-minority interest); *Grutter*, 539 U.S. at 310 (noting that Justice Breyer joined Justice O'Connor's majority opinion upholding the University of Michigan Law School's affirmative-action plan at issue).

62. *Parents Involved*, 127 S. Ct. at 2797 (Stevens, J., dissenting).

63. *See id.* at 2797–2800.

64. *See id.* at 2799–2800.

65. *See id.* at 2800.

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

other race-conscious remedial plans that had been required, permitted, and encouraged in the fifty years that had elapsed since *Brown*. The Roberts plurality, however, undermined the ability of local school boards to solve the problem of racial resegregation by simply ignoring dozens of those post-*Brown* precedents—including the unanimous Supreme Court decision in *Swann* that authorized remedial efforts to achieve racial balance.[67] Moreover, the distinction between de facto and de jure segregation, on which Roberts relied so heavily, was too tenuous to support the claim that *Swann*-type remedies were unavailable for de facto segregation. This was evidenced by the fact that both the Louisville and Seattle cases had been initiated by claims of de jure segregation. Neither the fact that one case was settled while the other was adjudicated, nor the fact that the two school districts had obtained a degree of integration before becoming resegregated, was sufficient to make race-conscious remedies unavailable.[68] The de facto/de jure distinction was relevant only to what the Constitution *required*—not to what it *permitted*.[69]

Justice Breyer also objected to a reading of the Equal Protection Clause that refused to distinguish between benign and invidious race consciousness, arguing that there were important differences between actions that include and actions that exclude racial minorities. Moreover, those differences were made doctrinally relevant by *Grutter*'s insistence on considering *context* when analyzing the permissibility of race-conscious remedies.[70] Because the Louisville and Seattle plans did not seek to separate students on the basis of merit, it was difficult to see how any student was stigmatized or otherwise harmed by the integration plans at issue. Although the majority asserted that *Grutter* diversity was compelling only in the context of higher education, the benefit of educational diversity was even *more* compelling in the formative years of primary and secondary education. *Brown* itself was about primary and secondary education. This made the governmental interest in educational diversity more than a mere interest in redressing "societal discrimination."[71] Moreover, the fact that the Louisville and Seattle plans evolved over many years—in a way that increasingly *reduced* the significance of race—showed both that the plans were narrowly tailored, and that other race-neutral alternatives had not proved effective.[72] Justice Breyer finally accused Chief Justice Roberts of trying to eliminate all remedial

67. *See id.* at 2800–02; 2811–14.
68. *See id.* at 2809–11.
69. *See id.* at 2823–24.
70. *See id.* at 2815–18.
71. *See id.* at 2821–24.
72. *See id.* at 2824–31.

uses of race, and of trying to wrest racial policymaking power from the democratic process in a way that threatened the promise of *Brown*.[73]

B. *Doctrinal Difficulties*

Serious doctrinal difficulties are posed by the Supreme Court's decision invalidating the Louisville and Seattle integration plans in the *Resegregation* case. The decision conflicts with the fundamental premises of *Brown* in at least two major respects. In addition, it relies on a standard litany of racially regressive legal propositions that recent conservative-bloc Justices have insisted on reading into the Constitution. These doctrinal difficulties are so pronounced that the motivation for the *Resegregation* decision seems to be transparently political.

1. *BROWN*

Whatever one thinks of the outcome in the *Resegregation* case, the decision seems pretty clearly to be in tension with the holding of *Brown*. *Brown* firmly establishes the proposition that racially integrated schools are constitutionally preferable to racially segregated schools. More subtly, *Brown* also stands for the proposition that the white-supremacist racial oppression underlying the separate-but-equal segregation regime that *Brown* overruled was also constitutionally impermissible. Nevertheless, as I have argued in greater detail elsewhere,[74] the *Resegregation* decision seems to have overruled both of those fundamental aspects of *Brown*.

Brown invalidated the separate-but-equal regime of *Plessy* and read the Equal Protection Clause to require the desegregation of public schools.[75] In so doing, *Brown* held that racial segregation in public schools was "inherently unequal."[76] Nevertheless, the conservative-bloc Justices in the *Resegregation* case read the Equal Protection Clause actually to *protect* "inherently unequal" resegregation. They invalidated race-conscious efforts to prevent resegregation, even when those efforts appeared to offer the only hope of preserving the post-*Brown* integration that race-conscious remedies had been required to achieve.[77] Justice Breyer's dissent demonstrated the ways in which the Louisville and Seattle integration plans had been narrowly tailored over time to prevent

73. *See id.* at 2833–37.

74. *See* Spann, *supra* note 18.

75. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

76. *See id.* at 495 ("Separate educational facilities are inherently unequal.").

77. *See Parents Involved*, 127 S. Ct. at 2824–26 (Breyer, J., dissenting) (arguing that race-neutral alternatives had proved inadequate); *cf. id.* at 2791–92 (Kennedy, J., concurring in part and concurring in the judgment) (suggesting that some race-conscious remedies for de facto segregation might be permissible if race-neutral alternatives were shown to be inadequate).

racial resegregation, and thereby to advance the interest in educational diversity that *Grutter* had found to be compelling.[78] But Chief Justice Roberts rejected that demonstration, stating that *Grutter* recognized only a compelling interest in "holistic" diversity that also included individualized nonracial factors—not an interest in racial diversity alone.[79] Although the four dissenters strenuously disagreed,[80] the Roberts rejection misses the point.

Ultimately, it does not matter whether *Grutter* authorizes the use of race-conscious remedies to preserve racial diversity, because *Brown* does. As a series of remedial cases implementing *Brown* has held, the whole point of *Brown* was to achieve *actual* integration—not mere proclamations of formal desegregation.[81] If *Brown* is correct that separate education "inherently" harms and stigmatizes racial-minority children, those problems will not go away simply because resegregation is now being achieved through residential housing patterns rather than through school-attendance laws. Both produce the same racial separation, and both produce the same attendant harms. The suggestion that one must distinguish between the two types of segregation in order to implement the only available segregation remedy is simply too precious to be plausible. It amounts to merely another declaration of formal equality by Chief Justice Roberts, which is analogous to the earlier southern segregationist declarations that the post-*Brown* cases rejected as unconstitutional.[82]

The Resegregation case is not only inconsistent with the actual integration principle of *Brown* and its progeny, it is inconsistent with *Brown*'s more fundamental aversion to racial oppression as well. In addition to invalidating the racially segregated school systems that had been maintained under the separate-but-equal doctrine of *Plessy*,[83] *Brown* also invalidated the regime of white supremacy out of which those segregated schools had emerged. *Brown* therefore stands for the proposition that the interests of racial minorities cannot simply be sacri-

78. *See id.* at 2824–30 (Breyer, J., dissenting).

79. *See id.* at 2753–55 (majority opinion) (citing Grutter v. Bollinger, 539 U.S. 306, 324–25, 330, 337–38 (2003)).

80. *See id.* at 2800–01; 2824–30 (Breyer, J., dissenting).

81. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (authorizing race-conscious efforts to reflect racial balance of school district); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) (invalidating ban on use of busing to achieve racial balance); McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (upholding voluntary race-conscious school-assignment plan designed to achieve racial balance); Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968) (invalidating reliance on mere formal "freedom of choice" plans).

82. *See* cases cited *supra* note 81 (citing post-*Brown* cases that required actual integration rather than mere formal equality).

83. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

ficed in order to advance the interests of whites. Such a sacrifice would convey the precise message of racial inferiority that *Brown* sought to eradicate.[84]

This anti-oppression reading of *Brown* is important, because the subordination of racial minorities has historically been a central feature of United States culture. Moreover, it is a feature in whose maintenance the Supreme Court has itself been heavily implicated. In *Dred Scott v. Sandford*, the Court upheld the institution of slavery.[85] In *United States v. Cruikshank*, the Court limited the effectiveness of Reconstruction legislation enacted to protect the rights of former black slaves.[86] In the *Civil Rights Cases*, the Court held that Reconstruction legislation could not constitutionally prohibit private acts of discrimination against former black slaves.[87] In *Plessy v. Ferguson*, the Court upheld the Jim Crow regime of official southern segregation.[88] In *Korematsu v. United States*, the Court upheld the exclusion order that led to the World War II internment of Japanese American citizens.[89] In *Brown v. Board of Education (Brown II)*, the Court delayed implementation of southern school desegregation for a decade.[90] In *Naim v. Naim*, the Court refused to invalidate then-common miscegenation laws.[91] In *Milliken v. Bradley*, the Court

84. *See id.* at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

85. 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery, as interfering with property rights of slave owners).

86. 92 U.S. 542, 551–59 (1876) (refusing to apply criminal provisions of Enforcement Act of 1870 to Ku Klux Klan lynching of black freedmen); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 460–64 (5th ed. 2005) (describing Supreme Court restrictions on Reconstruction legislation).

87. 109 U.S. 3, 8–19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875 and imposing "state action" restriction on congressional antidiscrimination legislation); *see also* STONE ET AL., *supra* note 86, at 460–64 (describing Supreme Court restrictions on Reconstruction legislation).

88. 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

89. 323 U.S. 214, 215–20 (1944) (upholding World War II exclusion order that led to Japanese American internment).

90. 349 U.S. 294, 301 (1955) (limiting desegregation obligation of public schools to that which could be accomplished "with all deliberate speed"); *see also* STONE ET AL., *supra* note 86, at 483–88 (describing Supreme Court inaction in face of massive southern resistance that followed *Brown*).

91. 350 U.S. 891, 891 (1955) (per curiam). In *Naim*, the United States Supreme Court was asked to hold unconstitutional a Virginia miscegenation statute that had been upheld by the Virginia Supreme Court of Appeals. *See id.* The United States Supreme Court vacated the Virginia decision and remanded for clarification of the record. *Id.* The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier decision and refused to clarify the record. Naim v.

effectively prohibited the integration of northern schools.[92] And even now, the Supreme Court often uses a colorblind conception of *Brown* to invalidate affirmative-action, redistricting, and integration programs of which the Court disapproves.[93]

Unfortunately, the *Resegregation* decision continues this trend of Supreme Court involvement in the sacrifice of racial-minority rights for the benefit of the white majority. In the aggregate, the *Resegregation* Supreme Court had to choose between giving seats in racially imbalanced schools to white students or to racial-minority students. Because the seats were neither in magnet schools nor in any other way related to merit, the only thing at stake was the racial composition of the schools in which the seats were located. If the Court gave the seats to minority students, the parents of white students would be inconvenienced by not sending their children to school in the locations that they preferred. If the Court gave the seats to white students, the schools in which those seats were located would become racially resegregated. The Supreme Court chose to give the seats to the white students, thereby sacrificing the inclusionary interests of minority students in an integrated education to the exclusionary convenience interests of white parents. Moreover, because white parents knew that resegregation would be the result of overriding the integration plans that they sought to invalidate, the "convenience" interest of disappointed white parents ended up actually being an interest in renewed racial segregation. The Supreme Court violated the anti-oppression principle of *Brown* when it allowed white parents to send their children to schools that are attended by other

---

Naim, 90 S.E.2d 849, 850 (1956) (per curiam). Nevertheless, the United States Supreme Court declined to recall or amend the mandate, finding that the constitutional question had not been "properly presented." Naim v. Naim, 350 U.S. 985, 985 (1956) (per curiam). This allowed the Virginia Court's decision to remain in effect. *Id.* Because the neutrality principle that had been announced in *Brown* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court's failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court's actions in *Naim* have been vigorously criticized. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) ("[T]here are very few dismissals similarly indefensible in law."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (noting that dismissal of the miscegenation case was "wholly without basis in the law"). The Supreme Court ultimately invalidated the Virginia miscegenation statute as a manifestation of white supremacy eleven years later in *Loving v. Virginia*, when only sixteen states still had miscegenation statutes on the books. 388 U.S. 1, 6, 11–12 (1967).

92. 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for de facto school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

93. *See* SPANN, *supra* note 31, at 156–89 (discussing Supreme Court affirmative-action and redistricting cases); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751–54 (2007) (invalidating Louisville and Seattle integration plans).

white students, rather than to schools that are attended by racial minorities. In so doing, it allowed white parents of today to pursue the same degree of racial separation that white parents of the separate-but-equal generation were able to pursue before the Supreme Court overruled *Plessy* in *Brown*.

2. RACIAL POLITICS

The *Resegregation* case Justices in the conservative bloc have consistently voted against racial-minority interests.[94] Indeed the voting records of those Justices, combined with the tenor of their opinions in race cases, is such that one cannot help but imagine that they would also have voted with earlier Supreme Court majorities in cases like *Dred Scott*,[95] *Plessy*,[96] and *Korematsu*.[97] The majority, plurality, and concurring opinions written by conservative-bloc Justices in the *Resegregation* case invoke a standard litany of regressive legal propositions that ultimately treats the Equal Protection Clause as a haven for existing white privilege, rather than as a guarantee of racial equality. Although the dissenting opinions written by the Justices in the liberal bloc convincingly challenge some of those propositions, the conservative-bloc majority still subscribes to a conception of so-called "equality" that seems itself to be racially discriminatory. The propositions that the conservative-bloc Justices endorse seem both counterintuitive and unnecessary. If fact, those propositions seem so gratuitous that it is difficult to view them as emanating from anything other than a transparent form of conservative racial politics.

(i) Strict Scrutiny.—The majority opinion of Chief Justice Roberts insists on applying strict scrutiny to all racial classifications, whether they are benign or invidious.[98] That means that race-conscious remedies for existing discrimination are constitutionally just as suspect as the underlying patterns of discrimination that they are designed to counteract. Although strict scrutiny is technically no longer "fatal in fact,"[99]

94. *See supra* text accompanying notes 29–33 (describing voting records of conservative-bloc Justices in race cases).

95. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).

96. *See* Plessy v. Ferguson, 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

97. *See* Koremâtsu v. United States, 323 U.S. 214, 215–20 (1944) (upholding World War II exclusion order that led to Japanese American internment).

98. *See Parents Involved*, 127 S. Ct. at 2751–54 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 227, 241 (1995)).

99. *See id.* at 2817 (Breyer, J., dissenting) (quoting *Adarand*, 515 U.S. at 237).

Grutter remains the only case since *Korematsu* in which a racial classification has survived strict equal-protection scrutiny.[100] Now that Justice O'Connor is no longer on the Supreme Court,[101] strict scrutiny is in the hands of a conservative-bloc majority that has never voted in favor of the racial-minority interest in any constitutional affirmative-action case. That suggests that, under the Roberts Court, strict scrutiny will once again become fatal in fact. I think that there is only one credible explanation for why a Court would ignore the obvious differences that exist between benign and invidious discrimination in fashioning and applying a standard of review. The Court wants to preserve existing racial inequalities by invalidating the remedies that would eliminate those inequalities. That is, of course, a position that seems consistent with contemporary conservative racial politics. Justice Kennedy is the only conservative-bloc Justice who has stated that he could envision circumstances in which race-conscious discrimination remedies might be subject to less than strict scrutiny.[102] In practice, however, it remains true that—in his twenty-year tenure on the Court—Justice Kennedy has still never voted in favor of the racial-minority interest in any constitutional affirmative-action case.[103]

(ii) Diversity.—To survive strict scrutiny, even a benign racial classification has to be narrowly tailored to advance a compelling governmental interest.[104] Although *Grutter* recognized the interest in educational diversity to be compelling, the majority opinion of Chief Justice Roberts in the *Resegregation* case has interpreted *Grutter* to require "holistic" diversity that does not simply focus on racial diversity alone.[105] However, it is completely unclear why "holistic" diversity that focuses on factors other than race should be required in an integration plan that is designed to protect *racial* integration. Other forms of diversity might be educationally desirable in other contexts, but they are simply inapposite when the prevention of *racial* resegregation is at stake. The act of requiring such an unfocused and homogenized conception of

100. The only two cases in which a racial classification has survived strict equal-protection scrutiny are the now-discredited World War II Japanese American exclusion case of *Korematsu v. United States*, which upheld a World War II exclusion order that led to the internment of Japanese Americans, 323 U.S. at 215–20, and the recent affirmative-action case of *Grutter v. Bollinger*, which upheld the University of Michigan Law School's affirmative-action plan as a narrowly tailored means of advancing a compelling interest in student diversity, 539 U.S. 306, 328 (2003).

101. *See supra* text accompanying note 16 (describing changes in Supreme Court personnel).

102. *See Parents Involved*, 127 S. Ct. at 2788–93 (Kennedy, J., concurring in part and concurring in the judgment).

103. *See supra* text accompanying note 31 (describing voting records of conservative bloc Justices in race cases).

104. *See Parents Involved*, 127 S. Ct. at 2751–52.

105. *See id.* at 2753–54.

diversity to satisfy the compelling-state-interest test seems like an act of political opposition to the very idea of *racial* diversity that *Brown* sought to infuse into the Constitution.

(iii) Narrow Tailoring.—Race-conscious student assignments seemed so necessary to maintain integration in the Louisville and Seattle school systems that there appeared to be no race-neutral alternative that would effectively prevent resegregation.[106] Nevertheless, the conservative-bloc majority applied the narrow-tailoring requirement of strict scrutiny with such harsh artificiality that it is realistically difficult to see how that requirement could ever be satisfied. Once again, it seems that only a Supreme Court majority that was politically hostile to racial integration itself would go to such lengths to find that strict scrutiny had not been satisfied in the *Resegregation* case.

(iv) Racial Balance.—Because the Louisville and Seattle integration plans *did* seem narrowly tailored to preserve the diversity benefits of racial integration, Chief Justice Roberts had to find some way of rendering that particular form of narrow tailoring doctrinally irrelevant. He did this by characterizing the integration interest of the school boards as merely an effort to achieve "racial balance, pure and simple,"[107] which previous cases had held to be "patently unconstitutional."[108] A question that immediately leaps to mind is *why* the Court would want to deem remedial racial balancing patently unconstitutional. The effort to have a school's student body reflect the racial composition of the district in which the school is located, seems like an imminently sensible way of promoting racial integration. Moreover, post-*Brown* remedy cases, such as *Swann*[109] and *McDaniel v. Barresi*,[110] expressly authorized the use of racial balance as a constitutionally permissible goal in formulating desegregation plans.[111] The suggestion that remedial efforts to promote racial balance are unconstitutional seems simply perverse. In a nondiscriminatory culture, one would expect societal resources to be distributed in a racially proportional manner. Therefore, efforts to replicate the results that would be produced by a nondiscriminatory culture hardly seem to merit Supreme Court condemnation as a form of unconstitu-

106. *See id.* at 2824–31 (Breyer, J., dissenting).

107. *Id.* at 2755 (plurality opinion).

108. *Id.* at 2753 (majority opinion) (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)); *see also id.* at 2755–58, 2763 (plurality opinion) (discussing plans as method of racial planning); *id.* at 2768–70 (Thomas, J., concurring) (stating school interest not constitutionally permitted).

109. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (authorizing race-conscious efforts to reflect racial balance of school district).

110. 402 U.S. 39, 41 (1971) (upholding voluntary race-conscious school assignment plan designed to achieve racial balance).

111. *See Parents Involved*, 127 S. Ct. at 2811–15 (Breyer, J., dissenting) (discussing cases authorizing pursuit of racial balance).

tional discrimination. Political opposition to racial integration seems yet again to be the most plausible explanation for this curious and doctrinally unnecessary Supreme Court holding.

(v) Societal Discrimination.—After having characterized the Louisville and Seattle school boards as being interested in promoting racial balance, Chief Justices Roberts went on to condemn the school boards for seeking to remedy general "societal discrimination."[112] Once again, one cannot help but wonder what is wrong with trying to remedy general societal discrimination. The doctrinal answer seems to be that governmental entities can remedy only that discrimination for which they themselves are responsible.[113] They apparently cannot seek to remedy the more subtle forms of pervasive discrimination that continue to permeate the culture without any particularized causal connection to an identifiable act of discrimination. The problem, of course, is that the lingering effects of those more pervasive forms of societal discrimination are *precisely* what one wants to remedy if one is genuinely interested in promoting prospective racial equality. This so-called "societal discrimination" is what is responsible for the bulk of the racial inequality that exists today. The conservative-bloc Justices might argue that they are only prohibiting the use of *race-conscious* remedies to combat general societal discrimination.[114] But that is hardly an adequate response in a context where race-conscious remedies offer the *only* realistic means to escape the continuing effects of pervasive societal discrimination. Conservative political approval of continuing racial inequality again seems to supply the most plausible explanation for the Court's counterintuitive "societal discrimination" rule.

(vi) De Facto Discrimination.—The conservative-bloc Justices are emphatic in their insistence that race conscious remedies can only be used for de jure, and not de facto, discrimination.[115] Indeed, Justice Thomas argues that de facto racial imbalance does not even count as "resegregation," despite the racially identifiable character of the schools that results.[116] Justice Breyer challenges the conservative-bloc emphasis on the de facto versus de jure distinction, arguing that the distinction itself is too tenuous to be meaningful. He notes that both the Louisville

112. *Id.* at 2758 (plurality opinion) (rejecting remedies for "societal discrimination"); *see also id.* at 2772 (Thomas, J., concurring) (same).

113. *See id.* at 2758 (plurality opinion) (limiting permissible remedies to discrimination caused by entity seeking to provide remedy); *id.* at 2772 (Thomas, J., concurring) (same).

114. *See id.* at 2758 (plurality opinion) (discussing limits on use of race-conscious remedies); *id.* at 2772 (Thomas, J., concurring) (same).

115. *See id.* at 2752 (majority opinion); *id.* at 2761–64 (plurality opinion); *id.* at 2768–73 (Thomas, J., concurring); *id.* at 2794–96 (Kennedy, J., concurring in part and concurring in the judgment).

116. *See id.* at 2768–73 (Thomas, J., concurring).

and Seattle school systems started out as school systems alleged to be de jure segregated, and only the happenstance of a settlement rather than an adjudication caused those two school systems to occupy different de facto and de jure categories.[117] In a culture where governmental involvement in private affairs has become as extensive as it is in contemporary United States culture, Justice Breyer certainly seems correct that the de facto/de jure distinction is ultimately untenable. But the more interesting question is why a Court would care whether demonstrable discrimination was of a de facto or a de jure nature. If a remedy appeared to be the only effective remedy for counteracting racial discrimination, why would that alone not be enough to make the remedy constitutionally available? This, of course, poses the very same problem that was posed by the aversion of conservative-bloc Justices to societal discrimination, and it raises the very same concern about the racial politics of those Justices.

(vii) Colorblindness.—Perhaps the most striking feature of the *Resegregation* decision is the insistence of Chief Justice Roberts that invalidation of the Louisville and Seattle race-conscious integration plans was compelled by some purported, race-neutrality requirement of *Brown*.[118] Justice Thomas even traced his supposed moral imperative for colorblindness all the way back to Justice Harlan's dissent in *Plessy*.[119] However, *Brown* and the *Plessy* dissent stand for no such requirement. Those opinions were about the invidious use of race to oppress racial minorities. They were *not* about the remedial use of race to undo the effects of past discrimination. *Brown* prohibited the assignment of children to schools based on the color of their skin as a way of *combating* the white privilege and attitudes of white supremacy that prevailed at the time. The Roberts Court majority prohibits the assignment of children to schools based on the color of their skin as a way of *preserving* the white privilege and attitudes of white supremacy that prevail today.

By ripping the *Brown* decision out of context, and forcing it to stand for the *opposite* of the proposition that it was intended to support, I think that the conservative-bloc Justices were themselves guilty of racial discrimination. Their insistence on prospective colorblind race neutrality has both the intent and the effect of protecting the existing allocation of societal resources from remedial attempts at redistribution. Moreover, they intend this result even though they know that the existing distribu-

117. *See id.* at 2809–11 (Breyer, J., dissenting).

118. *See id.* at 2767–68 (plurality opinion) (citing Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955)).

119. *See id.* at 2782 (Thomas, J., concurring) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

tion of societal resources remains highly tainted by the continuing effects of past discrimination. Justices in the conservative bloc choose to accept the present distribution of resource as a legitimate baseline allocation, and they insist upon perpetuating the inequalities built into that baseline by giving those inequalities constitutional protection. They read the Equal Protection Clause to constitutionalize a concept of equality that has a hidden discriminatory core. It is a form of equality that, when expedient, can itself be used to continue the sacrifice of racial-minority interests for the benefit of more privileged whites.

For Chief Justice Roberts, the complex and intractable problem of racial discrimination that has plagued the United States since before its inception is amenable to a simple solution. Roberts ends his *Resegregation* opinion by stating that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[120] Such a simplistic solution would appeal only to someone who was wholly unconcerned with the need for genuine racial equality. The conservative racial politics underlying the Roberts Court's *Resegregation* decision belies the supposedly apolitical constitutional exposition that is offered to support its result. The Roberts Court now simply lacks racial credibility in our post-Realist legal culture. The *Resegregation* Justices who have joined the Court's conservative voting bloc can no longer claim the mantle of good faith. As a result, they no longer merit the benefit of the doubt or our continued doctrinal respect. But one must still wonder *why* those Justices chose to invert the constitutional concept of equality in the way that they have. It may be that conservative-bloc Supreme Court Justices are not simply conservatives, but rather, are "movement conservatives."

II. MOVEMENT CONSERVATISM

In his book *The Conscious of a Liberal*, Princeton economist Paul Krugman argues that "movement conservatives" have adopted a radical, right-wing political strategy that seeks to dismantle the New Deal welfare state.[121] The effect of this dismantling is to increase economic inequality through the transfer of resources and governmental subsidies from the middle class to the wealthy. The strategy seems to be working. In his book *Richistan: A Journey Through the American Wealth Boom and the Lives of the New Rich*, *Wall Street Journal* reporter Robert Frank argues that the present divergence in wealth between the rich and the middle class has now become so vast that the rich should be viewed

120. *Id.* at 2768 (plurality opinion); *see also supra* note 43 (discussing ancestry of this aphorism).

121. KRUGMAN, *supra* note 4, at 3–14.

as residents of a different country—a country in which values and cultural practices are dramatically different from those prevailing in the mainstream United States.[122] The negative redistribution of wealth achieved by movement conservatism has been a noteworthy political accomplishment. Any transfer of wealth from the middle class to the rich, of course, directly disadvantages the middle-class electorate. In addition, the increased economic inequality created by this large divergence in wealth ultimately forces members of the middle class to outspend their resources trying to keep pace in the quest for basic middle-class goals.[123] Therefore, in order to convince middle-class voters to support the movement-conservative political agenda of the wealthy, movement conservatives had to form a political coalition around an issue that a sufficient number of middle-class voters cared about even more than they cared about their own economic interests. Movement conservatives chose to do this by exploiting the issue of race. Both the plutocratic nature of movement conservatism and the movement's skill at manipulating racial anxieties are worthy of attention.

A. *Plutocracy*

Movement conservatism is plutocratic in nature. A small, wealthy segment of the population has managed to capture the national political process so that governmental policies operate to advance their own interests, rather than the interests of the population at large. This governing plutocracy is defined by both its wealth and its ideology. Moreover, its political policies have benefited the rich by greatly increasing the nation's divergence in wealth.[124] However, divergence in wealth is not what has fostered our present political polarization. Rather it is political polarization that has fostered our present divergence in wealth.[125]

1. WEALTH DIVERGENCE

Much of the wealth in the United States is now held by a small percentage of the population. The top ten percent of the population earns 44.3% of the nation's total income, and the top one percent earns 17.4%.[126] Moreover, the richest one percent of Americans now controls more than thirty-three percent of the nation's wealth, and the wealth of

122. ROBERT FRANK, RICHISTAN: A JOURNEY THROUGH THE AMERICAN WEALTH BOOM AND THE LIVES OF THE NEW RICH 1–13 (2007).

123. *See id.* at 242–45; ROBERT H. FRANK, FALLING BEHIND: HOW RISING INEQUALITY HARMS THE MIDDLE CLASS 43–51, 78–94, 117–25 (2007). Note that, despite their similar names, the two "Frank" authors are different people.

124. *See* KRUGMAN, *supra* note 4, at 9–12.

125. *See id.* at 6–7, 124–52, 169–72.

126. *Id.* at 16 tbl.1 (reporting 2005 data).

the top one percent now exceeds the wealth of the bottom ninety percent.[127] Nevertheless, the absolute number of wealthy households in the United States is both large and growing. In addition, some wealthy households are now *very* wealthy. There are 7.5 million households in the United States with a net worth between $1 million and $10 million; 1.4 million households with a net worth between $10 million and $100 million; thousands of households with a net worth between $100 million and $1 billion (the exact number is unknown); and estimates range from 400 to over 1000 households with a net worth exceeding $1 billion (again the exact number is unknown).[128] The number of wealthy households in the United States has also been increasing rapidly in recent years. In the near decade between 1995 and 2004, the number of households in most wealth categories actually doubled, with many new wealthy households earning their money in soaring financial markets rather through the more traditional route of inheritance. The population of millionaires tripled between the 1980s and 2000, and the number of billionaires jumped from thirteen in 1982 to sixty-seven in 1989.[129]

Households that have recently acquired their wealth tend to be younger and more diverse than those with Old Money. Nevertheless, single digit millionaires tend to be politically homogeneous, with most typically voting as conservative Republicans.[130] Those higher up on the wealth scale, who may feel financially more secure with their wealth, are more likely to be liberal democrats. Single digit millionaires supported George W. Bush in 2004, while those worth $10 million or more supported John Kerry.[131] Self-financed candidates who spent between $1 million and $4 million on their own campaigns tended to be Republicans, but those who spent $4 million or more on their own campaigns tended to be Democrats by a ratio of three-to-one.[132] Republicans are more likely than Democrats to make political contributions in the $25,000 to $100,000 range, but Democrats are more likely to make political contributions that exceed $1 million.[133]

It would not be particularly surprising to learn that wealth—especially newly acquired wealth at the single-digit end of the millionaire scale—would cause people to favor fiscally conservative political policies that removed obstacles to their accumulation and retention of greater wealth. Accordingly, wealth might naturally generate a degree of

127. FRANK, *supra* note 122, at 242.
128. *Id.* at 7–12 (using 2004 and 2005 data).
129. *Id.* at 1–2, 6.
130. *See id.* at 6–9.
131. *See id.* at 10.
132. *Id.* at 186–87.
133. *See id.* at 201.

political polarization, causing the wealthy not only to oppose subsidies to the poor, but also to favor negative redistribution policies that benefit the wealthy at the expense of the middle class. Such policies include reductions in progressive taxation, elimination of the estate tax, hostility to organized labor, facilitation of high executive pay, hostility to governmental regulation, privatization of social security, and rollbacks in other New Deal social-welfare programs.[134] While many among the wealthy do, in fact, support such policies, what is surprising is Professor Krugman's conclusion that the causal arrow actually points in the opposite direction.

2. POLITICAL POLARIZATION

Professor Krugman argues that it is not the divergence in wealth between the rich and the middle class that has caused the political polarization that now exists between conservative Republicans and liberal Democrats. Rather, it is political polarization that has caused the present divergence in wealth.[135] Beginning in the mid 1970s, radical right-wing ideologues who were opposed to big government spearheaded a political movement that ultimately succeeded in taking over the Republican Party. The movement was joined by corporate lobbyists; independent oil producers; neo-conservative intellectuals who favored hard-line positions on defense and foreign policy; supply-side economists opposed to progressive taxation; social conservatives; old-line anti-communists; welfare opponents; anti-union business interests; anti-environmentalists; proponents of the religious right; opponents of social security; proponents of social-security privatization; opponents of the inheritance tax; and opponents of governmental regulation in general.[136] The effect of these movement-conservative policies was to benefit the wealthy at the expense of the poor and the middle class. However, Ronald Reagan was successfully able to depict movement-conservative ideological preferences as populist political policies, in a way that appealed to a wide enough segment of the electorate to generate initial electoral victories. As a result of those initial victories, wealthy Republicans became willing to provide the additional funding needed to secure the present dominance of movement-conservative policies in the Republican Party.[137]

Movement-conservative dominance of the Republican Party has thus far extended from the 1980 presidential election of Ronald Reagan

134. *See* KRUGMAN, *supra* note 4, at 7, 10–11.
135. *See id.* at 6–7, 124–52, 169–72.
136. *See id.* at 159–69, 171.
137. *See id.* at 171–72.

through the current Bush/Cheney administration.[138] Using its ample sources of funding, movement conservatism has exerted influence through an interlocking network of people and institutions. This network has included traditional politicians; a strong business base; media organizations; think-tank intellectuals; and publishing companies. The goal of movement conservatism has been to the secure political success by wielding hegemonic power over the nation's political culture. In the pursuit of that end, movement conservatives have used authoritarian control techniques to purge the Republican Party of its moderate members and to ensure the loyalty of the Party's remaining members. Those techniques have included the use of strong financial incentives to influence political behavior; the imposition of strict political discipline on Party candidates and governmental officials; the use of political patronage to fill governmental jobs; the extension of prestigious job offers to loyal public officials after governmental service; the use of targeted press coverage for candidates and issues; the provision of selective access to supportive lobbyists; and even the use of political and economic dirty tricks, including the disenfranchisement of opposition voters.[139]

In a very real sense, movement conservatism is a contemporary plutocracy in which a small class of wealthy ideological elites guides the formation of political and social policy in a way that advances its own interests. Krugman argues that movement conservatism is the contemporary analog to the wealthy robber-baron plutocracy that ruled over the formation of governmental policies in the "Long Gilded Age" that followed the Civil War and extended in one form or another until the Depression.[140] Movement conservatism has been wildly successful in producing income inequality. But, because of its plutocratic nature, it has also been wildly undemocratic.[141] Conservative ideologues, with disproportionate political power, have overseen a political process that has made significant cutbacks in social-welfare programs. The wealthy lead lifestyles in which they already purchase basic social services such as education, security, health care, and retirement benefits for themselves, rather than relying on the government to provide those services.[142] As a result, the wealthy are not harmed by cutbacks in social-welfare programs that harm other segments of the population. Moreover, the economic harms produced by those cutbacks are not just confined to the poor, but are also inflicted on the middle-class electorate—an electo-

138. *See id.* at 9–12.

139. *See id.* at 118–121, 163–69.

140. *See id.* at 21–26.

141. *See id.* at 10–11, 267.

142. *See* FRANK, *supra* note 122, at 242–45.

rate that is more likely than the poor to vote.[143] That posed a problem for movement conservatives in their effort to garner support for their political agenda.

B. *The Role of Race*

Because the economic policies of movement conservatism exacerbate economic inequality by increasing concentrations of wealth in a small percentage of the population, middle-class voters should oppose the regressive taxation and cutback in the welfare state that movement conservatives favor.[144] Nevertheless, movement conservatives were successfully able to capture middle-class voters for their political coalition, primarily by exploiting the issue of race. Correctly surmising that a large enough number of middle-class voters would harbor racial prejudices intense enough to override their own economic interests, movement-conservative political candidates made tacit appeals to the xenophobic racial anxieties that those middle-class voters possessed. The strategy worked particularly well for southern white voters, who responded by switching their longstanding political allegiance from the Democratic to the Republican Party.[145]

1. RACIAL ANXIETIES

Voters do not always vote their own interests, but they typically do. Since the 1970s, when movement conservatism began to take hold, public support for social-welfare programs has actually increased. Nevertheless, while the electorate has moved to the left on this issue, movement-conservative Republicans have been winning elections.[146] Thomas Frank's book *What's the Matter with Kansas?* argues that middle-class voters have simply been duped by conservatives into voting for policies that harm their own economic interests.[147] However, Krugman argues that middle-class voters have not so much been duped as seduced by coded forms of race baiting.[148]

Conservatives have traditionally been hostile to the interests of racial minorities. In 1957, William F. Buckley explicitly argued in his magazine, the *National Review*, that southern whites should take whatever measures were necessary to dominate blacks politically and culturally—including disenfranchisement, disregard of democratic

143. *See* KRUGMAN, *supra* note 4, at 192–94.

144. *See id.* at 172.

145. *See id.* at 177–83, 197.

146. *See id.* at 176.

147. *See* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA 1–10 (First Owl Books 2005) (2004).

148. *See* KRUGMAN, *supra* note 4, at 177.

majority rule, and even violence—because the white race was the advanced race.[149] Although such sentiments are rarely expressed so openly today, vestiges of the underlying sentiment appear to persist. Accordingly, when Ronald Reagan began his 1976 presidential campaign, he invoked the image of a "welfare queen" in seeking political support for his assault on the New Deal welfare state. Cultural stereotypes were such that he did not have to mention the race of his fictitious welfare queen. Reagan then began his 1980 presidential campaign with a states' rights speech delivered in Philadelphia, Mississippi—a city where three civil-rights workers had been murdered in 1964, during the height of the civil-rights movement. The race-baiting message was again transmitted without ever explicitly having to mention race.[150]

What Ronald Reagan did was show movement conservatives how they could appeal to white middle-class racial prejudices in understated ways that were acceptable in polite conversation. Having mastered those techniques, movement conservatives then successfully forced an association between poverty and race in the minds of middle-class voters. That enabled movement conservatives to enlist the aid of white middle-class voters in resisting redistributive social-welfare programs—even when those programs would benefit the white middle class. Movement conservatives were able to do this by depicting disfavored redistributive initiatives as programs designed to aid racial minorities.[151] Tacit appeals to voter racism, therefore, supplied a boost to the movement-conservative political agenda. When that boost was combined with the movement-conservative support that came from national-security hawks, the religious right, and the disenfranchisement of lower-income workers, movement conservatives had secured the political support needed not only to dominate the Republican Party, but to prevail on many of the national policy issues that they favored as well.[152]

2. SOUTHERN WHITE VOTERS

Krugman is precise in his identification of the voters for whom the movement-conservative race-baiting strategy worked. The strategy worked on southern white voters.[153] Prior to the rise of movement conservatism, the South had been strongly Democratic. That was because the Republican Party was still viewed in the South as the party of Abraham Lincoln—the President who is commonly viewed as having freed

149. *See id.* at 101–04.
150. *See id.* at 178–79.
151. *See id.* at 179.
152. *See id.* at 183–94.
153. *See id.* at 179–83.

the slaves.[154] In addition, Democrats had secured southern support for the New Deal welfare state by tolerating continued racial segregation in the South.[155] The rise of the civil-rights movement in the 1960s, however, caused the South to break with the Democratic party.

When President Lyndon Johnson signed the Civil Rights Act of 1964, he correctly predicted that he had just delivered the South to the Republican Party for the rest of his lifetime.[156] In 1964, Barry Goldwater's arch-conservative, states' rights presidential campaign emphasized his opposition to the Civil Rights Act of 1964. Although Goldwater was soundly defeated in the national election, all of the states that Goldwater won outside of his home state of Arizona were in the South.[157] Much of the South then voted for segregationist George Wallace in 1968, and Ronald Reagan was able to win southern states with coded appeals to segregationists in 1980.[158] Although the Republican Party had taken control of Congress and the White House by 2004, in the fifty years that elapsed between 1954 and 2004, the Democrats actually *gained* seats outside the South in the House of Representatives. The Democratic loss of power was produced entirely by the switch of southern voters from the Democratic to the Republican Party. Moreover, the voters who switched their party allegiance were white.[159] In 1954, southern voters were heavily Democratic at all income levels. By 2004, however, white Southern Democratic support had eroded. Although low-income white southerners were still as likely to vote Democratic as low-income voters in the rest of the country, middle- and upper-income white Southerners had by then become disproportionately Republican.[160] In both the 2000 and 2004 presidential elections, whites outside the South favored George W. Bush by modest margins, but white Southerners favored Bush by margins of thirty-five percent or more. That was enough white southern

154. In 1863, President Abraham Lincoln issued the Emancipation Proclamation, which stated that "all persons held as slaves within any State or designated part of a State, the people whereof [are] in rebellion against the United States, [are henceforward], and forever free." Abraham Lincoln, A Proclamation (Jan. 1, 1863), *reprinted in* JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION 96 (1963). In fact, the Emancipation Proclamation purported to free the slaves only in southern states that had seceded from the Union—states that, because of their secession, no longer recognized the authority of President Lincoln. Lincoln did not purport to free the slaves in northern states, which did recognize his authority, or in areas of the South that were under federal occupation. *See* FRANKLIN, *supra*, at 141–42, 151–53. Slavery was later abolished throughout the United States in 1865, with the adoption of the post-Civil War Thirteenth Amendment. *See* U.S. CONST. amend. XIII.

155. *See* KRUGMAN, *supra* note 4, at 180–81.

156. *See id.* at 99.

157. *See id.* at 181.

158. *See id.*

159. *Id.*

160. *Id.* at 182.

support to offset the heavily Democratic vote of black Southerners, and to give Bush two presidential-election victories that he would not have been able to obtain without the support of white southern voters.[161]

The movement-conservative strategy of equating governmental social-welfare spending with handouts to blacks in the minds of middle-class white voters also seems to have been effective. In general, the higher a state's black population is in percentage terms, the lower that state's per-person spending will be on social-welfare programs. Moreover, opposition to social-welfare spending has historically been linked to race. In the late 1940s, President Truman sought to implement a universal-health-care plan that would have resembled our current Medicare program. Although the plan had overwhelming public support, it was never adopted—in part because Southern whites who would have benefited from the plan opposed it out of fear that it would lead to racially integrated hospitals.[162] It remains to be seen how much of our contemporary failure to adopt universal health care can be explained by the continuing link between social-welfare spending and racial-minority interests in the minds of middle-class voters.

There is one other significant way in which movement conservatives have been able to use racial antipathy to advance their political agenda. That is through the use of voter fraud. Voter fraud has always been a staple of electoral politics in the United States, taking forms ranging from physical voter intimidation to less transparent forms of vote suppression. Movement conservatives have in the past utilized vote-suppression tactics to disenfranchise racial-minority voters. For example, in the 2000 presidential election, Florida's Republican Secretary of State Katherine Harris purged eligible voters from the voting rolls by falsely identifying those voters as felons. The purged voters were disproportionately black, and George W. Bush would not have been elected President if those voters had not erroneously been excluded from the election.[163] In 2005, Justice Department staff lawyers refused to approve a voter-identification law passed by the Republican Georgia legislature on the ground that the law was likely to discriminate against black voters in violation of the Voting Rights Act. Nevertheless, their decision was simply overruled by the Republican political appointees who ran the Bush Justice Department. The reversal was part of an orchestrated movement-conservative strategy to transform Justice Department voting rights "enforcement" into a mechanism for suppressing racial-minority

161. *Id.*
162. *Id.* at 179–80.
163. *See id.* at 195.

votes.[164] We do not yet know the degree to which electronic voting machine corruption has in the past or will in the future lead to undercounting of racial-minority votes, although such electronic voter fraud now seems technologically available to those with an inclination to use it.[165]

According to Krugman, the movement-conservative story is a fairly simple one. Movement conservatives do, in fact, constitute the "vast right-wing conspiracy" that they are often alleged to comprise, and they have successfully taken control of the Republican Party. They have moved governmental policies sharply to the right, in a way that has exacerbated the divergence of wealth in the United States. The resulting concentration of wealth in a small segment of the population has harmed and alienated middle-class voters to the extent that those voters are now gradually moving toward the Democratic Party. But movement–conservative Republicans have thus far been able to offset this leftward shift by exploiting the racial prejudices of white middle-class voters in sufficient numbers to secure and maintain political domination of the South.[166] And the Supreme Court has helped.

III. THE CONSCIENCE OF A COURT

It has been clear to me for some time now that an important function of the Supreme Court in United States culture has been to facilitate the sacrifice of racial-minority interests for the benefit of the white majority.[167] However, it has never been clear to me *why* the Court would care so much about actively promoting such racial exploitation. Because the Supreme Court is at bottom a political institution, I would have expected the Court to *reflect* the prevailing racial attitudes of the elite, white, majority constituents that it represents. But that does not explain why the Court would want to *nullify* concessions that a democratic majority voluntarily chose to accord racial minorities. Nevertheless, that is what the Court did in the *Resegregation* case and in numerous other affirmative-action cases over the last thirty years.[168] The Krugman the-

164. *See id.* The Supreme Court has since upheld from facial attack the constitutional and Voting-Rights-Act validity of a partisan Indiana voter-identification law that was alleged to have a discriminatory impact on minority voters and other classes of voters who tended to vote Democratic. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1613–15, 1623–24 (2008) (opinion of Stevens, J.).

165. *See* KRUGMAN, *supra* note 4, at 196–97.

166. *See id.* at 180.

167. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT 19–26, 94–99, 104–60 (1993) (arguing that Supreme Court has historically performed "veiled majoritarian" function of sacrificing racial-minority interests for benefit of white majority).

168. *See supra* text accompanying notes 29–33 (discussing Supreme Court conservative voting bloc).

sis, however, suggests an explanation for this judicial behavior. Krugman argues that movement conservatives have intentionally used tacit appeals to white racial antipathy as the bond that holds its Republican political coalition together. I view the five-Justice conservative voting bloc that has dominated the Supreme Court for the last twenty years as simply the doctrinal arm of the movement-conservative political machine.

One aspect of the movement-conservative strategy that has made it so successful is the multi-pronged network that it uses to advance its political agenda. Movement-conservative operatives include not just politicians, but business leaders, media moguls, publishers, and intellectuals.[169] I think that the Supreme Court has also served as a political operative for the movement-conservative mission. Unlike the intellectual arm of the movement, whose task has been to offer justifications for the Republican political agenda that are rooted in economic and political theory,[170] the function of the Supreme Court has been to offer justifications that are rooted in constitutional law. Because the Court is widely viewed as possessing the institutional competence required for constitutional exposition, a significant segment of the population will typically accept the Court's constitutional pronouncements. That is particularly true when the Court reads the Constitution to coincide with views and preferences that are already shared by those segments of the population. Stated more succinctly, movement conservatives need their exploitation of racial-minority interests to be perceived as culturally legitimate, because most of the white middle-class potential supporters that the movement targets do not think of themselves as openly racist. The Supreme Court helps to satisfy that need by making such racial exploitation constitutionally permissible. Indeed, the Court sometimes deems such exploitation to be constitutionally compelled.

The *Resegregation* case illustrates the manner in which the Court can comfort movement-conservative voters by reading the Constitution to protect segregation, despite *Brown*'s repudiation of *Plessy*.[171] The *Resegregation* case, of course, enables white, middle-class, Republican voters to send their children to white, de facto segregated schools—rather than to schools that are also attended by racial-minority children. But the case also does much more. It gives white, middle-class, Republican voters constitutional "cover" for their racially discriminatory preferences. Thanks to the Court, neither the attitudes nor the behavior of the

169. *See* KRUGMAN, *supra* note 4, at 115–20, 163–69.

170. *See id.* at 115–20.

171. *See supra* Part I.B.1 (arguing that *Resegregation* case overruled *Brown* and reinstated separate-but-equal regime of *Plessy*).

movement-conservative Republican electorate can properly be condemned on the ground of supposed racial intolerance. Rather, such attitudes and behavior should be congratulated, because they coincide with a proper appreciation of what the constitutional concept of equality supposedly requires. By thus inverting the concepts of equality and discrimination, the Supreme Court places its constitutional seal of approval on the movement–conservative tactic of race baiting.[172] Use of the Supreme Court as the doctrinal arm of the movement-conservative political program may well be racially expedient. I suspect that conservative-bloc Justices may even believe, as a matter of conscience, that they are acting in a way that will benefit the nation. But, I also believe, that as a matter of conscience, the conservative bloc has implicated the Supreme Court in the process of intentional discrimination.

A. *Intentional Discrimination*

The Supreme Court has taught us that intentional discrimination based on race is virtually always unconstitutional.[173] Therefore, when the Supreme Court conservative-bloc majority actively chooses to read the Equal Protection Clause in a way that benefits white movement conservatives at the expense of racial minorities, the Court is violating its own reading of the Constitution. As true as that insight might be, it yields only rhetorical benefits, because the Justices are not likely to hold their own adjudicatory actions unconstitutional. Nevertheless, we are not precluded from detecting the hypocrisy entailed in a reading of the Constitution that actually *promotes* racial discrimination. The Court can hardly claim that it is merely following the dictates of the Constitution, because the doctrinal indeterminacy surrounding the words "equal protection" is far too vast to impose any meaningful constraint on the exercise of judicial policymaking discretion.[174] Moreover, the Supreme Court has a long history of insensitivity to the rights of racial minorities, thereby lending further credibility to the claim that the current Court is

172. *See supra* text accompanying notes 118–20 (discussing Supreme Court inversion of concepts of equality and discrimination).

173. *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (holding that intentional discrimination triggers strict scrutiny under Equal Protection Clause). The only two cases in which a racial classification has survived strict equal-protection scrutiny are the now-discredited World War II Japanese American exclusion case of *Korematsu v. United States*, which upheld a World War II exclusion order that led to the internment of Japanese Americans, 323 U.S. 214, 215–20 (1944), and the recent affirmative-action case of *Grutter v. Bollinger*, which upheld the University of Michigan Law School's affirmative-action plan as a narrowly tailored means of advancing the compelling interest in student diversity, 539 U.S. 306, 328 (2003).

174. *See generally* SPANN, *supra* note 167, at 26–82 (arguing that doctrine cannot constrain judicial discretion).

simply ruling against racial minorities for political reasons.[175] There are at least two interesting tactics that the Court has used to promote movement-conservative racial divisiveness, while making its own intentional discrimination against racial minorities seem legitimate.

1. DOG-WHISTLE POLITICS

"Dog-whistle politics" is a British term used to describe a rhetorical technique that enables a speaker to send a charged message to a target audience, while simultaneously sending an innocuous version of that message to a general audience.[176] Like the sound of a dog whistle, only the intended audience can "hear" the charged message that is transmitted for its benefit. When George W. Bush denominated himself a "compassionate conservative," his general audience understood him to be providing assurance that he would not unduly undermine the social-welfare safety net that had been in place since the New Deal. However, his target audience understood that Bush was actually making reference to a religious-right mode of thought that favored dispensing charity and religion together through private faith-based initiatives, rather than through secular governmental programs.[177] Similarly, when Ronald Reagan wished to appeal to the racist sentiments of his target voters, without alienating general voters who might be offended by a more explicit invocation of race, he relied on dog-whistle politics to conjure up the image of a "welfare queen"—whose abuse of governmental generosity stereotypically implied all that needed to be said about her race.[178]

The Supreme Court is also able to use dog-whistle politics as a means of transmitting coded messages to a target audience, without explicitly disclosing a deeper meaning to a more general audience. In fact, the Court can use doctrinal exposition to transmit coded messages to its movement-conservative allies that have the *opposite* meaning of the messages received by general readers of the Court's opinions. Such dog-whistle adjudication has the effect of making Supreme Court opinions seem facially plausible, while actually producing a political effect that would undermine the Court's credibility if advanced directly.

In the *Resegregation* case, the insistence by Chief Justice Roberts that invalidation of the Louisville and Seattle integration plans was required by some colorblind, race neutrality requirement of *Brown* is an example of politically-motivated, dog-whistle adjudication. As has been

175. *See supra* text accompanying notes 85–93 (describing Supreme Court history of hostility to racial-minority interests).

176. *See* KRUGMAN, *supra* note 4, at 102.

177. *See id.* at 190–91.

178. *See id.* at 178.

discussed, those who understand the historical and doctrinal contexts out of which *Brown* emerged realize that the Roberts Court was actually overruling rather than following the holding in *Brown*.[179] Nevertheless, the Roberts opinions had a different effect on two other audiences. The target audience for the opinion consisted of parents who *did* want to steer their children to racially segregated schools, but who *did not* want to be viewed as racists because of their efforts to do so. Justice Roberts assured those parents that *Brown* could be manipulated to encompass their racial preferences in a way that was consistent with the Equal Protection Clause of the Constitution. The more general audience for the opinion simply accepted the colorblind, race-neutrality rhetoric of the Roberts opinions, because that audience had neither a personal stake in the outcome nor a doctrinal understanding of how the *Brown* precedent was being manipulated. By employing the adjudicatory version of dog-whistle politics, the Roberts Court tried to satisfy the discriminatory desires of its favored political constituents without losing the legitimacy needed to continue engaging in constitutional exposition that would be acceptable to the population at large. Although I hope that the Court will now be perceived as having overstepped the bounds of doctrinal plausibility in its *Resegregation* decision, it remains to be seen whether my hopes will be realized.

2. WATERBOARDING

The second tactic that the Supreme Court has used to maintain its perceived legitimacy, while actually engaging in movement-conservative racial politics, is a technique that I refer to as "waterboarding." Although I think that the Court has had to torture constitutional doctrine in order to reach the result that it reached in the *Resegregation* case, that is not why I use the term. Rather, I use the term metaphorically to represent a rhetorical tactic that rests on the practice of doctrinal diversion. Many people consider the extremely unpleasant interrogation technique of waterboarding to be a form of torture that is now illegal under United States and international law.[180] Rather than announcing that the United States will no longer use waterboarding as an interrogation technique, however, the Bush Administration has instead initiated a debate about whether waterboarding does or does not technically constitute

179. *See supra* text accompanying notes 118–120 (discussing use of "colorblindness" to overrule principles established by *Brown*).

180. *See* Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 89–96 (2007) (discussing legality of waterboarding and other forms of torture).

unlawful torture.[181] Moreover, the Administration has successfully used that debate to divert attention from the more meaningful debate that we should be having about whether it is permissible for the United States to be engaged in the practice of waterboarding, regardless of whether waterboarding constitutes torture.

As a rhetorical technique, "waterboarding" focuses attention on a relatively unimportant collateral issue in order to divert attention from a more important substantive issue that should be under consideration. This form of doctrinal diversion is unfortunate, because it permits a given questionable practice to continue without ever requiring the practitioner to justify that questionable practice on the merits.[182] The Bush Administration's practice of detaining enemy combatants in Guantánamo Bay provides another illustration.[183] We *should* be debating whether it is permissible to detain large numbers of human beings, who have never been convicted or even charged with a crime, under harsh conditions, for indefinite periods of time, without according them their customary legal rights. But, instead we are debating whether we should use a military or judicial tribunal to resolve the many legal issues that surround the confinement of those human beings.[184] Once again, collateral issues relating to the nature of the proper tribunal have been used to divert public attention from the fact that at least some innocent individuals continue to be confined for long periods of time without their confinement ever having been justified by the Administration that is confining them.

Like dog-whistle politics, waterboarding also has a judicial variant. In the *Resegregation* case, Chief Justice Roberts utilized judicial-waterboarding tactics on numerous occasions to divert attention away from the actual school resegregation he was producing, and to refocus attention on a series of subsidiary collateral issues that were of mere technical importance. In fact, each of the seven propositions asserted in the Roberts litany of reasons for viewing the Louisville and Seattle integration plans as unconstitutional concerned such technical, collateral issues. Chief Justice Roberts diverted our attention to the standard-of-review debate; the nature of qualifying diversity; the nature of narrow

181. *See id.* at 99–110 (describing Bush Administration efforts to circumvent legal prohibitions on waterboarding and other forms of torture).

182. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1014–18, 1028–32 (2008) (describing how procedural rather than substantive issues have dominated legal analysis of torture).

183. *See id.* at 1028–32 (discussing Supreme Court Guantánamo cases).

184. *See id.* (discussing procedural issues in Supreme Court Guantánamo cases); Boumediene v. Bush, 128 S. Ct. 2229, 2262–75 (2008) (holding that Guantánamo detainees had constitutional right to habeas corpus, rather than mere truncated procedures before military tribunal).

tailoring; the relevance of racial balancing; the effect of societal discrimination; the distinction between de facto and de jure discrimination; and the relevance of colorblindness. He rarely even mentioned the fact that the lower courts had found that invalidation of the programs at issue would lead to the resegregation of the Louisville and Seattle schools.[185] One could properly ask why those doctrinal issues are even marginally related to the overriding issue of school resegregation that was at stake in the case, but the answer would be disheartening. Those issues are relevant only because the Supreme Court has chosen to make them so. Over the last twenty years, the Court has chosen to develop equal-protection doctrine for affirmative-action cases in a way that focuses attention on those subsidiary collateral issues, rather than on the overriding issue of whether an affirmative-action program would actually promote or undermine equality for racial minorities. The Supreme Court has become so skillful in utilizing the waterboarding diversion technique that the Court has now actually built the desired diversions into the governing constitutional standards themselves. By using the technique of judicial waterboarding, the Supreme Court has diverted our attention away from threatening inquiries into the substantive meaning of the Constitution and redirected our attention so that it settles harmlessly on extraneous questions about the mere mechanics of constitutional doctrine.

B. *Judicial Plutocracy*

The institution of judicial review is plutocratic in nature. Because the meaning of most constitutional provisions is largely indeterminate, constitutional meaning ends up consisting largely of the normative values favored by the Supreme Court justices who prescribe it. Because those justices tend to be members of the wealthy elite that controls the formation of governmental policy, the normative values that the justices favor tend to be values that will advance the interests of that governing elite. Such a process for prescribing constitutional meaning may sometimes fail to reflect the will of the democratic majority. But that failure is not deemed fatal to the legitimacy of judicial review, because judicial review is intended to be a countermajoritarian activity. However, the fact that the Supreme Court possesses the raw institutional power to interpret the Constitution in a way that advances the interests of a plutocratic elite does not mean that it is proper for the Court to exercise that power in a parochial or self-interested way. A properly functioning

185. *See supra* Part I.B.2 (discussing litany of propositions invoked to support *Resegregation* decision).

Supreme Court should have higher aspirations. It should aspire to interpret the Constitution with both integrity and responsibility.

1. DOCTRINAL INTEGRITY

Even if constitutional doctrine is largely indeterminate, some readings of the Constitution are simply unacceptable. They are unacceptable because they lack doctrinal integrity. In the *Resegregation* case, the majority and dissenting justices offered different readings of the Constitution, which led to different constitutional results.[186] In a strict doctrinal sense, however, the reasoning in all of those opinions was equally logical. The differences between the opinions had more to do with the normative preferences of the Justices who wrote them than with any differences in their analytical abilities. Nevertheless, the majority, plurality, and concurring opinions in the *Resegregation* case simply seem wrong.

Whatever *Brown* and the Equal Protection Clause ultimately mean, they cannot mean that it is now okay to resegregate our schools in a way that may be the harbinger of an even more general resegregation of our society. Wherever *Brown* and the Equal Protection Clause are ultimately trying to take us, the *Resegregation* decision seems to be taking us back in the wrong direction. It seems to be transporting us back to a time in which we will be forced to relive the pains of racial caste all over again, and will be forced to do so for no legitimate reason. The decision's lack of doctrinal integrity seems even more evident if a conservative-bloc majority on the Supreme Court is actually seeking to *promote* racial divisiveness in order to preserve the cohesiveness of a movement-conservative political coalition with which the justices in that majority happen to be in sympathy.[187]

The post-modern nature of analytical reasoning is such that I cannot prove that the *Resegregation* decision lacks judicial integrity. But that does not mean that my claim is not demonstrably true. There are things that I could say whose rhetorical impact might be sufficient to convince you that my claim is valid. I could remind you that the Supreme Court has a horrible history in dealing with the issue of race.[188] Or I could again call to your attention the political affiliations and voting records of the conservative-bloc Justices who voted to invalidate the integration

186. *See supra* Part I.A. (describing opinions in *Resegregation* case).

187. *See supra* Part II (suggesting that Supreme Court is doctrinal arm of movement-conservative political initiative).

188. *See supra* text accompanying notes 85–93 (describing Supreme Court history of hostility to racial-minority interests).

plans at issue in the case.[189] Or I could tell you that the famous civil-rights empiricist Professor Gary Orfield has demonstrated how Reagan Revolution conservatives have utilized the appointment of activist judges to supplant the school desegregation achieved during the 1960s and 1970s with the present resegregation that the Supreme Court has read the Constitution to permit ever since.[190] Or I could tell you that Professor Reggie Oh has argued that the *Resegregation* decision now constitutionalizes the infamous "Parker Doctrine," which the post-*Brown* Supreme Court had to reverse because of its defiant resistance to integration.[191] Or I could tell you that Professor Oh wonders why Chief Justice Roberts did not choose to end his *Resegregation* opinion by reminding us that "[t]he way to stop segregation on the basis of race is to stop segregating on the basis of race," rather than choosing an aphorism that seems intended to *reinstate* segregation.[192] But I suspect that I do not have to convince you that the *Resegregation* decision is wrong, because I suspect that you already know that my claim is true. You may not like it. You may even be actively looking for ways to resist it. But you must, nevertheless, know that it is true. The nature of some truths is such that they transcend mere syllogistic efforts to suppress their validity.

2. JUDICIAL RESPONSIBILITY

In addition to interpreting the Constitution with doctrinal integrity, the Supreme Court should also aspire to interpret the Constitution in a way that is judicially responsible. Even though the Court possesses vast amounts of largely unconstrained judicial discretion, Supreme Court justices should remember that the way in which they exercise that discretion can have actual effects on a wide range of social practices. I doubt

189. *See supra* text accompanying notes 29–33 (describing voting records of conservative-bloc Justices in race cases).

190. *See* Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, *in* LAW AND SCHOOL REFORM 39, 39–41, 45–53 (Jay P. Heubert ed., 1999); Gary Orfield, *Turning Back to Segregation*, *in* DISMANTLING DESEGREGATION 1, 1–5, 16–22 (Gary Orfield et al. eds., 1996).

191. Professor Reggie Oh argues that Chief Justice Roberts is simply constitutionalizing the infamous reading of *Brown* adopted by Judge Parker in the South Carolina federal district court case of *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), where the court relied heavily on *Brown II* to distinguish between desegregation and integration. *See* Reginald C. Oh, *The Constitution Forbids Integration:* Parents Involved in Community Schools v. Seattle School District No. 1 *and the Mis-Interpretation of* Brown I *and* II, 46 U. LOUISVILLE L. REV. (forthcoming 2008). Under this so-called "Parker Doctrine," Judge Parker chose to hold integration hostage to private choice—the very approach that the Supreme Court itself later rejected in *Green v. County School Board*, 391 U.S. 430 (1968). *See* Oh, *supra*.

192. Oh, *supra* note 191. Chief Justice Roberts ended his actual opinion by proclaiming that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (plurality opinion); *see also supra* note 43 (discussing ancestry of this aphorism).

that anyone still subscribes to the *Marbury* model of adjudication, under which the Supreme Court exists to resolve isolated "cases" or "controversies" between the parties before the Court.[193] *Brown v. Board of Education*[194] was hardly a case about whether Linda Brown could attend a particular elementary school in Topeka, Kansas. We have now come to expect that the Supreme Court will make broad social policy pronouncements about abstract, theoretical issues such as school prayer, physician-assisted suicide, and racial discrimination. However, the abstract nature of the modern judicial function should not cause the Justices to lose sight of the tangible effects that their rulings are likely to have on social attitudes and behavior.

The *Resegregation* case opinions read as if they are part of an extended philosophical debate about the desirability of colorblind race neutrality in contemporary culture. And, in a sense, that is precisely what they are. But, because they are also *Supreme Court* opinions—rather than mere academic musings about a topical social-science issue—they are likely to have material effects that should not be simply ignored. As a result of the Court's decision in the *Resegregation* case, public schools in much of the nation may now end up *actually* being resegregated. However, the Supreme Court opinions permitting that result are written in a tone that treats actual resegregation as only marginally relevant to the constitutional exposition being offered. In my view, this failure to focus on the actual consequences of the Court's decision betrays a lack of concern for the racial minorities who will be harmed by the Court's decision, as well as for the society that is likely to be harmed by the continuing inequalities that will ensue. Because the Court's failure to confront the reality of resegregation cannot simply have been an oversight, this lack of judicial concern also betrays a lack of judicial responsibility.

Unfortunately, the Supreme Court often engages in constitutional adjudication that is judicially irresponsible in this sense. Cases like *Dred*

193. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67–73 (5th ed. 2003) (discussing *Marbury* model of adjudication); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 589–92 (1983) (same).

194. 347 U.S. 483 (1954).

Scott,[195] *Plessy*,[196] and *Korematsu*[197] provide infamous examples of instances in which the Supreme Court seems grossly to have underestimated the actual social problems that would be produced by its irresponsible decisions. I fear that the *Resegregation* case may turn out to be similarly irresponsible, in a way that produces similar social problems. The 1968 Kerner Commission concluded that a primary cause of urban unrest during the 1960s was the toxic mixture of persistent white racism combined with the hollow promise of civil-rights equality to racial minorities.[198] I fear that the *Resegregation* Court is heating that same toxic mixture to a boil by exploiting racial minorities at the same time that it purports to be promoting racial equality. Eventually, this combustible combination may prove just as likely to lead to explosive results as it did in the turbulent 1960s. But the movement-conservative Supreme Court majority seems not to be troubled by that possibility. It seems unable to appreciate that the oppressors cannot continue to exploit the oppressed indefinitely without eventually generating a destabilizing backlash. In the contemporary world climate created by ubiquitous terrorist activity, that backlash may turn out to be frightening enough to make the urban riots of the 1960s seem tepid by comparison. The mere possibility that some such result might be produced by a Supreme Court decision makes it seem like the height of judicial irresponsibility for the Court simply to ignore that danger.

CONCLUSION

As I said, I have been driven to the conclusion that the Supreme Court, as a matter of conscience, considers racial discrimination to be good for America. I think this because the *Resegregation* Court went out of its way to invalidate majoritarian efforts to promote racial equality when there was absolutely no doctrinal reason for it to have done so. The *Resegregation* case was decided along ideological lines, by a five-justice conservative voting bloc that has never voted to uphold the claim of a racial minority in a constitutional affirmative-action case. Moreover, the decision tortured the reasoning of *Brown* in an effort to make that landmark decision stand for an inverted conception of equality that

195. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).

196. Plessy v. Ferguson, 163 U.S. 537, 548, 551–52 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities, by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

197. Korematsu v. United States, 323 U.S. 214, 215–19 (1944) (upholding World War II exclusion order that led to Japanese American internment).

198. *See* KRUGMAN, *supra* note 4, at 90–91.

could be used to *promote* racial segregation rather than to eliminate it. In so doing, I believe that the five-justice Supreme Court majority was acting simply as the mouthpiece of a movement-conservative political initiative. The strategy of that initiative is to convince middle-class voters to support economic policies that harm the middle class and favor the rich, by appealing to the racial prejudices of those middle-class voters. The role of the Supreme Court in that endeavor has been to comfort those middle-class voters by assuring them that their racial biases are consistent with—rather than anathema to—the United States Constitution.

Obviously, Supreme Court political action of this sort does not fit into the traditional model of judicial review. Because of its subtle invidiousness, this covert politics may even transform the Supreme Court from "the least dangerous branch" into the *most* dangerous branch of government.[199] Consistent with the Madisonian Republicanism foundations of our constitutional form of government, the Supreme Court should seek to equalize the democratic competition among political factions, rather than assist the wealthiest faction in its effort to dominate other factions.[200] The proper role of the judiciary is to guard against corruption of the political process by faction, but the Roberts Court has instead simply aligned itself with the movement-conservative faction in a way that disregards the Madisonian structural safeguards built into the Constitution. Consistent with representation-reinforcement theories of judicial review, the Supreme Court should intervene in the political process to protect the interests of discrete and insular racial minorities, rather than assist in elite white "majority" efforts to promote racial exploitation.[201] The idea that the Constitution exists to protect wealth and property interests of an aristocratic elite from the redistributive threats posed by democratic politics is not a new one.[202] But, I had hoped that it was an idea whose time had both come and gone. The *Resegregation* decision suggests that my hope in this regard has not been well-founded.

I do have another hope, however, that may ultimately fare better. My hope is that the racially regressive politics of the Supreme Court in the *Resegregation* case has now become so palpable that the democratic majority will no longer be willing to tolerate judicial nullification of its

199. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press 2d ed. 1986) (1962) (elaborating on claim of Framers that federal judiciary would be least dangerous branch of government).

200. *See* STONE ET AL., *supra* note 86, at 12–29 (discussing Madisonian Republicanism).

201. *See id.* at 722–24 (discussing representation-reinforcement theory).

202. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 19–63, 73–188 (Norwood Press 1948) (1913); STONE ET AL., *supra* note 86, at 8.

more progressive racial policies—policies such as those that were embodied in the Louisville and Seattle voluntary-integration plans. Only the perception of judicial legitimacy permits the Supreme Court to substitute its policy preferences for the preferences of the democratic majority. And once that perception erodes, cases such as *Dred Scott*[203] and *Lochner v. New York*[204] demonstrate that the Court will no longer be able to command popular deference to its countermajoritarian policies. Given the Supreme Court's dismal history in dealing with the issue of race, it would be quite arrogant for the Court to think that it could do a better job than the political branches in formulating sound racial policy. Perhaps that arrogance will facilitate the loss of judicial legitimacy that I think would promote racial equality. Professor Krugman has suggested that the era of movement-conservative political domination may be coming to an end. Economic hardships are causing the middle class to reconsider its political affiliations, and larger immigrant populations are making the politics of racial exploitation less effective than it has been in the past.[205] If that is correct, there is even more reason to hope that the legitimacy of Supreme Court policymaking will now be called into question. Even if the Supreme Court genuinely believes, as a matter of conscience, that continued racial discrimination is good for America, that is not a belief that the rest of us should find to be morally or constitutionally acceptable. Nevertheless, after 232 years, the United States remains a nation that has yet to master the art of racial equality. And that necessarily gives one pause, even in the most hopeful of moments.

203. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407, 452 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).

204. 198 U.S. 45, 64 (1905) (invalidating as constitutional-due-process violation New York maximum-hours health-and-safety legislation for bakers).

205. *See* KRUGMAN, *supra* note 4, at 198–213 (discussing loss of movement-conservative political influence).