

*PLESSY 2.0*

by  
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*In its infamous 1896 decision in Plessy v. Ferguson the Supreme Court of the United States held that a Louisiana statute mandating separate but (in reality not) equal railway accommodations for black and white passengers did not violate the Fourteenth Amendment's Equal Protection Clause. One hundred and eleven years later, in Parents Involved in Community Schools v. Seattle School District No. 1, the Court held that the same clause prohibited racial integration and diversity plans voluntarily adopted by public school districts in Seattle, Washington and in the Louisville, Kentucky metropolitan area. This Article argues that Chief Justice John Roberts' plurality opinion in Parents Involved is reminiscent of, and indeed resurrects certain aspects of, Plessy's pre-1900 equal protection analysis, as both decisions ignored racial realities and social meanings of race and insulated racial hierarchy and the racial status quo from integrative change. Plessy's and Parents Involved's analytical commonalities and formalistic approaches to, and constructions and constrictions of, the Equal Protection Clause reveal the ways in which constitutional law and history can be circular rather than linear, regressive rather than progressive.*

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*“It does not follow because you cannot make certain classifications, you cannot make some classifications.”\*\**

## I. INTRODUCTION

In matters of race and, more specifically, racial integration, those who have come to the U.S. Supreme Court seeking race-conscious and integration-protective constructions of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution have experienced the reality that the mandated “equal protection of the laws” has been and continues to be elusive and often illusive.<sup>1</sup> Consider, in this regard, three cases decided by the Court at various points in a span of time beginning in the late nineteenth century and ending in the early twenty-first century.

The Court’s infamous 1896 decision in *Plessy v. Ferguson* held that a Louisiana statute requiring separate but (in reality not) equal railway accommodations for black and white passengers did not violate the Equal Protection Clause.<sup>2</sup> In so holding, the Court reasoned that the

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\*\* Transcript of Oral Argument at 10, *Briggs v. Elliott*, 347 U.S. 497 (1954) (No. 101), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 307, 317 (Philip B. Kurland & Gerhard Casper eds., 1975) (statement of Justice Felix Frankfurter).

<sup>1</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>2</sup> *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

challenged law was a “reasonable regulation” and that Louisiana was “at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”<sup>3</sup> To those who believed (correctly) that this “enforced separation of the two races stamps the colored race with a badge of inferiority,” the Court opined that any such inferiority was “not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>4</sup>

Fifty years later, in its unanimous opinion in *Brown v. Board of Education (Brown I)*,<sup>5</sup> the Court’s “greatest anti-discrimination decision,”<sup>6</sup> the Court rejected *Plessy*’s approach to, and construction of, the Equal Protection Clause as applied in the context of elementary and secondary public school education. Chief Justice Earl Warren, writing for the Court, stated that the separation of black 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.”<sup>7</sup> Racial segregation “in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law . . . .”<sup>8</sup>

Most recently, and 111 years after *Plessy*, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1* held that racial integration and diversity plans voluntarily adopted by public school districts in Seattle, Washington and in the Louisville, Kentucky metropolitan area violated the Equal Protection Clause.<sup>9</sup> Chief Justice John G. Roberts, Jr., writing for a plurality of the Court, opined that those who sought the invalidation of the plans were “more faithful to the heritage” of *Brown I*.<sup>10</sup> In support of this position, Roberts quoted the following passage in the *Brown I* plaintiffs’ 1952 brief to the Court: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.”<sup>11</sup> “What do the racial classifications at issue here do,” Roberts asked, “if not accord differential treatment on the basis of race” and

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<sup>3</sup> *Id.* at 550.

<sup>4</sup> *Id.* at 551.

<sup>5</sup> 347 U.S. 483 (1954).

<sup>6</sup> David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 937 (1989).

<sup>7</sup> 347 U.S. at 494.

<sup>8</sup> *Id.*

<sup>9</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

<sup>10</sup> *Id.* at 2767 (plurality opinion).

<sup>11</sup> *Id.* (alteration in original) (quoting Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument at 15, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 78288).

“determine admission to a public school on a racial basis?”<sup>12</sup> The *Parents Involved* plurality thus placed the *Brown I* plaintiffs and their lawyers who fought American apartheid’s unconstitutional, exclusionary, and immoral subordination of African-Americans on the same side as those who asked the Court to strike down Seattle and Louisville’s voluntary efforts to address the vestiges, consequences, and current manifestations of this Nation’s lived and living experiences with race and racism.

*Parents Involved* is a significant and troubling development in the historical and ongoing debate over the legal and sociopolitical meaning of the Equal Protection Clause as applied to raced<sup>13</sup> and racialized<sup>14</sup> persons of color. Chief Justice Roberts’ plurality opinion, resurrecting and reflecting the formalism<sup>15</sup> of the Court’s pre-1900 equal protection analysis, ignored the historical and social meanings of race as it decided the constitutionality of the at-issue integration plans. To interpret and apply the clause as if history had not occurred, to act as though the past is not connected to the current realities of racial segregation and resegregation, is to insulate entrenched racial hierarchy and the racial status quo from integrative change. To decide whether and which integrationist measures are permitted or prohibited by the Equal Protection Clause via an interpretive approach in which all race-conscious governmental decision making, the exclusive as well as the inclusive, is the same, is to place beyond the reach of the clause racialism in the real, and not in some imagined, world. In these respects, the *Parents Involved* plurality opinion is reminiscent of, and resurrects certain aspects of, *Plessy*.

This Article addresses *Plessy* and *Parents Involved*’s analytical commonalities and formalistic approaches to, and constructions of, the Equal Protection Clause. The discussion unfolds as follows. Part II begins with an overview of important constitutional, legal, and political developments preceding the Court’s decision in *Plessy*, and then examines the Court’s negative answer to the question whether Louisiana’s separate-but-equal statute violated the Equal Protection Clause. Part III turns to and discusses *Brown* and the Court’s break with

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<sup>12</sup> *Id.* at 2767–68.

<sup>13</sup> An individual is “raced” when “others in society are inclined to classify him on the basis of certain markers and if, in turn, this classification constitutes the basis of differential actions affecting his welfare.” GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 22–23 (2002).

<sup>14</sup> Persons are racialized when they are subordinated by a majority of a society and that subordination is “enforced by the perception of racial difference . . . .” Luis Angel Toro, “A People Distinct From Others”: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 *TEX. TECH L. REV.* 1219, 1230 (1995).

<sup>15</sup> On formalism, see generally ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 95–98 (rev. 2d ed., Hart Publishing 2005) (1992); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 105–07 (1997); Brian Leiter, *Positivism, Formalism, Realism*, 99 *COLUM. L. REV.* 1138 (1999); Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988).

the *Plessy* analysis and worldview. Parts IV, V, and VI explore the resistance to *Brown* and, more specifically, the ways in which President Richard M. Nixon and the Burger and Rehnquist Courts contributed to the bleaching of the seminal 1954 decision. Part VII focuses on and critiques Chief Justice Roberts' and Justices Clarence Thomas and Anthony Kennedy's opinions in *Parents Involved*, and contends that certain features of the Court's 2007 ruling are reminiscent of the formalism and reality-blindness on display in *Plessy*. As argued herein, *Parents Involved* is an important exemplar and reminder of the ways in which constitutional law and history can be circular rather than linear, regressive rather than progressive.

## II. PLESSY

In *Plessy v. Ferguson*, the Supreme Court considered Homer Plessy's challenge to a Louisiana law mandating separate railway accommodations for black and white passengers.<sup>16</sup> Did this separate-but-equal requirement "deny to any person" in Louisiana "the equal protection of the laws"?<sup>17</sup> Before considering the Court's negative answer to this question, a brief discussion of significant constitutional and political developments in the decades preceding the Court's decision may provide a helpful backdrop for our consideration of the Court's 1896 construction of the Fourteenth Amendment.

### A. The Clause and Pre-Plessy Court Rulings

#### 1. African-Americans and the Post-Civil War New Slavery

Following the April 1865 formal cessation of hostilities in the Civil War and the ratification of the Thirteenth Amendment's formal proscription of slavery,<sup>18</sup> southern states moved to limit the newfound rights of freed persons. "The civil and political status of the freedmen remained unclear at war's end, it being uncertain whether the Thirteenth Amendment did anything more than abolish the legal condition of chattel slavery."<sup>19</sup>

In 1865, the states of the former Confederacy enacted Black Codes "legislat[ing] the freed slaves into a condition as close to their former one as it was possible to get without actually reinstating slavery,"<sup>20</sup> and "practically recrea[ting] slavery for African-American agricultural workers

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<sup>16</sup> 163 U.S. 537 (1896).

<sup>17</sup> U.S. CONST. amend. XIV, § 1.

<sup>18</sup> See U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

<sup>19</sup> PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY 19 (2006).

<sup>20</sup> NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 34 (2006).

by prescribing their labor terms in detail.”<sup>21</sup> Louisiana’s Black Code, for instance, provided that “[e]very negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro,” and mandated that black persons had to have travel permits and obey curfews.<sup>22</sup> Mississippi’s Black Code criminalized black ownership, rental, or leasing of property outside of towns and cities and ordered that each black person had to have proof of lawful employment.<sup>23</sup> The Texas Black Code “required blacks to have a contract if the job they were working on lasted more than a month. Once under contract, laborers were at the mercy of their employers, who could fine them for everything from sickness to ‘idleness.’”<sup>24</sup> African-Americans were also subjected to whippings,<sup>25</sup> lynchings, and the enforcement of the new slavery by governmental authorities and white vigilantes.<sup>26</sup>

Black workers who were not employed or did not have written labor contracts or government licenses allowing them to practice a particular trade were charged with and convicted of vagrancy.<sup>27</sup> Upon conviction, they “were fined heavily and could be hired out by the state for a pittance until the fine was paid.”<sup>28</sup> For example, in 1866, Alabama Governor Robert M. Patton, in exchange for a fee of \$5, leased 374 black prisoners to a partnership controlled by the Alabama and Chattanooga Railroad.<sup>29</sup> (Patton later became president of that same railroad.<sup>30</sup>) That same year, Texas provided two railroad companies with 250 “convicts,” with the state receiving a fee of \$12.50 per month.<sup>31</sup>

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<sup>21</sup> DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 8 (2001); see also Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 273 (2005).

<sup>22</sup> MORENO, *supra* note 19, at 19.

<sup>23</sup> See ELLIOT JASPIN, BURIED IN THE BITTER WATERS: THE HIDDEN HISTORY OF RACIAL CLEANSING IN AMERICA 36 (2007).

<sup>24</sup> *Id.*

<sup>25</sup> GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 83 (2006).

<sup>26</sup> PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 17–18 (2002); Akhil Reed Amar, Foreword, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 108 (2000) (“In the case of race, the Black Codes, Jim Crow, lynchings, and disfranchisement have loomed large.”); Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 169 (2003) (“The advent of the Black Codes in 1865 occurred simultaneously with a steep rise in [W]hite vigilantism and lynching.” (alteration in original)).

<sup>27</sup> BRUCE BARTLETT, WRONG ON RACE: THE DEMOCRATIC PARTY’S BURIED PAST 33 (2008).

<sup>28</sup> *Id.*; see also, BERNSTEIN, *supra* note 21, at 10 (noting that vagrancy laws in Georgia, North Carolina, Texas, and Virginia “essentially criminalized unemployment, even temporary unemployment”).

<sup>29</sup> DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 54 (2008).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see also *id.* at 54–57 (describing the practice of every former Confederate

In an 1866 meeting in a Pulaski, Tennessee law office, the Ku Klux Klan (KKK) was first organized.<sup>32</sup> “Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.”<sup>33</sup> Pursuing “the goal of overthrowing federal domination and reestablishing the subordination of the black population,”<sup>34</sup> the KKK’s terroristic atrocities included murder, burning persons at the stake, whippings, the rape of African-American girls, and, in later years, cross burnings.<sup>35</sup>

## 2. *The Civil Rights Act of 1866 and the Fourteenth Amendment*

The Black Codes, later defended by Woodrow Wilson as necessary to control freed slaves,<sup>36</sup> “perpetuated a kind of slavery, described as a twilight zone between slavery and freedom, something that resembled the South Africa apartheid laws.”<sup>37</sup> Responding to the codes, the U.S. Congress, over the veto of President Andrew Johnson,<sup>38</sup> enacted the Civil Rights Act of 1866. This statute provided

That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance,

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state, with the exception of Virginia, of leasing black prisoners to businesses).

<sup>32</sup> See Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL’Y & L. 129, 129–30 (2004).

<sup>33</sup> *Virginia v. Black*, 538 U.S. 343, 352 (2003).

<sup>34</sup> LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* 68 (2008).

<sup>35</sup> See *Black*, 538 U.S. at 353; *id.* at 389 (Thomas, J., dissenting); KEITH, *supra* note 34, at 69; Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 754 n.280 (2002).

<sup>36</sup> In a 1901 magazine article, Wilson argued that the Black Codes were necessary to control freed slaves who, in his view, were “unpracticed in liberty, unschooled in self-control; never sobered by the discipline of self-support, never established in any habit of prudence; excited by a freedom they did not understand, exalted by false hopes; bewildered and without leaders, and yet insolent and aggressive; sick of work, covetous of pleasure—a host of dusky children untimely put out of school.” BARTLETT, *supra* note 27, at 97 (quoting Woodrow Wilson, *The Reconstruction of the Southern States*, ATLANTIC MONTHLY, Jan. 1901, at 1). For more on Wilson’s prejudiced views about blacks, see A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 576–77 (1990).

<sup>37</sup> Eileen Kaufman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1981*, 22 TOURO L. REV. 1059, 1074–75 (2007).

<sup>38</sup> ALEXANDER TSEIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 99 (2008) (discussing President Johnson’s veto). One supporter of Johnson’s veto, Senator James H. Lane of Kansas, “sensed that his reputation and popularity would never recover” and committed suicide. EPPS, *supra* note 25, at 248.

regulation, or custom, to the contrary notwithstanding.<sup>39</sup>

Thereafter, the race-conscious thirty-ninth Congress,<sup>40</sup> “aim[ing] to provide an unimpeachable legal foundation” for the 1866 legislation,<sup>41</sup> proposed the Fourteenth Amendment; that amendment was officially added to the Constitution in 1868.<sup>42</sup> At the time of ratification, and reflecting the Reconstruction-era taxonomy of rights (civil,<sup>43</sup> political,<sup>44</sup> and social<sup>45</sup>), the Framers of the Amendment generally understood that the Amendment addressed and guaranteed only civil rights<sup>46</sup> and “never expected blacks to become social equals with whites.”<sup>47</sup> (As will be seen,

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<sup>39</sup> Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1981 (2006)).

<sup>40</sup> “From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.” Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985); see also Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997).

<sup>41</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 381 (2005); see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 187 (1998) (stating that Section 1 of the Fourteenth Amendment “was consciously designed and widely understood to embrace” the Civil Rights Act of 1866); *Neal v. Delaware*, 103 U.S. 370, 386 (1881) (stating that the Fourteenth Amendment “secure[s] to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons”). But see Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don’ts and Three Dos*, 16 WM. & MARY BILL RTS. J. 433, 445–48 (2007) (arguing that the Fourteenth Amendment should not be regarded as the Civil Rights Act of 1866 “in [c]onstitutional [d]ress”).

<sup>42</sup> U.S. CONST. amend. XIV.

<sup>43</sup> Civil rights, provided in and protected by the Civil Rights Act of 1866, referred to “freedom of contract, property ownership, and court access.” MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 19 (2004). Holding in *Buchanan v. Warley*, 245 U.S. 60 (1917), that a local law prohibiting blacks from buying houses in predominantly white neighborhoods violated the Fourteenth Amendment, the Court stated that the “right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.” *Id.* at 81. The Court noted that the law did “not deal with the social rights of men” and that the case before it did “not deal with an attempt to prohibit the amalgamation of the races.” *Id.* at 79, 81.

<sup>44</sup> Political rights included voting or jury service. See KLARMAN, *supra* note 43, at 19.

<sup>45</sup> Social rights referred to the right to marry (but did not include the right to marry a person of another race) and to attend public school (but not a racially integrated school). *Id.* As will be seen, the *Plessy* Court opined that state-mandated separation of black and white students and bans on interracial marriages were constitutional exercises of state police power. See *infra* notes 81–83 and accompanying text.

<sup>46</sup> See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 43 (2005).

<sup>47</sup> DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 23 (2002); see also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56–57



this categorization and understanding of rights is on display in the *Plessy* Court's decision and analysis of the constitutionality of the separate-but-equal doctrine.)<sup>48</sup>

The Fourteenth Amendment's Equal Protection Clause—"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"<sup>49</sup>—does not explicitly define "equal protection" and does not textually specify that which falls within and without the constitutional mandate. The scope and operative meaning of the clause would be supplied by the Supreme Court exercising its arrogated power "to say what the law is"<sup>50</sup> as it exclusively, and with finality,<sup>51</sup> decides whether "to displace the choices of politically responsible officials with those of a small body of appointed, life-tenured justices."<sup>52</sup>

### 3. *The Court's Initial Interpretations of the Equal Protection Clause*

The Court did not find it "difficult to give a meaning" to the Equal Protection Clause in its first encounters with the Fourteenth Amendment.<sup>53</sup> In the *Slaughter-House Cases*, the Court declared that "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such

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(1955). Jack Balkin refers to the division of citizens' rights into civil, political, and social components as "the tripartite theory of citizenship." Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1689–90, 1694 (2005). Social equality was "a code word for miscegenation and racial intermarriage" leading to "mixed race children" or "blacks and whites regard[ing] themselves as members of the same family. Thus, states could continue to prohibit interracial sex or interracial marriage consistent with the Fourteenth Amendment." *Id.* at 1694–95.

The Reconstruction-era taxonomy of rights is the subject of Rebecca J. Scott's important article, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777 (2007). Scott argues that Homer Plessy and his supporters claimed and sought to enforce "what the 1868 Louisiana Constitution had defined as *public rights*." *Id.* at 781. "'Social equality,' by contrast, was a label their enemies had long attempted to pin on the proponents of equal public rights in order to associate public rights with private intimacy and thereby to trigger the host of fears connected with the image of black men in physical proximity to white women." *Id.* Thus, Scott argues, "To conflate the phrase 'social equality' with an imagined taxonomy of civil, political, and social rights is to mistake an insult for an analytic exercise." *Id.*; see also *id.* at 802 ("[O]nce the [*Plessy*] Supreme Court Justices accepted white supremacists' claim that what was at stake was a presumption to 'social equality,' the next step was the easy denial that the Fourteenth Amendment guaranteed such 'social equality.'").

<sup>48</sup> See *infra* Part II.B–C.

<sup>49</sup> U.S. CONST. amend. XIV, § 1.

<sup>50</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>51</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring that the Court "is supreme in the exposition of the law of the Constitution").

<sup>52</sup> H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 15 (2008).

<sup>53</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

laws are forbidden.”<sup>54</sup> The “one pervading purpose found [in the Civil War Amendments to the Constitution], lying at the foundation of each” is “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”<sup>55</sup>

*Strauder v. West Virginia*,<sup>56</sup> decided shortly after the end of the First Reconstruction<sup>57</sup> and at the beginning of post-bellum southern home rule,<sup>58</sup> described the “common purpose” of the Equal Protection Clause as “securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”<sup>59</sup> Contained within the clause’s prohibition of the denial of equal protection of the laws is “a necessary implication of a positive immunity, or right, most valuable to the colored race,” the Court stated, a “right to exemption from unfriendly legislation against them distinctively as colored” and “from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.”<sup>60</sup>

The *Strauder* Court also expressed its view of the “abject and

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<sup>54</sup> *Id.*; see also Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 423 (1960) (“[H]istory puts it entirely out of doubt that the chief and all-dominating purpose [of the Equal Protection Clause] was to ensure equal protection for the Negro.”).

<sup>55</sup> *Slaughter-House Cases*, 83 U.S. at 71.

<sup>56</sup> 100 U.S. 303 (1880).

<sup>57</sup> The First Reconstruction ended with the Hayes-Tilden Compromise of 1877. Democratic presidential candidate Samuel J. Tilden won the popular vote in that year’s election but lost in the electoral college, by one vote, to Republican candidate Rutherford B. Hayes. Reaching an agreement with Tilden electors from five southern states, Hayes promised that in exchange for their votes, federal troops would be withdrawn from the South and that the Fifteenth Amendment’s ban on racial discrimination in voting would not be enforced. See CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 248–49 (2008); ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, at 3 (2003); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951). When Hayes assumed the presidency, federal troops were withdrawn from and no longer protected blacks in the South. See Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1717 (2006). In addition, as a result of the compromise, all but one of the members of the Supreme Court deciding *Plessy v. Ferguson* was appointed after 1877. “Thus, *Plessy* and later cases were decided by Justices appointed by Democratic presidents, or Republicans after their party had decided not to keep African American suffrage high on the list of priorities.” Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 117 (2008).

<sup>58</sup> See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 587–601 (1988).

<sup>59</sup> *Strauder*, 100 U.S. at 306.

<sup>60</sup> *Id.* at 307–08.

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ignorant” members of the “colored race” who were “unfitted to command the respect of those who had superior intelligence.”<sup>61</sup> These “mere children . . . especially needed protection against unfriendly action in the States where they were resident,” the Court opined, and the Fourteenth Amendment “was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.”<sup>62</sup> Recognizing white resistance to the “true spirit and meaning” of the amendment, the Court stated that

it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.<sup>63</sup>

Three years after its decision in *Strauder*, the Court held in the *Civil Rights Cases* that the Fourteenth Amendment’s protections did not apply to or prohibit the racially discriminatory actions of private persons.<sup>64</sup> Moving away from a solely black-protective reading and understanding of the Amendment, the Court said that the Amendment “extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.”<sup>65</sup> The Court also cautioned that providing equal protection for African-Americans has its limits. “When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws . . .”<sup>66</sup> Thus, a mere eighteen years after the appearance of the reactionary Black Codes, fifteen years after the adoption of the Fourteenth Amendment, and seven years after the end of the First Reconstruction and the federal government’s abandonment of blacks living in the former Confederacy, the Court signaled to the Nation that “favoring” African-Americans under the Equal Protection Clause concerned and even troubled the Court.

An additional case in the precedential backdrop, *Pace v. Alabama*, rejected an equal protection challenge to a state criminal law’s penalty enhancement for adultery or fornication engaged in by white-black

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<sup>61</sup> *Id.* at 306.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 109 U.S. 3 (1883).

<sup>65</sup> *Id.* at 24; *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (finding that the Fourteenth Amendment’s provisions “are universal in their application, to all persons within the territorial jurisdiction [of a state], without regard to any differences of race, of color, or of nationality”).

<sup>66</sup> *Civil Rights Cases*, 109 U.S. at 25.

couples.<sup>67</sup> Punishing those couples more severely than same-race couples did not violate the Equal Protection Clause, the Court reasoned, because the harsher punishment was “directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.”<sup>68</sup> On that view, equal application of the law satisfied the constitutional requirement of the equal protection of the law.

B. *The Plessy Court’s Decision*

1. *The Court’s Validation Of The Separate-But-Equal Doctrine*

Louisiana’s Separate Car Law reviewed by the Supreme Court in *Plessy v. Ferguson* provided that “all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations . . . .”<sup>69</sup> In separating blacks and whites and criminalizing those who dared to step beyond and outside of the state’s segregative box, Louisiana drew an explicit and unambiguous color line.<sup>70</sup> Homer Adolphe Plessy (described by the Court as a man “of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood”)<sup>71</sup> stepped over that line in June 1892 when the thirty-year-old shoemaker paid for first-class travel on the East Louisiana railway from New Orleans to Covington, Louisiana and sat in a seat in the coach

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<sup>67</sup> 106 U.S. 583 (1883).

<sup>68</sup> *Id.* at 585.

<sup>69</sup> 163 U.S. 537, 540 (1895) (quoting Act of July 10, 1890, No. 111, 1890 La. Acts 152, 153). For an exploration and dissection of the Court’s decision, see CHARLES A. LOGGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

<sup>70</sup> On the color line, see W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 12 (Gramercy Books 1994) (1903) (“The problem of the twentieth century is the problem of the color-line—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.”). As for the twenty-first century, Bryan Fair argues that “in race matters, the problem . . . will be the problem of colorblindness—the refusal of legislators, jurists, and most of American society—to acknowledge the causes and current effects of racial caste and to adopt effective remedial policies to eliminate them.” Bryan K. Fair, *Been in the Storm Too Long, Without Redemption: What We Must Do Next*, 25 S.U. L. REV. 121, 124 (1997).

<sup>71</sup> *Plessy*, 163 U.S. at 538. Homer Plessy’s attorney, Albion Tourgée, searched for “a plaintiff who had ‘not more than one-eighth colored blood’ and would be able to pass as ‘white.’” MARK ELLIOTT, *COLOR-BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR RACIAL EQUALITY FROM THE CIVIL WAR TO PLESSY V. FERGUSON* 264 (2006). Tourgée sought “to exploit the Louisiana legislature’s failure to define race and to introduce the inconclusiveness of scientific evidence on racial categories and definitions into evidence.” *Id.* *Plessy* was selected as the plaintiff for the case challenging the separate-but-equal law. *See id.* at 265. For more on the selection of the light-complexioned Plessy as the plaintiff in the challenge to Louisiana’s apartheid regime, see Mark Golub, *Plessy as “Passing”*: *Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*, 39 LAW & SOC’Y REV. 563 (2005).

designated for white passengers.<sup>72</sup> The Citizens' Committee to Test the Constitutionality of the Separate Car Law and local railroad companies "overwhelmingly opposed to the Separate Car Act because of its extra cost and inconvenience," and had previously made arrangements to have Plessy expelled from the car designated for whites.<sup>73</sup> When a conductor ordered Plessy to move to a seat in the coach for "persons not of the white race," Plessy refused to move; he was then arrested and imprisoned and charged with violating the separate-but-equal statute.<sup>74</sup>

Plessy argued that the state's law violated the Equal Protection Clause.<sup>75</sup> Rejecting that contention, Justice Henry Billings Brown, writing for the Court, observed that a

statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races . . . .<sup>76</sup>

Brown opined that the challenged law was a "reasonable regulation," with the "question of reasonableness" answered by an examination of the state's "liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."<sup>77</sup> The people's usages, customs, traditions, comfort, public peace, and good order: all reflected in state-mandated racial segregation, in the way things were and, in the eyes of the segregationists, should have been. All resistant to Plessy's effort to step out of the color box and over the color line, and his refusal to cede to the noxious doctrine of purported black

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<sup>72</sup> See BLISS BRODYARD, *ONE DROP: MY FATHER'S HIDDEN LIFE—A STORY OF RACE AND FAMILY SECRETS* 280 (2007) ("[Plessy,] a thirty-year-old shoemaker, . . . looked white enough to enter the 'whites only' coach without calling attention to himself, but was black enough—one-eighth—to get himself arrested.")

<sup>73</sup> ELLIOT, *supra* note 71, at 265.

<sup>74</sup> *Plessy*, 163 U.S. at 538.

<sup>75</sup> Plessy also argued that the law violated the Thirteenth Amendment to the Constitution. The Court did not agree. "That [the law] does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument." *Id.* at 542. The statutory implication of "a legal distinction between the white and colored races . . . founded in the color of the two races . . . has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude." *Id.* at 543.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 550; *see also id.* ("[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."). In its brief to the Supreme Court, Louisiana argued that the statute was a reasonable exercise of the state's police power because "'thrusting the company of one race upon the other' would just exacerbate the repulsion between them." HARVEY FIRESIDE, *SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM* 188 (2004) (quoting Brief on Behalf of Defendant in Error at 19, *Plessy*, 163 U.S. 537 (No. 210)).

inferiority previously proclaimed and sanctioned by a Court on which sat several Justices who had at one time owned slaves.<sup>78</sup> All embraced and constitutionalized by the Court as valid reasons to enforce, by law and subject to penalty, a white supremacist structure denying to African-Americans the same access, rights, privileges, and opportunities available to and enjoyed by whites.

This “reasonable regulation,” in Justice Brown’s view, did not offend the Fourteenth Amendment, the object of which “was undoubtedly to enforce the absolute equality of the two races before the law.”<sup>79</sup> “Equality” was not “intended to abolish distinctions based upon color,” Brown wrote, “or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”<sup>80</sup> This construction and constriction of the Equal Protection Clause placed social equality concerns beyond the reach of that provision and served as both premise and prelude to the Court’s determination that “[l]aws permitting, and even requiring” the separation of the races “do not necessarily imply the inferiority of either race to the other.”<sup>81</sup> Such laws “have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power,” Brown opined, most commonly in “the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.”<sup>82</sup> And, the Justice continued, “[l]aws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State.”<sup>83</sup>

Justice Brown’s opinion then presented and addressed three assumptions. First, placing Plessy’s challenge to Louisiana’s apartheid measure in the category of the purportedly fallacious, Brown argued that

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<sup>78</sup> In *Dred Scott v. Sandford*, the Court described African slaves and their descendants as “beings of an inferior order . . . [who] had no rights which the white man was bound to respect . . .” 60 U.S. (19 How.) 393, 407 (1857). Most of the seven Justices comprising the *Dred Scott* majority, including Chief Justice Taney, had owned slaves. See JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS 90 (2006); GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 7 (2003).

For more on the “lie of black inferiority” and the need to extinguish that lie and the correlate “lie of white superiority,” see Enola G. Aird, *Toward a Renaissance for the African-American Family: Confronting the Lie of Black Inferiority*, 58 EMORY L.J. 7, 20 (2008).

<sup>79</sup> *Plessy*, 163 U.S. at 544, 550.

<sup>80</sup> *Id.* at 544.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 545. In 1967, the Court held that anti-miscegenation laws prohibiting certain interracial marriages were unconstitutional. See *Loving v. Virginia*, 388 U.S. 1 (1967).

any “assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . [was] not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>84</sup> That construction rested upon a second assumption, that if “the colored race should become the dominant power in the state legislature . . . it would thereby relegate the white race to an inferior position.”<sup>85</sup> Not so, said Brown: “We imagine that the white race, at least, would not acquiesce in this assumption.”<sup>86</sup> The third assumption, that “social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races,”<sup>87</sup> incorrectly posited that social equality could be achieved by and through law, Brown reasoned. “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”<sup>88</sup> In the Court’s view, “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.”<sup>89</sup> Distinguishing social rights from civil and political rights,<sup>90</sup> Brown concluded: “If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”<sup>91</sup>

## 2. Justice Harlan: “Our Constitution Is Color-Blind”

The *Plessy* Court’s decision, as we know, was not unanimous. A dissenting Justice John Marshall Harlan rejected the Court’s position that any assumption that Louisiana’s law placed a badge of inferiority on African-Americans was “because the colored race chooses to put that

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<sup>84</sup> *Plessy*, 163 U.S. at 551. In the words of James Fleming, in this passage the Court suggests: “That is, that’s their problem: they’ve got an inferiority complex.” James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1145 (2008); see also Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L.J. 1191, 1203 (2008) (“If you think Louisiana’s segregation of railroad cars is stigmatic, *Plessy* says, that’s your problem—it’s only because you choose to place that construction on it.”).

<sup>85</sup> *Plessy*, 163 U.S. at 551.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1215–16 (“[*Plessy*] used concepts such as the distinction among civil, political, and social rights . . . to immunize state segregation from a constitutional challenge based on the Fourteenth Amendment.”).

<sup>91</sup> *Plessy*, 163 U.S. at 551–52; see also *Ex parte Virginia*, 100 U.S. 339, 367 (1880) (Field, J., dissenting) (stating that the equality protected by the Fourteenth Amendment “extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration”).

construction upon it.”<sup>92</sup> “Every one knows,” Harlan wrote, “that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”<sup>93</sup> Thus, Harlan argued, the “real meaning” of the Louisiana law at issue was to denigrate black persons and treat them as if they were inferior:

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.<sup>94</sup>

Justice Harlan’s dissent also set forth his metaphoric conception of the Constitution as it is understood and applied in the sphere of civil rights:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>95</sup>

Many who today invoke Justice Harlan’s 1896 colorblind statement as support for the proposition that the Equal Protection Clause outlaws any and all contemporary governmental considerations and uses of race fail to mention that, in his *Plessy* dissent, a race-conscious Harlan made clear his view:

[T]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.<sup>96</sup>

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<sup>92</sup> *Plessy*, 163 U.S. at 551.

<sup>93</sup> *Id.* at 557 (Harlan, J., dissenting).

<sup>94</sup> *Id.* at 560.

<sup>95</sup> *Id.* at 559 (emphasis added). Harlan had earlier expressed his no-caste and no-class reading of the Fourteenth Amendment in his dissent in the *Civil Rights Cases*. 109 U.S. 3, 62 (1883) (“If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.”).

<sup>96</sup> *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Notably, Chief Justice Roberts’ plurality in *Parents Involved in Community Schools v. Seattle School District No. 1*, failed to mention Harlan’s race-conscious views. 127 S. Ct. 2738, 2758 n.14 (2007). For



And in another passage the Justice wrote: “Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.”<sup>97</sup> That is not the view or expression of someone who is blind to race (in fact, Harlan had owned slaves and opposed the Emancipation Proclamation, the Thirteenth Amendment, and the Freedman’s Bureau).<sup>98</sup> It is, instead, the sentiment of someone who “seems to be embracing the notion that people inevitably do think and act in race-conscious ways, and that, when contained within the private sphere in which the rights of others are not affected, race-conscious expression and action is not a bad thing.”<sup>99</sup>

It must also be noted that Justice Harlan, viewing the railway car segregation as the denial of a civil right,<sup>100</sup> did not recognize or endorse the social equality of African-Americans.<sup>101</sup> In his words:

[S]ocial equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the

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discussions of Justice Harlan’s race consciousness, see TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 160–62 (1995); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996); Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan’s View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973 (1996); Laurence H. Tribe, “*In What Vision of the Constitution Must the Law be Color-Blind?*,” 20 J. MARSHALL L. REV. 201 (1986). One commentator has remarked that “virtually every . . . modern fan” of Harlan’s dissent “elides Harlan’s acknowledgement of white superiority in the very paragraph in which he proclaimed fealty to colorblindness.” Ian F. Haney López, “*A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*,” 59 STAN. L. REV. 985, 993 (2007). It should be noted that Justice Thomas has acknowledged this aspect of Harlan’s opinion. See *Parents Involved*, 127 S. Ct. at 2787 (Thomas, J., concurring).

<sup>97</sup> *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting).

<sup>98</sup> See YARBROUGH, *supra* note 96, at 55; Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 649, 652–53 (1957).

<sup>99</sup> Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1048 (1996); see also Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. 1927, 2021 (2003) (“Thus, like most of his contemporaries, Harlan believed in the centrality of race and in the legitimacy of racial thinking. . . . Although Harlan was highly unusual in the courage, integrity, and decency he showed in racial matters, he nonetheless also remained a person of his time.”).

<sup>100</sup> “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.” *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

<sup>101</sup> See Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1149 (1996) (arguing that in his *Plessy* dissent Justice Harlan “was not arguing for racial social equality”).

same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting.<sup>102</sup>

“In other words,” Jack Balkin argues, under Harlan’s approach “it doesn’t matter how much you integrate the institutions of American political and civil society. Blacks and whites are not social equals and they are not going to be.”<sup>103</sup>

Justice Harlan’s race-consciousness is also evidenced by his reference to “a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race.”<sup>104</sup> Exhibiting no colorblindness with regard to that “race,” Harlan buttressed his argument against the Louisiana law by pointing out that “a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race [cannot].”<sup>105</sup>

Many contemporary references to Justice Harlan’s colorblind axiom also fail to take into account his opinion for a unanimous Court in *Cumming v. Richmond County Board of Education*.<sup>106</sup> Decided just three years after *Plessy*, *Cumming* held that a county school board’s termination of funding for an all-black high school, while continuing funding for an all-white high school, did not violate the Equal Protection Clause. Noting that the question of the constitutionality of school segregation was not before the Court, Harlan saw no evidence that the school board had acted “with any desire or purpose . . . to discriminate against any of the colored school children of the county on account of their race.”<sup>107</sup> In his view, the school board, faced with the choice of operating a high school for sixty black children or closing that school and using the same facility to provide a primary school for three hundred black children, did not abuse its discretion when it acted “in the interest of the greater number of colored children” and closed the black high school.<sup>108</sup> Thus, as Michael Klarman has observed, Harlan considered the “separate-and-unequal scheme” of operating a white but not a black high school to be

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<sup>102</sup> *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

<sup>103</sup> Balkin, *supra* note 47, at 1700.

<sup>104</sup> *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

<sup>105</sup> *Id.* It is noteworthy that Justice Harlan voted with Court majorities to uphold explicitly race-based and exclusionary immigration laws in the *Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893). And he dissented in *United States v. Wong Kim Ark*, wherein the Court held that a Chinese person born in the United States to persons who were not citizens of the country was a citizen by birth. 169 U.S. 649, 693 (1898). Harlan joined the dissent of Chief Justice Fuller, who argued that Congress had the power “to prescribe that all persons of a particular race, or their children, cannot become citizens.” *Id.* at 732.

<sup>106</sup> 175 U.S. 528 (1899).

<sup>107</sup> *Id.* at 543, 544; *see also* *Berea Coll. v. Kentucky*, 211 U.S. 45, 69 (1908) (Harlan, J., dissenting) (arguing against the legality of state proscription of racial integration in a private institution of higher education but not deciding the question of the constitutionality of public school segregation).

<sup>108</sup> *Cumming*, 175 U.S. at 544.

reasonable and therefore constitutional.<sup>109</sup> Harlan's opinion for the *Cumming* Court, and the fact that he joined a unanimous Court in *Pace v. Alabama's* rejection of a constitutional challenge to an enhanced criminal penalty for certain sexual conduct engaged in by different-race couples,<sup>110</sup> reveal that his "jurisprudence on race exhibited no overarching preoccupation with colorblindness."<sup>111</sup>

### C. *The Plessification of the Equal Protection Clause*

*Plessy's* validation of Louisiana's blatant but (in light of the Court's decision) constitutional discrimination against African-Americans is not, and should not, be surprising given the pre-1900 legal and social contexts and then-extant racial/racist norms and understandings.<sup>112</sup> At that time, racial segregation, a manifestation and implementation of white supremacy,<sup>113</sup> was viewed by the state and by the Supreme Court as reasonable and consistent with the Fourteenth Amendment's equal protection mandate. Blacks and whites "would not be forced into a situation of social equality before they were ready," and the fact that Louisiana's law was "part of a system designed to keep blacks in their place was simply ignored."<sup>114</sup> Black persons traveling in the same railway cars with whites, like black and white children attending the same schools, were contrary to then-settled segregative expectations and white-supremacist-reflective customs and traditions. If African-Americans believed that separating the races and criminalizing integration stamped them with a "badge of inferiority," they fallaciously saw that which did not exist, the Court concluded,<sup>115</sup> for the mere "legal distinction" implied by the separate-but-equal statute "has no tendency to destroy the legal equality of the two races."<sup>116</sup> On this account, Homer Plessy's lived and racialized experiences and the subordinating realities and social

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<sup>109</sup> KLARMAN, *supra* note 43, at 45; *see also* Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 693 (1992) ("If a school district could operate a high school for whites but not for blacks, it is hard to imagine how *any* state of affairs could violate the equality requirement.").

<sup>110</sup> *Pace v. Alabama*, 106 U.S. 583 (1883), discussed *supra* notes 67–68 and accompanying text.

<sup>111</sup> Goodwin Liu, "History Will Be Heard": *An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL'Y REV. 53, 60 (2008); *see also* *Williams v. Mississippi*, 170 U.S. 213 (1898) (Harlan joining the Court's opinion upholding a racially discriminatory poll tax).

<sup>112</sup> *See* Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867, 869 (2005) ("Given the tenor of the times and the trend of prevailing precedent, it is plausible to argue, as some have, that *Plessy* was not a surprising or earth-shattering case.").

<sup>113</sup> *See generally* GEORGE M. FREDERICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981).

<sup>114</sup> Griffin, *supra* note 90, at 1216.

<sup>115</sup> *See supra* note 4 and accompanying text.

<sup>116</sup> *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

meanings of Louisiana's racial apartheid system did not matter.<sup>117</sup> All that mattered to the Court was that institution's understanding and construction of an Equal Protection Clause grounded in and flowing from the Justices' worldviews, sensibilities, and belief that social equality could not be achieved by and through law.

The *Plessy* Court's racial formalism and treatment of "race-as-merely-color stripped the social meaning of group debasement from segregation laws."<sup>118</sup> Segregation mandated by law was simply a fact of social life, was a "reasonable regulation" reflecting and reinforcing tradition and custom, and was a "neutral" means of promoting "the people's" comfort and preserving the public peace.<sup>119</sup> Louisiana's statute, as interpreted and applied by the Court, "said nothing about the status of [b]lacks" and was not "inherently connected to . . . a legal and social system that perpetuated the stigma of inferiority based on race."<sup>120</sup>

Under the Court-approved *Plessy* regime, blacks and whites were "equally protected" by a law that intentionally racialized and separated members of one group from the other and made criminals of those who dared to act contrary to the state's color coding of racial groups.<sup>121</sup> That construction of the Equal Protection Clause is the result of the Court's deference to and endorsement of the state's disingenuous argument that blacks were treated the same as whites—just as Homer Plessy could not ride in a railroad car reserved for whites, a white person could not ride in a car reserved for blacks.<sup>122</sup> Having chosen a tradition-protective over a tradition-corrective reading of the Equal Protection Clause,<sup>123</sup> the Court's finding of legal and constitutional equality was divorced from and ignored the historical background and sociopolitical meaning of classifying, subordinating, and stigmatizing racial segregation. In the

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<sup>117</sup> On how and why the challenged racist system mattered, consider the following statement made in a letter from the publisher of a Creole newspaper in New Orleans to Albion Tourgée, Plessy's lawyer: "You don't know what the feeling is . . . knowing that you are a freeman, & yet not allowed to enjoy a freeman's liberty, rights, and privileges unless you stake your life every time you try it. To live always under the feeling of restraint is worse than living behind prison bars." BROYARD, *supra* note 72, at 283.

<sup>118</sup> López, *supra* note 96, at 1062.

<sup>119</sup> See *supra* note 3 and accompanying text.

<sup>120</sup> Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 38 (1991); see also Harris, *supra* note 112, at 897 ("Under *Plessy's* logic, race became a formal identity category disconnected from history and from subordination, past and present.").

<sup>121</sup> See Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995).

<sup>122</sup> See Cheryl I. Harris, *The Story of Plessy v. Ferguson*, in CONSTITUTIONAL LAW STORIES 183 (Michael C. Dorf ed., 2004).

<sup>123</sup> See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 68 (2001) (discussing the transformative equality-promoting elements of the Fourteenth Amendment); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring) (stating that the Equal Protection Clause "might be thought to have some counter-historical content").

words of one scholar, the Court's "radical formalism of constitutional interpretation in the face of contrary social facts . . . produce[d] a legal absurdity."<sup>124</sup>

### III. *BROWN*

#### A. *Changing Times*

As the Nation moved into the twentieth century, legal and sociopolitical developments formed a changing backdrop against which the Supreme Court considered and decided equal protection challenges to the race-conscious conduct of governmental entities. Millions of African-Americans migrated from southern to northern states,<sup>125</sup> and a number of blacks benefited from New Deal programs (some administered in a racially discriminatory fashion).<sup>126</sup> In World War II, the United States fought "the Nazis and their hateful theories of racial superiority."<sup>127</sup> President Harry S. Truman (an opponent of interracial marriage<sup>128</sup>) ordered the integration of the armed forces.<sup>129</sup> African-American soldiers returning home from the war refused to accept the label and limits of second-class citizenship.<sup>130</sup>

As the United States battled "with Communist countries to win the hearts and minds of emerging third world peoples"<sup>131</sup> in the aftermath of World War II, "[p]rogress on the American treatment of African Americans offered a way to deflect Soviet criticism and prevent Communist defections in decolonized nations in Asia and Africa."<sup>132</sup> Indeed, in its amicus brief to the Supreme Court in the *Brown* litigation, the U.S. Department of Justice emphasized the importance of addressing the foreign policy implications of racial discrimination in the United

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<sup>124</sup> Liu, *supra* note 111, at 60–61.

<sup>125</sup> See generally NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

<sup>126</sup> See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 35 (2005).

<sup>127</sup> Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 271 (1983).

<sup>128</sup> "I don't believe in it. What's that word about four feet long? Miscegenation? The Lord created it that way. You read your Bible, and you'll find out." WILLIAM E. LEUCHTENBURG, *THE WHITE HOUSE LOOKS SOUTH* 223 (2005) (quoting President Truman).

<sup>129</sup> See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

<sup>130</sup> See FRANCIS D. ADAMS & BARRY SANDERS, *ALIENABLE RIGHTS: THE EXCLUSION OF AFRICAN AMERICANS IN A WHITE MAN'S LAND, 1619–2000*, at 264 (2003).

<sup>131</sup> Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

<sup>132</sup> RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 41 (2007). For more on the Cold War implications of the nation's discrimination against and mistreatment of African-Americans, see CAROL ANDERSON, *EYES OFF THE PRIZE* (2003); THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE* (2001); MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS* (2008); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

States:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.<sup>133</sup>

The mid-twentieth century was also a time in which the Court invalidated separate-but-equal and racially discriminatory policies in the context of graduate school admissions.<sup>134</sup> In two of those cases, the Court mentioned but did not reexamine *Plessy*.<sup>135</sup> *Plessy* thus lived, and so did the separate-but-equal doctrine as applied to public schools.

### B. Brown I

*Plessy* was reexamined by the Court in *Brown v. Board of Education* (*Brown I*), the seminal Warren Court case in which plaintiffs challenged the racial segregation of public school children in Kansas, South Carolina, Virginia, and Delaware.<sup>136</sup> It is noteworthy that after the initial oral argument of the cases in 1952 and the Court's December 13, 1952, post-argument conference it was by no means clear that the Court would end the *Plessy* regime. Justice William O. Douglas believed that "if the cases were to be then decided the vote would be five to four in favor of the constitutionality of segregation in the public schools in the States."<sup>137</sup> Chief Justice Fred Vinson expressed his view that "the *Plessy* case was right."<sup>138</sup> Justice Felix Frankfurter, believing that there were five votes to reverse *Plessy*, convinced the Court to set the case for reargument.<sup>139</sup> Prior to that reargument, and in what Jack Balkin calls one of the salient

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<sup>133</sup> Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 113, 121 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>134</sup> See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (per curiam); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>135</sup> See *Sweatt*, 339 U.S. at 636; *Gaines*, 305 U.S. at 344.

<sup>136</sup> 347 U.S. 483 (1954).

<sup>137</sup> Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1902 (1991) (quoting memorandum of Justice Douglas (May 17, 1954)).

<sup>138</sup> MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 187 (1994) (quoting Memorandum of Justice Douglas (May 17, 1954)). Vinson noted that Justice Harlan's *Plessy* dissent was "careful not to refer to schools. That has significance, because Harlan was strong on other items and later wrote the *Cumming* case for this Court." Conference Notes of Chief Justice Fred Vinson, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), in THE SUPREME COURT IN CONFERENCE (1940-1985) 646 (Del Dickson ed., 2001).

<sup>139</sup> TUSHNET, *supra* note 138, at 187.

“contingencies of history,”<sup>140</sup> Vinson had a heart attack and died<sup>141</sup> and was replaced on the Court by President Dwight D. Eisenhower’s appointee Earl Warren.<sup>142</sup>

Thereafter, on May 17, 1954 (a day labeled “Black Monday” by segregationists),<sup>143</sup> a unanimous Court issued its decision in an opinion by Chief Justice Warren. The Chief Justice initially focused on one of the questions the Court asked the parties to address in the reargument: “What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”<sup>144</sup> Warren opined that the “circumstances surrounding the adoption of the Fourteenth Amendment” were “inconclusive” and “not enough to resolve the problem with which we are faced.”<sup>145</sup> Opining that “we cannot turn

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<sup>140</sup> Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 722 (2005).

<sup>141</sup> It has been reported that Justice Frankfurter, commenting on Vinson’s death, remarked, “This is the first indication that I have ever had that there is a God.” BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 72 (1983).

<sup>142</sup> For a discussion of Warren’s appointment to the Supreme Court, see JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 239–58 (2006).

<sup>143</sup> JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975*, at 48 (2006); TOM P. BRADY, *BLACK MONDAY* (1955).

<sup>144</sup> *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953) (mem.).

<sup>145</sup> *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 489 (1954). Warren reasoned that the “most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States’” while the “opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.” *Id.* He noted, further, that “free common schools, supported by general taxation, had not yet taken hold” at the time the Amendment was adopted, and that white children were educated by private groups while the education of black children “was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.” *Id.* at 489–90.

On the asserted inconclusiveness of the Fourteenth Amendment’s framers’ and ratifiers’ original understanding of and views on school segregation, see RICHARD A. POSNER, *OVERCOMING LAW* 62 (1995) (“It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the equal protection clause to prevent racially segregated public education.”); LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 117 (2008) (“Depending on the level of generality at which one examines the understanding of those who wrote and ratified the Fourteenth Amendment, one can find historical evidence for a wide range of possible understandings of the equality concept that the amendment was meant to enshrine.”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 156 (1999) (“the very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia” and the amendment’s supporters assured their opponents that the amendment would not lead to integrated schools); Bickel, *supra* note 47, at 64 (“[T]he immediate objectives to which section I of the fourteenth amendment was addressed . . . was not expected in 1866 to apply to segregation.”); Michael Klarman, *An Interpretive History of Modern*

the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,<sup>146</sup> Warren focused on 1954 and on “public education in the light of its full development and its present place in American life throughout the Nation.”<sup>147</sup> He wrote that:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>148</sup>

Chief Justice Warren then asked and answered in the affirmative the question whether segregating children by race unconstitutionally deprived colored children of equal educational opportunities, even though the physical facilities and other tangible factors of segregated schools were “equal.”<sup>149</sup> Referencing the Court’s invalidation of segregated education in the professional school setting,<sup>150</sup> he reasoned:

Such considerations apply with added force to children in grade and high schools. To separate them 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.<sup>151</sup>

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*Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) (“Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful . . .” (footnote omitted)). For the argument that *Brown I* is consistent with an original understanding of the Fourteenth Amendment, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995).

For arguments that the thirty-ninth Congress that submitted the Fourteenth Amendment engaged in certain race-conscious actions, see *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564 n.12 (1990); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396–98 (1978); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997); Schnapper, *supra* note 40, at 754.

<sup>146</sup> *Brown I*, 347 U.S. at 492.

<sup>147</sup> *Id.* at 492–93.

<sup>148</sup> *Id.* at 493.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 494.



Chief Justice Warren opined, further, that the demeaning effect of separation by and because of race was “well stated” by a lower court finding in the Kansas case, which he quoted:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”<sup>152</sup>

Continuing to focus on 1954, Chief Justice Warren concluded that “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”<sup>153</sup> The “modern authority” language was accompanied by a footnote’s citation to several social science studies,<sup>154</sup> including the late Dr. Kenneth Clark’s doll test<sup>155</sup> and Gunnar Myrdal’s *An American Dilemma*.<sup>156</sup>

Having rejected (but not expressly overruled) *Plessy*<sup>157</sup> and the Court’s late nineteenth century approach to and application of the Equal Protection Clause, *Brown I* declared “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 494–95 (footnote omitted).

<sup>154</sup> *See id.* at 494 n.11.

<sup>155</sup> *See id.* (citing, among other studies, K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth 1950)). Clark reported the results of his doll test in which black children given a choice between black and white dolls selected the latter. *See also* KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 19–20 (2d ed. 1963) (discussing the doll test’s findings); ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 13–15 (1996) (critiquing Clark’s doll test); Aird, *supra* note 78, at 14 (discussing 2005 film in which the filmmaker conducted a doll test with black and white dolls and noting that the majority of black children chose the white doll as the “nice and good” doll).

<sup>156</sup> *See* 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 640–41 (5th ed. 1944).

<sup>157</sup> *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 113 (1992) (“*Plessy* has never been overruled . . .”); Amar, *supra* note 26, at 66 (stating that *Brown I*, “the doctrinalists’ knight in shining armor, did not apologize for *Plessy* or openly overrule it”); David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1070 (2008) (noting that even though *Brown I* “did not formally overrule *Plessy*,” it did squarely address “the claim, central to *Plessy*, that segregation did not necessarily denote inferiority”); Laurence H. Tribe, Lawrence v. Texas: *The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1914 n.74 (2004) (*Brown I* “did not explicitly overrule” *Plessy*).

facilities are inherently unequal.”<sup>158</sup> The plaintiffs thus succeeded in obtaining the Court’s pronouncement that the challenged segregation did not pass constitutional muster. But they did not obtain an immediate cessation and remediation of what was now unconstitutional conduct. Rather than order the erasure of the subordinating color line separating black and white public school students, the Court set the cases for yet another argument, this one on the issue of the formulation of judicial decrees governing the admission of African-American children to public schools they had not been allowed to attend because of their race.<sup>159</sup>

### C. Brown II

The implementation of *Brown I* was a complicated matter. Plaintiffs’ counsel, Thurgood Marshall, sought a specific date upon which school segregation would end, and U.S. Attorney General Herbert Brownell’s brief to the Court requested that southern schools be required to develop desegregation plans within ninety days of the Court’s *Brown II* decision.<sup>160</sup>

But others were concerned, with good reason, that an immediate and robust desegregation mandate would be met by southern resistance and violence, by uncivil disobedience and blatant defiance of the Court’s order.<sup>161</sup> Justice Hugo Black feared that “people are going to die” and that “before the tree of liberalism could be renewed in the South a few candidates must water it with their blood.”<sup>162</sup> In Black’s view, the Court should “[w]rite a decree and quit . . . . The less we say, the better off we are.”<sup>163</sup> Notwithstanding those concerns, Black, along with Justice Douglas, argued for an expeditious and not a gradual desegregation process.<sup>164</sup> Justice Frankfurter urged that a specific date set by the Court would be arbitrary and would “alienate instead of enlist favorable or educable local sentiment.”<sup>165</sup> Chief Justice Warren, “especially aware that the Court by itself could not do much to enforce a firm order,” believed

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<sup>158</sup> *Brown I*, 347 U.S. at 495; see also *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racially segregated schools in the District of Columbia violated the Due Process Clause of the Fifth Amendment).

<sup>159</sup> See *Brown I*, 347 U.S. at 495.

<sup>160</sup> See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 83 (2001).

<sup>161</sup> Consider, in this regard, Mississippi Senator James Eastland’s statement to his constituents: “On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided integration was right . . . . You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it.” J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 69 (1979).

<sup>162</sup> ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 438–39 (1994).

<sup>163</sup> *Id.* at 439.

<sup>164</sup> See TUSHNET, *supra* note 138, at 229.

<sup>165</sup> *Id.* at 228 (quoting Letter from Justice Frankfurter to Supreme Court colleagues (Apr. 14, 1955)).

that neither President Eisenhower nor the U.S. Congress would have supported a Court order setting a specific date for the formal end of racial segregation in public schools.<sup>166</sup>

A compromise was reached: the Court would instruct the lower courts to order Kansas, South Carolina, Virginia, and Delaware (but not other states) to proceed, in language proposed by Justice Frankfurter, with “all deliberate speed.”<sup>167</sup>

Accordingly, in its 1955 *Brown II* decision, a unanimous Court remanded the four state cases to the district courts so that local “public and private needs” could be assessed by those courts “guided by equitable principles.”<sup>168</sup> The district courts were directed “to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases.”<sup>169</sup>

Described by scholars as oxymoronic<sup>170</sup> and an “infamous remedial formula,”<sup>171</sup> *Brown I*’s “with all deliberate speed” instruction “gave local decision makers too much choice”<sup>172</sup> and signaled to those who resented and were likely, if not sure, to resist *Brown I* that time and delay were on

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<sup>166</sup> PATTERSON, *supra* note 160, at 83.

<sup>167</sup> TUSHNET, *supra* note 138, at 230; *see also* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 11 (2004) (discussing the origins of the “deliberate speed” phrase).

The “with deliberate speed” language was used in the United States’ brief to the Court in the 1952 *Brown I* argument, and was inserted into that document by former Frankfurter clerk and Department of Justice official Philip Elman. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 742 (1976). According to Elman, the 1952 brief “is the one thing I’m proudest of in my whole career” as it was “the first to suggest” that “if the Court should hold that racial segregation in public schools is unconstitutional, it should give district courts a reasonable period of time to work out the details and timing of implementation of the decision. In other words, ‘with all deliberate speed.’” Philip Elman & Norman Silber, Interview, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 827 (1987).

Justice Frankfurter had previously used the “deliberate speed” phrase in his concurrence in *Sutton v. Leib*, 342 U.S. 402, 414 (1952), and in his dissenting opinion in *Chrysler Corp. v. United States*, 316 U.S. 556, 568 (1942). Justice Oliver Wendell Holmes employed the same language in a 1911 opinion, *Virginia v. West Virginia*, 222 U.S. 17, 19–20 (1911) (“[A] State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed.”).

<sup>168</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

<sup>169</sup> *Id.* at 301 (emphasis added).

<sup>170</sup> *See* David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753, 764 (1993).

<sup>171</sup> Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 220 (2004).

<sup>172</sup> TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 321 (1995).

their side. (As Thurgood Marshall explained, “all deliberate speed” meant “S-L-O-W.”<sup>173</sup>) A district court judge charged with the interpretation and implementation of the “all deliberate speed” standard was now front and center in the Court-ordered desegregation project, and his “personal role [was] painfully obvious. If the judge did more than the bare minimum, he would be held unpleasantly accountable. Bold movement meant community opprobrium. Segregationists were always able to point to more indulgent judges elsewhere.”<sup>174</sup> Subsequent events would reveal, as the *Brown II* lawyer Robert Carter argued, that the *Brown II* remedial formula “was a grave mistake” and “sacrificed individual and immediate vindication of the newly discovered right to desegregated education in favor of a mass solution.”<sup>175</sup>

#### D. Summary

*Brown I* and *II* were and continue to be the focus of a still intense debate over the meaning and application of the Equal Protection Clause when the state determines that race matters.<sup>176</sup> The very same clause not violated by Louisiana’s legally mandated separation of blacks and whites on railway cars was violated by the forced separation of black and white public school students. What explains, at least in part, these disparate results? The text of the Equal Protection Clause did not change. The times in which the Justices lived and the Court as an institution ruled in *Plessy* and *Brown I* had changed, as had the sociopolitical meanings of race in the interregnum between *Plessy*’s acceptance (indeed, embrace and endorsement) of American apartheid and *Brown I*’s repudiation of one aspect of that regime.<sup>177</sup>

The *Brown I* Court’s formal interment of the separate-but-equal doctrine as applied to elementary and secondary public schools was a welcome but too-long-in-coming repudiation of the manifestation of a theory of black inferiority hypothesized by white supremacists. At the time of its decision in 1954, the Court broke with *Plessy*’s analysis and refused to constitutionalize traditional and entrenched understandings and norms permitting and requiring the exclusion of African-Americans from certain spaces and places. That exclusion, based on and grounded in white-supremacist ideology, subordinated persons on the basis of an individual’s phenotype and bigoted notions of the need for separate and

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<sup>173</sup> OGLETREE, *supra* note 167, at 10.

<sup>174</sup> WILKINSON, *supra* note 161, at 81.

<sup>175</sup> Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968).

<sup>176</sup> See generally CORNEL WEST, RACE MATTERS (1993).

<sup>177</sup> In subsequent cases the Court struck down de jure racial segregation in other public settings. See *Watson v. City of Memphis*, 373 U.S. 526 (1963) (recreational facilities); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

distinct black and white spheres. The Court thus spoke to and against the historical oppression of African-Americans “com[ing] down in apostolic succession from slavery” to modern times, as well as racial segregation’s anti-black subordination consisting “not of mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own.”<sup>178</sup>

#### IV. RESISTING *BROWN*

##### A. *The Southern Manifesto and the Parker Doctrine*

Negative reactions and opposition to *Brown I* and *II* were immediate and intense. In 1956, U.S. Senators and Representatives from southern states placed in the Congressional Record the “Southern Manifesto”<sup>179</sup> in which they declared that the “unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.”<sup>180</sup> These elected officials “pledg[ed] [themselves] to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution.”<sup>181</sup> Moreover, and going beyond words and protestations, resistance to *Brown* and to the broader pursuit of racial justice and integration came in the form of the murder, bombings, beatings, and castrations of those fighting for and seeking relief from the entrenched and enervating system of racial caste and hierarchy.<sup>182</sup>

The meaning and mandate of the Court’s decisions were articulated in limiting ways in one of the cases remanded by *Brown II*. In *Briggs v. Elliott*<sup>183</sup> Judge John J. Parker,<sup>184</sup> writing for a three-judge panel, opined

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<sup>178</sup> Black, *supra* note 54, at 424–25.

<sup>179</sup> See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 115 (1994).

<sup>180</sup> *The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles*, 102 CONG. REC. 4459, 4460 (1956) (Senate); *Deviation from Fundamentals of the Constitution*, 102 CONG. REC. 4515, 4516 (1956) (House of Representatives). The manifesto is discussed in ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 785–88 (2002).

<sup>181</sup> 102 CONG. REC. at 4460 (Senate); 102 CONG. REC. at 4516 (House of Representatives).

<sup>182</sup> For discussions of the violent resistance to the Civil Rights Movement, see DIANE MCWHORTER, *CARRY ME HOME* (2001), and Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1015 (1989).

<sup>183</sup> 132 F. Supp. 776 (E.D.S.C. 1955).

<sup>184</sup> Parker had been nominated in 1930 for a seat on the Supreme Court by President Herbert Hoover. The nomination was opposed by the National Association for the Advancement of Colored People after that organization learned of a newspaper story reporting statements made by Parker in his 1920 speech accepting the Republican Party’s nomination for the position of governor of North Carolina. As reported in that story, Parker stated that “[t]he participation of the Negro in politics

that the Supreme Court

has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend.<sup>185</sup>

All that was decided “is that a state may not deny any person on account of race the right to attend any school that it maintains.”<sup>186</sup> The Constitution is not violated where “the children of different races voluntarily attend different schools, as they attend different churches.”<sup>187</sup>

Accordingly, Parker concluded:

Nothing in the Constitution . . . takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.<sup>188</sup>

Commenting on this integration-not-required reading of *Brown*, known as the “Parker Doctrine,” J. Harvie Wilkinson III stated:

The distinction between Thou Shalt Integrate and Thou Shalt Not Segregate is all-important. If *Brown* were read to require integration, southern school boards would be under an immediate duty to submit plans for substantial racial mixing. If, as Parker contended, *Brown* merely prohibited segregation, then the question became what evidence courts would accept that school boards were no longer doing so.<sup>189</sup>

As other district courts agreed with and adopted Parker’s approach,<sup>190</sup> *Briggs* “set a standard for evasiveness by school districts

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is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.” KLUGER, *supra* note 167, at 142 (quoting Bost, *Republicans Happy in Progress of Negroes to Democratic Party*, GREENSBORO DAILY NEWS, Apr. 19, 1920, at 1); *see also* Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 815 (2005). By a vote of thirty-nine for and forty-one against confirmation, the Republican-controlled Senate rejected the Parker nomination. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 2* (2007).

<sup>185</sup> *Briggs*, 132 F. Supp. at 777.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* The National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund “did not appeal Parker’s order to the Supreme Court, in part because of their thin resources and in part because they feared it might be upheld.” JACK BASS, *UNLIKELY HEROES* 124 (1981).

<sup>189</sup> WILKINSON, *supra* note 161, at 82.

<sup>190</sup> *See* TUSHNET, *supra* note 138, at 241; *see, e.g.*, *Randall v. Sumter Sch. Dist. No. 2*, 241 F. Supp. 787, 789 (E.D.S.C. 1965) (“The Constitution is color-blind; it should no more be violated to attempt integration than to preserve segregation.”) (quoting

throughout the South.”<sup>191</sup> The dictum of that decision was “relied upon for a decade by those who sought to circumvent the mandate of *Brown* by perpetuating school segregation”<sup>192</sup> until the *Briggs* approach was later rejected by the Supreme Court.<sup>193</sup>

### B. Resistance

Several southern state legislatures passed resolutions declaring *Brown* null and void, employing the doctrine of interposition and nullification, a theory dating back to the 1880s and associated with, among others, secessionist John Calhoun of South Carolina.<sup>194</sup> “The doctrine’s basic premise is that the Constitution is a compact between sovereign states that delegates strictly limited powers to the federal government. According to the theory, when the federal government exceeds those limits, states have a right to ‘interpose’ their authority between the federal government and their citizens.”<sup>195</sup> A majority of the states of the former Confederacy adopted interposition resolutions calling for resistance to *Brown* and the nullification of federally imposed integration measures.<sup>196</sup> For instance, in February 1956, Virginia resolved to employ “all ‘honorable, legal and constitutional’ means to ‘resist this illegal encroachment on our sovereign powers.’”<sup>197</sup>

An audacious incidence of resistance to *Brown* and an event of great legal and historical significance occurred in 1957 when Arkansas Governor Orval Faubus and a mob prevented nine black students from enrolling at Little Rock Central High School. President Eisenhower responded by dispatching to Little Rock one thousand soldiers from the 101st Airborne Division (the same division deployed against the Nazis in Normandy in 1944);<sup>198</sup> the Division restored order and the students enrolled in school.<sup>199</sup>

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Hubert H. Humphrey, *Introduction to SCHOOL DESEGREGATION: DOCUMENTS AND COMMENTARIES 3* (Hubert H. Humphrey ed. 1964)).

<sup>191</sup> KLUGER, *supra* note 167, at 751.

<sup>192</sup> *Lee v. Macon County Bd. of Educ.*, 970 F.2d 767, 773 (11th Cir. 1992).

<sup>193</sup> *See id.*; *Green v. County Sch. Bd.*, 391 U.S. 430, 441 (1968); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200 n.11 (1973).

<sup>194</sup> *See* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2734 (2003); *see also* DANIEL FARBER, *LINCOLN’S CONSTITUTION* 26–91 (2003) (discussing interposition theories).

<sup>195</sup> David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1081 n.43 (2004).

<sup>196</sup> *See* TAYLOR BRANCH, *PARTING THE WATERS* 380 (1988); Douglas, *supra* note 179, at 93 n.5; Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 WM. & MARY L. REV. 1261, 1269 (1996).

<sup>197</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 60 (2000) (quoting S.J. Res. 3, 1956 Gen. Assem., Reg. Sess., 1956 Va. Acts 1213, 1215).

<sup>198</sup> *See* Henry W. McGee Jr., *Introduction: Brown, Triumph or Challenge?*, 3 SEATTLE J. SOC. JUST. 13, 15 (2004).

<sup>199</sup> *See* BRANCH, *supra* note 196, at 224.

Three years later, in New Orleans, Louisiana, six-year-old Ruby Bridges was escorted by federal marshals past egg-and-tomato-throwing bigots and into the William Frantz Elementary School (a moment depicted in Norman Rockwell's famous painting *The Problem We All Live With*).<sup>200</sup> This young child was "the first black pupil to integrate a school" in that city.<sup>201</sup>

## V. RESISTING SCHOOL SEGREGATION

### A. *The Warren Court Speaks*

From 1954 to 1964, ten years in which "virtually *nothing happened*" relative to southern school desegregation,<sup>202</sup> the Supreme Court decided three cases involving elementary and secondary school segregation.<sup>203</sup> In its 1958 decision in *Cooper v. Aaron*,<sup>204</sup> the Court, addressing the aforementioned obstructive actions of Arkansas Governor Faubus,<sup>205</sup> declared that the constitutional rights recognized in *Brown* "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"<sup>206</sup> Rejecting the argument that state officials were not bound by and did not have to comply with *Brown*, the Court declared that "the federal judiciary is supreme in the exposition of the law of the Constitution" and that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States."<sup>207</sup>

Thereafter, *Goss v. Board of Education* upheld an equal protection

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<sup>200</sup> See DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 257 (2006).

<sup>201</sup> *Id.*

<sup>202</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (2d ed. 2008). "Ten years after *Brown* only 1.2 percent of black schoolchildren in the South attended school with whites. Excluding Texas and Tennessee, the percent drops to less than one-half of one percent (.48 percent)." *Id.* Thus, "[a]fter ten years of Court-ordered desegregation, in the eleven Southern states barely 1 out of every 100 black children attended schools with whites. . . . The numbers show that the Supreme Court contributed virtually *nothing* to ending segregation of the public schools in the Southern states in the decade following *Brown*." *Id.*; see also TUSHNET, *supra* note 145, at 136 ("The Supreme Court's 1954 decision was so widely disregarded in the deep South that only a tiny number of schools there were desegregated by 1964. In this sense *Brown v. Board of Education* was a short-term victory (the short term being the days following the Court's decision) and a long-term irrelevancy (the long term being the ensuing decade).").

<sup>203</sup> See ROSENBERG, *supra* note 202, at 43.

<sup>204</sup> 358 U.S. 1 (1958); see generally TONY A. FREYER, *LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION* (2007).

<sup>205</sup> See McGee, *supra* note 198 and accompanying text.

<sup>206</sup> 358 U.S. at 17.

<sup>207</sup> *Id.* at 18.



challenge to the transfer provision of a formal desegregation plan.<sup>208</sup> That provision permitted a student transferred to a desegregated school where she would be in the racial minority to return to the segregated school from which she transferred and where she was in the racial majority. In the Court's view, this provision "lends itself to perpetuation of segregation" and provided "a one-way ticket leading to but one destination, *i.e.*, the majority race of the transferee and continued segregation."<sup>209</sup>

In *Griffin v. County School Board*, the Court held that a Virginia county seeking to perpetuate racial segregation violated the Constitution when it closed its public schools and opened private state- and county-assisted schools for white children.<sup>210</sup> The Court stated: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia."<sup>211</sup>

In 1968, four years after the passage of the momentous Civil Rights Act of 1964,<sup>212</sup> *Green v. County School Board* struck down a "freedom of choice" plan allowing students to select the public school they wished to attend.<sup>213</sup> Adopted a decade after *Brown I* and *II*, the challenged plan "operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board."<sup>214</sup> The Court's "last easy school desegregation case,"<sup>215</sup> *Green* emphasized that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."<sup>216</sup> In another decision issued the same day as *Green*, *Monroe v. Board of Commissioners*,<sup>217</sup> the Court held that a "free transfer" plan permitting student transfers to

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<sup>208</sup> 373 U.S. 683 (1963).

<sup>209</sup> *Id.* at 686–87.

<sup>210</sup> 377 U.S. 218, 220–21, 225 (1964).

<sup>211</sup> *Id.* at 234.

<sup>212</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, §101, 78 Stat. 241 (current version at 42 U.S.C. § 2000e (2006)). This law authorized the U.S. Attorney General to bring suits challenging segregative educational practices and, pursuant to Title VI, to terminate the federal funding of school districts engaging in racial discrimination. Gerald Rosenberg argues that the rate of school desegregation increased after the enactment of both the 1964 legislation and the Elementary and Secondary Education Act of 1965's provision of federal assistance to schools with high percentages of low-income children. *See* ROSENBERG, *supra* note 202, at 47, 51; Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (current version at 20 U.S.C. § 6301 (2006)).

<sup>213</sup> 391 U.S. 430, 441 (1968).

<sup>214</sup> *Id.* at 441–42.

<sup>215</sup> Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 33 (1976).

<sup>216</sup> 391 U.S. at 437–38.

<sup>217</sup> 391 U.S. 450 (1968).

schools of their choice did not meet *Green*'s affirmative duty requirement. "Only by dismantling the state-imposed dual system can that end be achieved."<sup>218</sup>

*B. Richard M. Nixon, Candidate and President*

At the time of the Court's consideration of and decisions in *Green* and *Monroe*, Richard M. Nixon was campaigning for and seeking election to the office of President. Nixon pledged that, if elected, he would appoint "law and order" Justices<sup>219</sup> and "strict constitutionalists" to the Supreme Court—"men that interpret the law and don't try to make the law."<sup>220</sup> Pursuing the endorsement of South Carolina Senator Strom Thurmond,<sup>221</sup> Nixon informed Thurmond and southern Republican Party delegates that Nixon did not "think there [was] any court in this country, any judge in this country, either local or on the Supreme Court . . . qualified to be a local school district and to make the decisions as your local school board."<sup>222</sup> Nixon promised that he would not

go beyond . . . [*Brown*] and say it is the responsibility of the federal government, and the federal courts, to, in effect, act as local school districts in determining how we carry that out, and then to use the power of the federal treasury to withhold funds or give funds in order to carry it out."<sup>223</sup>

During his first term in office, President Nixon (whose

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<sup>218</sup> *Id.* at 458; see also *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (holding that segregated Mississippi schools had to immediately operate on a unitary basis and that "a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible").

<sup>219</sup> STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 60 (2008).

<sup>220</sup> THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 112 (2004) (quoting Richard M. Nixon, Address at the Republican Party Convention (1968)).

<sup>221</sup> In seeking Thurmond's support, Nixon was concerned that Thurmond would back Ronald Reagan; speaking of Reagan, Thurmond had stated, "I love that man. He's the best we've got." RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 283 (2008). Pursuing Thurmond's endorsement in the days and weeks following the Court's *Green* decision, Nixon convinced Thurmond that, as president, Nixon would deal with "a power-grasping Supreme Court" and would only appoint strict constructionists to the federal bench. *Id.* at 284, 285.

In a book published in 1968 Thurmond argued that the Court's 1954 decision in *Brown* was a "conspicuous moment when the Court freed itself of its oath to uphold the Constitution." STROM THURMOND, *THE FAITH WE HAVE NOT KEPT* 14 (1968). "Revolutionary social change was instituted without reference to the desires of the electorate. What was legal and constitutional one day was 'illegal' and 'unconstitutional' the next." *Id.* at 14–15. Thurmond also complained that "[i]n crowded cities, children are bused across town to strange schools and strange playmates in order to learn the current mathematics of the population mix. Although they are forced to play together, they are forbidden to pray together." *Id.* at 2.

<sup>222</sup> KECK, *supra* note 220, at 112.

<sup>223</sup> *Id.*

administration “whistled white tunes”)<sup>224</sup> nominated, and the U.S. Senate confirmed, four Supreme Court Justices: Chief Justice Warren Burger and Justices Harry Blackmun, Lewis F. Powell, and William H. Rehnquist.<sup>225</sup> Blackmun was nominated after Nixon, seeking “to appoint conservative justices who would appeal to his Southern supporters . . . made two unsuccessful attempts to appoint a Southern appeals court judge.”<sup>226</sup>

### C. *The Burger Court Speaks*

In 1971, the aforementioned four Nixon appointees to the Court joined their colleagues in the unanimous *Swann v. Charlotte-Mecklenburg Board of Education* decision.<sup>227</sup> There, the Court, in an opinion by Chief Justice Burger, held that the federal district courts’ broad equitable powers and remedial discretion in cases involving de jure racial segregation in public schools included the limited use of mathematical ratios and racial balance requirements, “affirmative action in the form of remedial altering of attendance zones . . . to achieve truly nondiscriminatory assignments,” and ordering “bus transportation as one tool of school desegregation.”<sup>228</sup>

Expressly recognizing the reality of the resistance to *Brown I* and *II*, Burger observed that an expansive scope of equitable authority was necessary given the “changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented.”<sup>229</sup> Noting, further, that the racial composition of schools was affected by school location and capacity, site availability, financing, and other issues, Burger recognized that “[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important

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<sup>224</sup> WILKINSON, *supra* note 161, at 217. Nixon’s “southern strategy dismissed the black vote; his domestic advisor had counseled ‘benign neglect’ of black problems; and his lieutenants dismantled ‘black’ federal programs only barely begun.” *Id.*

<sup>225</sup> See KECK, *supra* note 220, at 113–14. These four appointments replaced the retiring Chief Justice Warren and Justices Abe Fortas, Hugo Black, and John Marshall Harlan, the grandson of the first Justice Harlan. *Id.*

<sup>226</sup> EISGRUBER, *supra* note 184, at 127; *see also id.* at 127, 132 (discussing the U.S. Senate’s rejection of Nixon’s nominations of federal appeals court judges Clement Haynesworth and Harold Carswell).

<sup>227</sup> 402 U.S. 1 (1971).

<sup>228</sup> *Id.* at 28, 30; *see also* Davis v. Bd. of Sch. Comm’rs, 402 U.S. 33, 37 (1971) (holding that upon a finding of a constitutional violation a “district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones”).

<sup>229</sup> *Swann*, 402 U.S. at 13–14 (footnote omitted).

impact on composition of inner-city neighborhoods.”<sup>230</sup>

In a significant part of his opinion, Chief Justice Burger cautioned that “[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary.”<sup>231</sup> In his view, the plenary powers of local authorities were more expansive than and extended beyond a court’s power of remediation:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, *that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.* To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.<sup>232</sup>

The *Swann* Court’s language was clear and unambiguous: Even in the absence of a constitutional violation, school boards could voluntarily establish and pursue racial integration and could prescribe specific ratios of African-American and white students reflecting a school district’s racial demographics. Such action by a school board, even if not required by the Constitution, was a permissible exercise of educational policy falling within the discretionary power not of the federal courts, but of school officials grappling with the ways and means of preparing students for life in a multiracial and multicultural society.

## VI. THE BLEACHING OF *BROWN*

As President Nixon’s appointments to the Supreme Court “were designed to . . . rein in court-ordered busing,”<sup>233</sup> he was surprised and disappointed by *Swann*. Nixon told his aides about his breakfast meeting

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<sup>230</sup> *Id.* at 20–21.

<sup>231</sup> *Id.* at 16.

<sup>232</sup> *Id.* (emphasis added); see also *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (“[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”).

As Reva Siegel notes, *Swann* confirmed the holdings of lower courts, in cases decided throughout the 1960s, “that state and local governments could use race-specific measures to break down de facto segregation or ‘racial imbalance’ in the nation’s public schools, even where there was no finding of a constitutional violation.” Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1516–17 (2004).

<sup>233</sup> Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 496 (2006).

with Chief Justice Burger and Attorney General John Mitchell three weeks *before* the Court issued its decision. “I lit into Burger. I said, ‘Now look here, I’ll be honest with you, if you insist on busing . . . .’ So I was sorta disappointed.”<sup>234</sup> Thereafter, in 1972, Nixon told Burger that “the people” had lost confidence as a result of the Warren Court’s decisions.<sup>235</sup> “They see these, you know, they see these hippies, and frankly, the Negro problem[,] . . . and then there’s busing. That just drives them up the damn wall.”<sup>236</sup>

#### A. *The Burger Court Speaks Again*

While *Swann* disappointed President Nixon, the Court’s decision in *Milliken v. Bradley*<sup>237</sup> did not. By a five to four vote, the Court, per Chief Justice Burger, held that lower courts had improperly ordered a multidistrict and area-wide remedy for de jure segregation in the city of Detroit, Michigan.<sup>238</sup> In the absence of an interdistrict violation of the Constitution, “there is no constitutional wrong calling for an interdistrict remedy.”<sup>239</sup> Accordingly, the challenged desegregation order covering the city of Detroit and fifty-three suburban school districts in the Detroit metropolitan area subjected to federal court control suburban school

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<sup>234</sup> Tatel, *supra* note 195, at 1100 (quoting Audio tape: Conversation between Richard Nixon, Harry Dent, John Mitchell and others, Oval Office of the White House, Washington, D.C. (Apr. 21, 1971) (Nat’l Archives Nixon White House Tape Conversation 484-2)).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 1100–01 (alteration in original) (quoting Audio tape: Conversation between Richard Nixon and Warren Burger, Oval Office of the White House, Washington, D.C. (June 14, 1972) (Nat’l Archives Nixon White House Tape Conversation 733-10)). Concerned that he would lose southern support as he sought a second term in the White House, Nixon called for the consideration of a legislative moratorium on or a constitutional amendment restricting the use of busing. *See id.* at 1095. Nixon was cognizant of the politics of such a constitutional amendment. “[L]et the Democratic candidate be against it. It’ll polarize the country. I’m telling you we’re going to fight this battle, we’re going to fight it.” *Id.* at 1096 (quoting Audio tape: Conversation between Richard Nixon, H.R. Haldeman, and Charles W. Colson, Oval Office of the White House, Washington, D.C. (Mar. 30, 1972) (Nat’l Archives Nixon White House Tape Conversation 697-29)).

<sup>237</sup> 418 U.S. 717 (1974).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 745. Chief Justice Burger stated that an interdistrict remedy may be appropriate where racial discrimination in one or more school districts caused racial segregation in an adjacent district, or where school district lines were intentionally drawn by race. “In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.” *Id.*

In a subsequent decision, *Hills v. Gautreaux*, 425 U.S. 284, 298 (1976), the Court opined that “[n]othing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.”

districts not shown to have engaged in intentional racial discrimination. In the absence of such a showing, a remedy for school segregation in Detroit could not extend to and require the performance of desegregating measures in and by the suburbs surrounding the city, Burger concluded. As the Sixth Circuit had found, this city-only remedy “would result in an all black school system [in Detroit] immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.”<sup>240</sup>

In striking down the interdistrict remedy, Chief Justice Burger argued that that remedy was contrary to the principle of local control over educational matters. “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.”<sup>241</sup> The consolidation of city and suburban school districts would require the “large-scale transportation of students” and “give rise to an array of other problems in financing and operating this new school system.”<sup>242</sup> Questioning the competence of the federal judiciary to issue and supervise metropolitan-wide remedial orders, Burger determined that a federal district court acting as “a *de facto* ‘legislative authority’” would be faced with “a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.”<sup>243</sup> (Recall presidential candidate Nixon’s view that no federal court was “qualified to be a local school district and to make the decisions as your local school board.”<sup>244</sup>)

Decided twenty years after *Brown I*, *Milliken* was a significant development in the Court’s school desegregation jurisprudence. The Court’s ruling restricted “the ability of the federal courts to order multidistrict desegregation remedies in circumstances in which entire districts were racially homogenous”<sup>245</sup> and ended, practically and effectively, “the possibility of integrated schooling in the central cities.”<sup>246</sup>

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<sup>240</sup> *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974).

<sup>241</sup> 418 U.S. at 741–42. The local control principle was also emphasized in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). There, the Court stated that local control “means . . . the freedom to devote more money to the education of one’s children,” affords the opportunity “for participation in the decisionmaking process that determines how . . . local tax dollars will be spent,” and “affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.” *Id.* at 49–50.

<sup>242</sup> 418 U.S. at 743.

<sup>243</sup> *Id.* at 743–44.

<sup>244</sup> KECK, *supra* note 220, at 112; *supra* note 222 and accompanying text.

<sup>245</sup> Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1312 (2004).

<sup>246</sup> Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of*

Whites who had engaged in post-*Brown* and government-assisted white flight<sup>247</sup> and white avoidance<sup>248</sup> now enjoyed a “suburban veto,” the “power to limit any education reform that would interfere with suburban autonomy.”<sup>249</sup> Given that veto, “desegregation plans in urban areas were largely futile, for the simple reason that there were not enough white students left in public schools.”<sup>250</sup> *Milliken’s* insulation of suburban schools from judicial desegregation orders thus “gave suburban citizens more incentive to create their own separate school districts, and offered white parents in urban districts fearful of school desegregation havens of predominantly white schools to which they could flee.”<sup>251</sup> Detroit is a glaring example of this reality: more than one hundred suburban school districts now ring the city, and the black-white student ratio in city schools, six to four in 1967, was ninety-one to four in 2000.<sup>252</sup>

### B. *The Rehnquist Court’s Resegregation Trilogy*

In its “resegregation trilogy”<sup>253</sup> of the early and mid-1990s the Rehnquist Court—on which sat several appointees of Presidents Ronald Reagan (who viewed school desegregation as a “failed social experiment that nobody wants”<sup>254</sup>) and George H. W. Bush (who favored a return to

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*Affirmative Action*, 105 COLUM. L. REV. 1436, 1518 (2005).

<sup>247</sup> “In the 1950s, 60s, and 70s, federal and state funds were actively invested in Whiteness by building the infrastructure—such as roads, highways, sewers, water mains—that allowed White flight out of urban centers and into the new, segregated suburbs.” Robert S. Chang & Catherine E. Smith, *John Calmore’s America*, 86 N.C. L. REV. 739, 747 (2008).

<sup>248</sup> The “white avoidance” theory hypothesizes that, “other things being equal, whites prefer schools and classrooms that are all-white or predominantly white.” CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 91–92 (2004).

<sup>249</sup> James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1646 (2004).

<sup>250</sup> *Id.* at 1645.

<sup>251</sup> SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 212 (2004); see also THURMOND, *supra* note 221, at 10 (“In city after city, Negroes have gradually become more numerous than whites. Families with higher incomes have moved to the suburbs in an attempt to find the life they once knew.”); Taunya Lovell Banks, *Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner*, 43 HARV. C.R.-C.L. L. REV. 127, 155 (2008) (noting that “white families fled large northern and western cities for the suburbs rather than submit to racially integrated schools”).

<sup>252</sup> See CASHIN, *supra* note 251, at 212.

<sup>253</sup> Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 63 (2002).

<sup>254</sup> Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 457 (2005) (quoting Tom Wicker, *Advantages of School Busing*, S.F. CHRON., June 11, 1985, at 39). For the Reagan Justice Department, the Court’s approaches to school desegregation and affirmative action were wrong and were inconsistent with the administration’s views on and interpretations of the Constitution. See Dawn E. Johnsen, *Ronald Reagan and the*

freedom-of-choice plans<sup>255</sup>)—considered and were receptive to school boards' efforts to dissolve court-imposed desegregation plans.

In the first case of the trilogy, *Board of Education of Oklahoma City Public Schools v. Dowell*,<sup>256</sup> the Court concluded that desegregation decrees were “not intended to operate in perpetuity.”<sup>257</sup>

Dissolving [such] decree[s] after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.<sup>258</sup>

District courts were instructed to ask whether the school board had complied in good faith with the decree, and whether the “vestiges of past discrimination had been eliminated to the extent practicable.”<sup>259</sup> (That query seems to accept that some undefined quantum of prior discrimination may never be remediable or eliminable.) Affirmative answers to both questions would provide grounds for the termination of federal court supervision and monitoring of a school district's operational matters subject to the decree.

The second trilogy case, *Freeman v. Pitts*, held that a district court could end judicial supervision of certain discrete matters subject to a court-mandated desegregation plan where the school district had achieved compliance with respect to those, but not all, covered subjects.<sup>260</sup> Accordingly, Justice Anthony M. Kennedy wrote for the Court, a “court in appropriate cases may return control to the school system in

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*Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 367 (2003); see also CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 90 (1991) (noting the Reagan Administration's commitment “to dismantling government-imposed racial preferences”).

Reagan nominated to the Court, and the Senate confirmed, Justices Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy, and elevated Justice Rehnquist to the position of Chief Justice after the retirement of Warren Burger. For more on Reagan's Court appointments, see SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974–2008, at 189–94 (2008).

<sup>255</sup> See Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63, 123 n.305 (1992). As previously discussed, freedom-of-choice plans were adopted by southern school districts in the wake of *Brown*, with one such plan struck down in 1968. See *supra* notes 213–18 and accompanying text.

During his term in office President Bush appointed to the Court David H. Souter and Clarence Thomas. See WILENTZ, *supra* note 254, at 311–12.

<sup>256</sup> 498 U.S. 237 (1991).

<sup>257</sup> *Id.* at 248.

<sup>258</sup> *Id.* (internal quotation marks and citations omitted).

<sup>259</sup> *Id.* at 249–50.

<sup>260</sup> 503 U.S. 467 (1992).



those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree.”<sup>261</sup> Kennedy also stressed the importance of local control of schools. “Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.”<sup>262</sup>

Having decided that partial compliance warrants partial dissolution of desegregation decrees, Justice Kennedy set forth his and the Court’s views on the meaning and significance of racial imbalance and residential segregation’s relationship to school segregation. As for racial imbalance:

Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.<sup>263</sup>

As for the “high correlation between residential segregation and school segregation,”<sup>264</sup> Justice Kennedy reasoned that in a nation in which people move to different counties and states “it is inevitable that the demographic makeup of school districts, based as they are on political subdivisions such as counties and municipalities, may undergo rapid change.”<sup>265</sup> He characterized residential segregation as “a product not of state action but of private choices” while at the same time recognizing that the “vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.”<sup>266</sup> Although “we cannot escape our history,” Kennedy wrote, “neither must we overstate its consequences in fixing legal responsibilities . . . . It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.”<sup>267</sup>

*Missouri v. Jenkins*,<sup>268</sup> the third case of the resegregation trilogy, concluded that a district court exceeded its remedial authority when, contrary to *Milliken*, it ordered the implementation of an interdistrict plan to attract nonminority students to a school district as relief for an

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<sup>261</sup> *Id.* at 491.

<sup>262</sup> *Id.* at 490.

<sup>263</sup> *Id.* at 494. That a school district has no duty to address racial imbalance is different from a district’s voluntary and not judicially compelled effort to address an imbalance.

<sup>264</sup> *Id.* at 495.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 495–96.

<sup>268</sup> 515 U.S. 70 (1995).

intradistrict violation.<sup>269</sup> Nor could the district court order an across-the-board salary increase for certain employees, the Court determined. That increase, “grounded in remedying the vestiges of segregation by improving the desegregative attractiveness” of the district, was “simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation.”<sup>270</sup> The district court also erred, in the Court’s view, when it required the state to fund remedial education programs until student achievement levels met grade-level national norms. Improvements in test scores were not required in order for the school district to achieve partial unitary status, the Court determined, and the achievement levels of minority students could be affected by factors beyond the school district’s control.<sup>271</sup> “So long as these external factors are not the result of segregation, they do not figure in the remedial calculus.”<sup>272</sup>

The resegregation trilogy gave primacy of position to the principle of local control of schools. In the Court’s view, dissolving decrees after a Court-determined reasonable period of time and following a school board’s demonstration of a Court-determined level of compliance warranting dissolution appropriately returned operational and decisional control to school officials closest and most directly accountable to their communities (including officials who had resisted desegregation and integration “by recalcitrance, foot-dragging, and the litigation process itself”).<sup>273</sup> Of particular interest is the way in which the Rehnquist Court “retreated to a *Plessy*-like formalism, first reducing *Brown* to a formula and then turning the formula into a departure rite by which the federal courts were to find racially-impacted ghetto schools ‘inevitable’ and terminate desegregation efforts with desegregation unachieved.”<sup>274</sup>

The Rehnquist Court thus placed the issues of residential segregation and public school segregation and resegregation in the frame, not of state action and/or responsibility, but of private choices beyond the remedial powers of the courts. This framing move disconnected the school segregation and resegregation issues of today from the reality, staying power, and extant (not just vestigial) effects of residential segregation and hypersegregation<sup>275</sup> originating in explicitly segregative policies promulgated, implemented, encouraged, and facilitated by governmental actors and acquiesced in by segregation-

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<sup>269</sup> See *id.* at 90.

<sup>270</sup> *Id.* at 100 (citation omitted).

<sup>271</sup> *Id.* at 101–02.

<sup>272</sup> *Id.* at 102.

<sup>273</sup> Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 *HOW. L.J.* 705, 733–34 (2004).

<sup>274</sup> ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 273 (2000) (footnote omitted).

<sup>275</sup> On hypersegregation, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 74 (1993). See also ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION* 43 (1998) (contending that *American Apartheid* “exaggerate[s] the significance of hypersegregation”).

preserving and integration-resistant communities and individuals.<sup>276</sup>

At the federal level, for instance, whites interested in moving to suburban homes in the 1940s and 1950s were assisted by the G.I. Bill and by loans and subsidies from the Veterans Administration (VA) and the Federal Housing Authority (FHA).<sup>277</sup> (Interestingly, these governmental entities recommended the use of racially discriminatory restrictive covenants even after the Court outlawed such agreements in 1948.<sup>278</sup>) The Home Owners' Loan Corporation (HOLC) also "marked neighborhoods by race to determine their credit-worthiness. The practice of redlining by the government was amplified because private banks used the HOLC ratings in deciding whether to make loans."<sup>279</sup>

To simply label and treat this official and governmental conduct as a now inactive and irrelevant historical fact is to overlook or to remain ignorant of the reality that the "FHA's actions have had a lasting impact on the wealth portfolios of black Americans" who were "[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history."<sup>280</sup> Between 1934 and 1962, the FHA and the VA underwrote \$120 billion in real estate purchases; less than two percent of that amount went to non-white families.<sup>281</sup> As of 1993, almost forty years after the *Brown I* decision, eighty-six percent of suburban whites resided in communities with black populations of less than one percent.<sup>282</sup> Today "the legacy of the FHA's contribution to racial residential segregation lives on in the inability of blacks to incorporate themselves into integrated neighborhoods in which the equity and demand for their homes is maintained."<sup>283</sup> Today the FHA, while doing "much good," continues to do "much harm" given its promotion of "new housing over repairing existing housing, suburbs over central cities, private vehicles

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<sup>276</sup> See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1848 (1994). The segregation-enforcing and integration-resistant conduct of governmental actors was supported at times by individuals and mobs who violently resisted black families moving into "their" neighborhoods. For an excellent discussion of the history and consequences of this "move-in" violence, see Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47 (2007).

<sup>277</sup> See generally MICHAEL J. BENNETT, *WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA* (1996); EDWARD HUMES, *OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM* (2006). See Chang & Smith, *supra* note 247, at 747.

<sup>278</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>279</sup> Chang & Smith, *supra* note 247, at 746–47 (footnotes omitted). Redlining is the practice in which lenders refuse credit to persons and communities of color. See Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255, 287 (2005).

<sup>280</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (2d ed. 2006).

<sup>281</sup> See Chang & Smith, *supra* note 247, at 747.

<sup>282</sup> See *id.*

<sup>283</sup> OLIVER & SHAPIRO, *supra* note 280, at 42.

over public transportation, and uniform communities . . . over diverse ones.”<sup>284</sup> Today state *and* (not or) private choices about the spaces and places in which racialized persons of color could or could not enter and could or could not remain are connected to present-day residential segregation and resegregation and the related and resulting racial isolation found today in many public schools.

#### VII. PARENTS INVOLVED (*PLESSY* 2.0)

One hundred and eleven years after the issuance of its decision in *Plessy v. Ferguson*,<sup>285</sup> in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>286</sup> the Supreme Court—on which now sit President George W. Bush’s appointees John Roberts and Samuel Alito<sup>287</sup>—considered another case involving the Equal Protection Clause and the constitutionality of race-conscious governmental conduct. Before the Court was the issue of the constitutionality of voluntary racial integration plans adopted by elected school boards in Seattle, Washington<sup>288</sup> and Jefferson County, Kentucky.<sup>289</sup> By a five to four vote, the Court held that

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<sup>284</sup> THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 132 (2004).

<sup>285</sup> 163 U.S. 537 (1896).

<sup>286</sup> 127 S. Ct. 2738 (2007).

<sup>287</sup> Prior to nominating Roberts and Alito, President Bush identified Justices Scalia and Thomas as his model Supreme Court Justices. See Neal A. Lewis & David Johnston, *Bush Would Sever Law Group’s Role in Screening Judges*, N.Y. TIMES, Mar. 17, 2001, at A1. In 2005, Bush nominated Roberts to the Court as the replacement for the late Chief Justice Rehnquist and, later that year, nominated Alito to the seat vacated by the retired Justice O’Connor.

<sup>288</sup> The Seattle plan was promulgated and implemented by the Seattle School District after the NAACP filed a complaint with the federal government alleging racial segregation in Seattle schools. Under the version of the plan challenged in *Parents Involved*, incoming ninth-grade students were allowed to choose to attend any one of the district’s ten public high schools. Where too many students listed a particular school as their first-choice institution the plan provided four tiebreakers governing the allocation of admissions to oversubscribed locations: (1) students with siblings already attending the oversubscribed school; (2) students whose race would bring the school into racial balance (defined as the school being within ten percentage points of the district’s forty-one percent white and fifty-nine percent nonwhite student demographic); (3) the distance between the student’s chosen school and the student’s residence; and (4) a lottery. See *Parents Involved*, 127 S. Ct. at 2747; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1171 (9th Cir. 2005) (en banc) (noting the availability of the “virtually never used” lottery tiebreaker), *rev’d*, 127 S. Ct. 2738 (2007).

<sup>289</sup> The Jefferson County, Kentucky plan was voluntarily adopted by that county’s school board in 2001 following the dissolution of a federal district court’s desegregation decree governing student admissions in the Louisville metropolitan area. See 127 S. Ct. at 2749; *id.* at 2806–09 (Breyer, J., dissenting); see also *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) (holding that, so far as was practicable, the school district had eliminated the vestiges of past de jure segregation). The plan’s guidelines provided that the enrollment of African-American students in non-magnet schools had to be not less than fifteen percent and

the at-issue plans' consideration of the race of students in seeking racial diversity on a school-by-school basis constituted racial balancing proscribed by the Constitution.<sup>290</sup>

A. *The Roberts and Thomas Opinions*

1. *Chief Justice Roberts for The Majority and Plurality*

In an opinion by Chief Justice Roberts, joined in its entirety by Justices Scalia, Thomas, and Alito (all Reagan Administration alumni) and in part by Justice Kennedy, the Court subjected the Seattle and Louisville voluntary integration plans to strict scrutiny review.<sup>291</sup> Roberts concluded that the compelling governmental interests of remediation and student body diversity recognized by the Court in prior cases could not be relied on as justificatory rationales for the plans.<sup>292</sup> The interest in remedying past intentional discrimination<sup>293</sup> was not being pursued by the school districts, Roberts concluded, as there was no showing that the Seattle schools had ever been segregated by law,<sup>294</sup> and the Louisville schools, while previously subject to a subsequently dissolved desegregation decree, had achieved unitary status.<sup>295</sup>

As for the diversity interest, found by the Court to be compelling in *Grutter v. Bollinger*,<sup>296</sup> Chief Justice Roberts concluded that *Grutter* was

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not greater than fifty percent of the particular school's student population. Parents of students who would be attending kindergarten or first grade, or new students coming into the district, were permitted to apply for admission to their first or second choice "resides" schools "grouped into clusters in order to facilitate integration." *Parents Involved*, 127 S. Ct. at 2749. A student was not admitted to his or her desired school where doing so would have resulted in noncompliance with the plan's racial integration guidelines. In addition, the transfer requests of elementary and secondary school students could be denied on the bases of noncompliance with the guidelines or lack of available space. *See id.* at 2749–50.

<sup>290</sup> 127 S. Ct. at 2746.

<sup>291</sup> *Id.* at 2751.

<sup>292</sup> *Id.* at 2767–78. Roberts also determined that *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), was not relevant precedent. The "suggestion" in that case that school districts could prescribe ratios of black and white students in each school was *dicta*, he determined, as the Court "had no occasion to consider whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible." 127 S. Ct. at 2752 n.10; *see supra* note 229 and accompanying text. Justice Breyer rejected that characterization of *Swann*, arguing that while the Court's statement in that case "was not a technical holding," the Court did "set forth . . . a basic principle of constitutional law—a principle of law that has found 'wide acceptance in the legal culture.'" *Id.* at 2812 (Breyer, J., dissenting) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

<sup>293</sup> *See* 127 S. Ct. at 2752 (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

<sup>294</sup> *See* 127 S. Ct. at 2761; *but see id.* at 2812 (Breyer, J., dissenting) (arguing that the claim of no segregation in Seattle was not accurate; one could only "validly claim that *no court* ever found that Seattle schools were segregated in law").

<sup>295</sup> *See id.* at 2752.

<sup>296</sup> 539 U.S. 306 (2003) (holding that the University of Michigan law school's

limited to the “unique context of higher education.”<sup>297</sup> *Grutter* permitted race-conscious government action “only as part of a ‘highly individualized, holistic review’” and as “part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be ‘patently unconstitutional.’”<sup>298</sup> By contrast, Roberts stated, in the Seattle and Louisville plans “race is not considered as part of a broader effort to achieve ‘exposure to widely diverse people, cultures, ideas, and viewpoints,’ . . . race, for some students, is determinative standing alone.”<sup>299</sup>

Speaking for a plurality of the Court, Chief Justice Roberts reasoned that the plans were “not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity” and were instead “directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”<sup>300</sup> He expressed his concern that accepting what he viewed as “racial balancing” as a compelling governmental interest would justify racial proportionality throughout the Nation,<sup>301</sup> “would ‘effectively assur[e] that race will always be relevant in American life,’” and would hinder the achievement of “the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race.”<sup>302</sup> In a footnote accompanying this discussion of racial balancing, Roberts quoted the “[o]ur Constitution is color-blind” passage of Justice Harlan’s *Plessy* dissent.<sup>303</sup>

In the final pages of the plurality opinion Chief Justice Roberts, eschewing a minimalist judicial approach,<sup>304</sup> addressed and set forth his understanding of the meaning of *Brown*. Writing that “when it comes to using race to assign children to schools, history will be heard,”<sup>305</sup> Roberts set forth the following description of *Brown I* and reference to *Brown II*:

In *Brown* . . . we held that segregation deprived black children of

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race-conscious admissions policy did not violate the Equal Protection Clause).

<sup>297</sup> *Parents Involved*, 127 S. Ct. at 2754.

<sup>298</sup> *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 330, 337).

<sup>299</sup> *Parents Involved*, 127 S. Ct. at 2753 (quoting *Grutter*, 539 U.S. at 308).

<sup>300</sup> *Parents Involved*, 127 S. Ct. at 2755 (plurality opinion).

<sup>301</sup> *See id.* at 2757.

<sup>302</sup> *Id.* at 2758 (alteration in original) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

<sup>303</sup> *See Parents Involved*, 127 S. Ct. at 2758 n.14 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1869)).

<sup>304</sup> *See* Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997, 1034 (2008) (discussing charge that Justice Roberts has embraced judicial minimalism and respect for the Court’s precedents while at the same time reinterpreting *Brown* in *Parents Involved*). On judicial minimalism, see generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

<sup>305</sup> *Parents Involved*, 127 S. Ct. at 2767. This, as noted by Justice John Paul Stevens, from a Justice who only two months earlier had declared, “It is a familiar adage that history is written by the victors.” *Id.* at 2798 (Stevens, J., dissenting) (quoting *Brewer v. Quarterman*, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting)).

equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. . . . It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. (“The impact [of segregation] is greater when it has the sanction of the law”). The next Term, we accordingly stated that “full compliance” with *Brown I* required school districts “to achieve a system of determining admission to the public schools *on a nonracial basis*.”<sup>306</sup>

This description of *Brown I* is disturbingly incomplete and misleading. While the *Brown I* Court did say that the impact of segregation is greater when law sanctions that conduct, the Court said much more. Chief Justice Roberts does not quote the second part of the very same sentence in Chief Justice Warren’s *Brown I* opinion: “[F]or the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”<sup>307</sup> Thus, contrary to Roberts’ account, in 1954 the Court did not only and unequivocally declare that the at-issue constitutional violation was the legal separation of all children on the basis of race, a framing of the issue “implying equal burdens on blacks and whites.”<sup>308</sup> The specific violation identified and invalidated by the Court was the exclusion of black children from schools attended by white children in furtherance of a regime of race-based apartheid and in a manner “generat[ing] 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.”<sup>309</sup>

Furthermore, as Goodwin Liu has noted, Chief Justice Roberts’ reference to the requirement of non-race-based admissions to public schools does not acknowledge “that the Court in later decisions required school districts to do much more than assign children to schools on a nonracial basis to comply with *Brown*.”<sup>310</sup> The uninitiated and uninformed would not know that *Brown*’s progeny includes decisions charging school boards with the “affirmative duty” to eliminate discrimination, “root and branch,”<sup>311</sup> and recognized the broad equitable powers and remedial discretion of the federal courts to order race-conscious affirmative action in addressing persistent segregative practices and realities.<sup>312</sup>

Chief Justice Roberts’ plurality opinion then turned to the parties’ and amici curiae’s debate over “which side is more faithful to the

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<sup>306</sup> *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion) (alteration in original) (citation omitted) (quoting *Brown v. Bd. Of Educ. (Brown I)*, 347 U.S. 483, 494 (1954)).

<sup>307</sup> *Brown I*, 347 U.S. at 494; see *supra* note 152 and accompanying text.

<sup>308</sup> Liu, *supra* note 111, at 62.

<sup>309</sup> *Brown I*, 347 U.S. at 494.

<sup>310</sup> Liu, *supra* note 111, at 62.

<sup>311</sup> *Green v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

<sup>312</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

heritage of *Brown*.<sup>313</sup> In his view, “the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: ‘[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.’”<sup>314</sup> “What do the racial classifications at issue here do,” Roberts asked, “if not accord differential treatment on the basis of race?”<sup>315</sup> The Chief Justice quoted a statement to the Court made by *Brown* lawyer (now senior federal Judge) Robert L. Carter in the 1952 oral argument of *Brown I*: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”<sup>316</sup> “There is no ambiguity in that statement,” Roberts wrote, arguing that “it was that position that prevailed in this Court.”<sup>317</sup> The Chief Justice asked and answered in the affirmative the question “What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?”<sup>318</sup>

Consider each argument made and proposition set forth in the preceding paragraph.<sup>319</sup> Chief Justice Roberts posits, incredibly, that those who challenged and fought the entrenched system of racial apartheid in the mid-1950s were and are jurisprudentially aligned with the twenty-first century position of those who sought the invalidation of the Seattle and Louisville voluntary integration plans. This invention and illusion of symmetry masks the real and obvious asymmetry and differences between Jim and Jane Crow’s state-mandated exclusion and subordination of African-Americans and Seattle and Louisville’s inclusionary integration projects. And Roberts’ characterization of *Brown* as a case about, not racial hierarchy and the stigmatization and subordination of African-American children, but the “racial

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<sup>313</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767 (2007) (plurality opinion).

<sup>314</sup> *Id.* (alteration in original) (quoting Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument at 15, *Brown I*, 347 U.S. 483 (Nos. 1, 2, 4, 10), 1953 WL 78288).

<sup>315</sup> *Parents Involved*, 127 S. Ct. at 2767.

<sup>316</sup> *Id.* at 2767–68 (quoting Transcript of Oral Argument at 7 (Robert L. Carter, Dec. 9, 1952), *Brown I*, 347 U.S. 483).

<sup>317</sup> *Parents Involved*, 127 S. Ct. at 2768. As I have argued elsewhere, in quoting and relying on Carter’s statement, Chief Justice Roberts “took an argument made by a lawyer in one specific context challenging one specific practice and extrapolated from that statement a grand theory of equal protection law in which all race-conscious governmental actions, whatever the context, are the same.” Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 *HOW. L.J.* 251, 315 (2008).

<sup>318</sup> *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

<sup>319</sup> For an in-depth discussion and criticism of Chief Justice Roberts’ references to and reliance on the *Brown* brief and lawyers, see Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 *CORNELL L. REV.* 203 (2008).



classification” of any and all children illustrates the problems and perils of sanitized narrative.<sup>320</sup> The classifications at issue in *Brown* did treat children differently on the basis of race—and did so for the purpose and as a means of intentionally excluding black children from attending school with white children consistent with and protective of a social order grounded in white supremacy. Given that reality, to simply and only ask whether persons are being classified by race without asking “why” and “for what purpose” is a problematically partial and acontextual query that too easily yields answers and conclusions blind and indifferent to contemporary racial realities.

As for Chief Justice Roberts’ quotation of and reliance on Judge Carter’s 1952 oral argument statement, Carter, commenting after the *Parents Involved* decision, had this reaction: “All that race was used for at that point in time [in the 1950s] was to deny equal opportunity to black people. . . . It’s to stand that argument on its head to use race the way they use [it] now.”<sup>321</sup> That is the reaction of one who was present at and was angered and disgusted by the “mean-spirited approach” of attorney John W. Davis in the *Brown* oral argument as Davis defended segregation in South Carolina.<sup>322</sup> In Carter’s view, “Too many white people in this country share Davis’s sentiment that blacks should be content with half a loaf or even a quarter of a loaf of full equality.”<sup>323</sup>

Carter has also written that in the years following *Brown*, he and his colleagues “felt the only way for a school board to determine whether its schools were divided into black and white schools was to take a race census. We would then use the results to achieve as many integrated schools as possible.”<sup>324</sup> Carter noted the criticism of this race-conscious approach by those who “argued that if we were trying to build a color-blind society, then to use race as a criterion was moving backward. Some of these people may have been sincere—but most were hypocrites, with no interest in breaking down existing racial barriers.”<sup>325</sup> As for the meaning of *Brown*’s heritage, Carter has made clear his view that the Court’s 1954 decision “remains a pivotal moment in the struggle for racial justice” and “launched the movement that overturned Jim Crow in the South and sparked a revolution in black consciousness and race relations, one that transformed America’s social and political landscape

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<sup>320</sup> See *Parents Involved*, 127 S. Ct. at 2767–68.

<sup>321</sup> Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (quoting senior federal judge Carter); see also *id.* (*Brown* lawyer Jack Greenberg lamenting Roberts’ “preposterous” characterization of *Brown*); *id.* (according to *Brown* lawyer William Coleman, the Court’s opinion “is 100 percent wrong” and is “dirty pool”).

<sup>322</sup> ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 124 (2005).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 175.

<sup>325</sup> *Id.*

and continues to resonate to this day.”<sup>326</sup> There is no ambiguity in that statement.

In the last paragraph of his *Parents Involved* opinion, Chief Justice Roberts stated that “[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”<sup>327</sup> (No, a dissenting Justice John Paul Stevens responded: “[The Chief Justice] fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.”<sup>328</sup>) For Roberts the way to achieve a nonracial admissions system for public schools that have never segregated by race or have removed the “vestiges of past segregation . . . is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>329</sup>

“[H]owever nifty it may sound,”<sup>330</sup> this all-discrimination-is-wrong slogan<sup>331</sup> and approach does not comprehend that “the point of prohibiting discrimination is not to forbid distinguishing between people—differentiation is important and even necessary in some

<sup>326</sup> *Id.* at 242. For more on Judge Carter’s views on *Brown* and racial integration, see Robert L. Carter, *The Conception of Brown*, 32 *FORDHAM URB. L.J.* 93 (2004); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 *ST. LOUIS U. L.J.* 885 (1993); Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 *HARV. C.R.-C.L. L. REV.* 615 (1979); Robert L. Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment’s Guarantee of Equal Educational Opportunity*, 1972 *WASH. U. L.Q.* 479 (1972); Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 *W. RES. L. REV.* 502 (1965).

<sup>327</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (plurality opinion).

<sup>328</sup> *Id.* at 2798 (Stevens, J., dissenting); see also *id.* at 2836 (Breyer, J., dissenting) (“[S]egregation policies did not simply tell schoolchildren ‘where they could and could not go to school based on the color of their skin,’ . . . they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination.” (quoting *id.* at 2768)).

<sup>329</sup> *Id.* at 2768 (plurality opinion). See also William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 *U. CHI. L. REV.* 775, 809 (1979) (“[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race.”).

Compare and contrast Roberts’ “just say no to discrimination” approach with Justice Blackmun’s view that “[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion). Unlike Roberts, Blackmun referred, not to any and all differential treatment of any and all persons of different races, but to the existence and perpetuation of racial supremacy and hierarchy.

<sup>330</sup> Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 *LEWIS & CLARK L. REV.* 599, 644 (2008).

<sup>331</sup> See *Parents Involved*, 127 S. Ct. at 2834 (Breyer, J., dissenting).

instances”;<sup>332</sup> nor does it present and require consideration of “the moral question posed by the fact that it is often desirable and sometimes necessary to treat people differently.”<sup>333</sup> Thus, as Martha Minow observes, Roberts ignores

the simple difference between the use of race by Seattle and Louisville and the use of race rejected by the Court in *Brown*. To stop current discrimination in schools, communities may need schools to take race into account—but in a very different way than the exclusions of the Jim Crow days. Using race and ethnicity to redress effects of past discrimination, to overcome poor educational outcomes associated with schools with majority non-white enrollments, and to promote work, play, and democratic cooperation across racial lines simply are not the same kind of invidious discrimination that *Brown* struck down. Somehow, color-blindness replaced equality as the measure of the law.<sup>334</sup>

## 2. Justice Thomas, Concurring

In a separate concurring opinion, Justice Thomas<sup>335</sup> set forth his views that “resegregation is not occurring in Seattle or Louisville”<sup>336</sup> and that there is a difference between segregation and racial imbalance in the

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<sup>332</sup> DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 172 (2008). Hellman argues that discrimination “is both ubiquitous and necessary. We routinely draw distinctions among people in public policy and law as well as in business, school settings, and private life.” *Id.* at 2–3.

<sup>333</sup> *Id.* at 4.

<sup>334</sup> Minow, *supra* note 330, at 645; see also Martha C. Nussbaum, Foreword, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 91 (2007) (stating that Roberts’ “stop discriminating” postulate is “a statement whose verbal and intellectual fluency markedly contrasts with its failure to attend to the human salience of the distinction between exclusion and inclusion”).

<sup>335</sup> Justice Thomas has identified himself as an originalist and made clear his view that “judges should seek the original understanding” of constitutional text “if that text’s meaning is not readily apparent.” Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996). In Thomas’s view, originalism promotes judicial impartiality by reducing a judge’s resort to his or her individual discretion in deciding cases. *Id.* at 6–7. He has called for an original understanding and original meaning analysis of the First Amendment, the Fifth Amendment’s Taking Clause, the Commerce Clause, and the Fourteenth Amendment’s Privileges or Immunities Clause. See *Morse v. Frederick*, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring); *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *Saenz v. Roe*, 526 U.S. 489, 521–22 (1989) (Thomas, J., dissenting). See also Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70, 87–90 (Earl M. Maltz ed., 2003).

Interestingly, Thomas does not employ an originalist methodology and approach in his *Parents Involved* concurrence. See James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 150 (2007) (“Whatever else one might say about the Court’s opinion, it is not originalist. Nor does Justice Thomas’s concurring opinion rely, more than fleetingly and vaguely, on originalism.”).

<sup>336</sup> *Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).

public school context. “[S]egregation is the deliberate operation of a school system to ‘carry out a governmental policy to separate pupils in schools solely on the basis of race,’”<sup>337</sup> while “[r]acial imbalance is the failure of a school district’s individual schools to match or approximate the demographic makeup of the student population at large.”<sup>338</sup> Acknowledging that “presently observed racial imbalance might result from past *de jure* segregation,” Thomas opined that “racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.”<sup>339</sup> Because racial imbalance sans intentional separation of the races by the state is not “segregation,” Seattle had no history of *de jure* segregation, and Louisville was no longer covered by a desegregation decree, Justice Thomas concluded that the integration plans did not serve “a genuinely compelling state interest.”<sup>340</sup>

Justice Thomas also made an extended argument for colorblind constitutionalism. “My view of the Constitution is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ And my view was the rallying cry for the lawyers who litigated *Brown*.”<sup>341</sup> Is Thomas’s view of the Constitution the same as Harlan’s? And is Thomas’s view the same as the rallying cry of the *Brown* lawyers?

Justice Harlan’s colorblindness was and is more complicated than the see-no-color mantra Justice Thomas found in and constructed from the aforementioned thirteen words of Harlan’s *Plessy* dissent. As previously discussed,<sup>342</sup> a race-conscious and color-aware Harlan spoke of colorblind constitutionalism in matters of civil rights and equality; he did not endorse, did not argue for, and did not believe in the social equality of blacks, as a reading of other passages in his *Plessy* dissent makes clear.<sup>343</sup> Thomas thus argued for a colorblind approach to the Equal Protection Clause that was not in fact Harlan’s approach, unless Thomas adopted the Reconstruction-era “tripartite theory of citizenship” which did not encompass, recognize, or protect the social right to attend a racially integrated school.<sup>344</sup> Thomas’s description and understanding of Harlan’s colorblind constitutionalism is thus materially incomplete and fundamentally flawed.

Nor does Justice Thomas’s contention that his view of the Constitution is the same as the rallying cry of the *Brown* lawyers withstand

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<sup>337</sup> *Id.* at 2769 (quoting *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 6 (1971)).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 2773.

<sup>341</sup> *Id.* at 2782 (citation omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>342</sup> *See supra* Part II.B.2.

<sup>343</sup> *See supra* note 101 and accompanying text.

<sup>344</sup> *See Balkin, supra* note 47, at 1690, 1694.

scrutiny. Thomas quoted Judge Constance Baker Motley's comment that Thurgood Marshall "had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson* . . . . I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days."<sup>345</sup> To say that one stands with Marshall may, understandably, have significant rhetorical force and argumentative power. But it is by no means clear or persuasively arguable that Marshall and Thomas share the same or relevantly similar views of Harlan's dissent when it comes to applying the Equal Protection Clause in the specific contexts of public school desegregation and voluntary integration in the wake of, and with full knowledge of, the stubborn resistance and obstruction in the decades following the Court's 1954 and 1955 decisions. What is known is that Justice Marshall was disappointed by certain aspects of the Court's post-*Brown* jurisprudence, including the Rehnquist Court's resegregation decisions joined by Thomas, and that Marshall lamented "our collective failure to live up to the promise and vision that animated" *Brown*.<sup>346</sup>

Having invoked and aligned himself with Justice Harlan and the *Brown* lawyers, Justice Thomas provocatively placed a dissenting Justice Breyer in the camp of the segregationists who opposed *Brown*. Thomas argued that the views expressed in Breyer's *Parents Involved* dissent "first appeared in *Plessy*" wherein the "Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to 'the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.'"<sup>347</sup> "What was wrong in 1954 cannot be right today,"<sup>348</sup> Thomas urged:

Whatever else the Court's rejection of the segregationists' arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. . . . And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards' race-based plans because no contextual detail—or collection of contextual details—can "provide

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<sup>345</sup> *Parents Involved*, 127 S. Ct. at 2783 (Thomas, J., concurring) (quoting IN MEMORIAM: HONORABLE THURGOOD MARSHALL, PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, X (1993)).

<sup>346</sup> CASHIN, *supra* note 251, at 209 (author, one of Justice Marshall's former law clerks, recounting the Justice's views).

<sup>347</sup> *Parents Involved*, 127 S. Ct. at 2783 (Thomas, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896)).

<sup>348</sup> *Id.* at 2786.

refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”<sup>349</sup>

Justice Thomas’s position that the same principles guiding the *Brown* Court in 1954 guided the *Parents Involved* Court in 2007 is premised on his description of *Brown* as a case in which the Court prohibited any and all race-conscious distinctions by governmental actors. But *Brown* was and is much more than that: While the Court outlawed state-mandated racial discrimination, to be sure, *Brown* is more accurately described and understood as a decision upholding an Equal Protection Clause challenge to discrimination in the form of anti-black discrimination and the subordination and subjugation of a historically oppressed people. But that detail and context are of no significance for Thomas,<sup>350</sup> given his belief that any governmental consideration of race violates the Equal Protection Clause. On this view, segregation in furtherance of the goal of excluding black children from schools attended by white children and voluntary integration measures bringing together students of different races both violate the Constitution.

#### B. Justice Kennedy, Concurring In Part

Justice Kennedy cast the fifth and majority-creating vote for striking down the Seattle and Louisville plans.<sup>351</sup> In a separate concurring opinion he concluded that “the state-mandated racial classifications at issue,

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<sup>349</sup> *Id.* (citation omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment). In his *Adarand* concurrence Thomas stated that he believed “that there is a “moral [and] constitutional equivalence” . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.” *Adarand Constructors, Inc.*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment) (quoting *id.* at 243 (Stevens, J., dissenting)). Justice Stevens found no such “moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.” *Id.* at 243 (Stevens, J., dissenting). The equivalency argument “would disregard the difference between a ‘No Trespassing’ sign and a welcome mat. It would treat a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers.” *Id.* at 245.

<sup>350</sup> Context did matter to Justice Thomas in *Johnson v. California*, 543 U.S. 499 (2005). Dissenting from the Court’s decision subjecting to strict scrutiny review a California prison policy requiring the racial segregation of inmates for sixty days following their entry into a new correctional facility, Thomas argued that “constitutional demands are diminished in the unique context of prisons.” *Id.* at 541 (Thomas, J., dissenting).

<sup>351</sup> For insightful discussions of Kennedy’s *Parents Involved* concurrence, see Kevin Brown, *Reflections on Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy is Right*, 59 S.C. L. REV. 735 (2008); Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.”<sup>352</sup> While school districts may “continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds,”<sup>353</sup> public schools should not pursue this objective by “resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.”<sup>354</sup> Thus, as Heather Gerken notes, “Kennedy is willing to let the state consider race at the wholesale level but not at the retail level” and “is perfectly comfortable with . . . ‘indirect’ and ‘general’ race-conscious strategies.”<sup>355</sup>

Justice Kennedy parted company with other aspects of Chief Justice Roberts’ equal protection analysis, however. Rejecting colorblind constitutionalism, he wrote: “The enduring hope is that race should not matter; the reality is that too often it does.”<sup>356</sup> He argued, further, that parts of Roberts’ plurality opinion “imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account,”<sup>357</sup> and that Roberts’ “stop discriminating” postulate<sup>358</sup> “is not sufficient to decide these cases.”<sup>359</sup> As for Roberts’ and Justice Thomas’ invocation of Justice Harlan’s *Plessy* dissent, Kennedy stated that Harlan’s colorblind Constitution “was most certainly justified in the context of his dissent . . . . And, as an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”<sup>360</sup>

Opining that school officials may “adopt general policies to encourage a diverse student body,”<sup>361</sup> Justice Kennedy would allow pursuit of the goal of diversity through race-conscious means, including: (1) “strategic site selection of new schools;” (2) “drawing attendance zones with general recognition of the demographics of neighborhoods;” (3) “allocating resources for special programs;” (4) “recruiting students and faculty in a targeted fashion;” and (5) “tracking enrollments, performance, and other statistics by race.”<sup>362</sup> These race-conscious measures are “unlikely” to require strict scrutiny judicial review, he

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<sup>352</sup> *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>353</sup> *Id.* at 2797.

<sup>354</sup> *Id.*

<sup>355</sup> Gerken, *supra* note 351, at 118.

<sup>356</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>357</sup> *Id.*

<sup>358</sup> See *supra* note 329 and accompanying text.

<sup>359</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>360</sup> *Id.* at 2791–92.

<sup>361</sup> *Id.* at 2792.

<sup>362</sup> *Id.*

reasoned, since each student would not be defined by and treated differently on the basis of her or his race.<sup>363</sup>

What all of this means, and whether and how Justice Kennedy's approach may be applied in future cases, is by no means clear. Given this ambiguity,<sup>364</sup> risk-averse school boards considering the adoption of integration plans but concerned about lawsuits and the attendant litigation and aggravation costs may decide, for legal and not educational reasons, to forego racial integration initiatives.<sup>365</sup>

Although Seattle and Louisville did not persuade a majority of the Court that their race-conscious policies did not violate the Equal Protection Clause, Justice Kennedy's declaration that there are circumstances in which school officials may take race into account, coupled with the race-can-be-considered position of the four dissenting Justices,<sup>366</sup> "create[d] a fragile majority that would permit school systems and housing developers to locate schools based on demographic studies with the aim of encouraging racial integration."<sup>367</sup> But that victory "can hardly obscure the reality that, in the wake of these decisions, there remains no viable mechanism for enforcing *Brown*, and that this so-called

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<sup>363</sup> *Id.* In Justice Kennedy's view, schools may seek to achieve diversity through "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools." *Id.* at 2793. How the *Grutter* approach, applied by the Court to race-conscious admissions programs at institutions of higher education, would work in the context of K-12 public school education is not apparent. See Aderson Bellegarde François, *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN ST. L. REV. 985, 989 (2008) ("Since these school districts, unlike *Grutter* institutions, do not actually purport to engage in substantive evaluations of students, it is difficult to imagine the factors, which when added to race, would indeed result in the level of racial integration that could be achieved with a straightforward racial classification.").

<sup>364</sup> Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 231-32 (2008) ("Given the large numbers of school districts in which racial assignment is an issue, . . . the absence of a majority opinion in *Parents Involved* . . . cannot but contribute to uncertainty on the part of those school districts about which uses of race, if any, are permissible, and which are not.") (footnote omitted); see also Nussbaum, *supra* note 334, at 92-93 (arguing that Kennedy's opinion is characterized by "loose reasoning, lack of definitional clarity, and a marked preference for fantasy over reality").

<sup>365</sup> For a discussion of this point, see Ryan, *supra* note 335, at 148-49. See also Warren Richey, *Court Rejects Racial Diversity Plans*, CHRISTIAN SCI. MONITOR, June 29, 2007, at 1 ("[The *Parents Involved*] decision is likely to spark legal challenges to many affirmative-action plans and other proactive race-conscious measures aimed at reaching out to African-Americans and other minorities.").

<sup>366</sup> "[F]ive Members of this Court agree that 'avoiding racial isolation' and 'achiev[ing] a diverse student population' remain today compelling interests." *Parents Involved*, 127 S. Ct. at 2835 (Breyer, J., dissenting) (quoting *id.* at 2797 (Kennedy, J., concurring)).

<sup>367</sup> Minow, *supra* note 330, at 644.



compelling state interest will probably remain something to be paid ceremonial curtsy to but never to be honored, much less enforced, in actual practice.”<sup>368</sup>

### C. Plessy 2.0

*Plessy* and *Parents Involved* are separated by 111 years—decades and generations in which the sociopolitical meanings of race have been anything but static. The institution of the Supreme Court, interpreting and applying the Equal Protection Clause, has played a critical role in giving content to the phrase “equal protection of the laws” because the Court has acted and reacted in response to claims that the Constitution permits or prohibits certain race-conscious governmental conduct.

As discussed above, the Equal Protection Clause as read and understood by the Court in *Plessy* did not provide relief for African-Americans who lived in and fought against the subordination and stigmatization of Louisiana’s racial apartheid regime.<sup>369</sup> Supposedly institutionally unaware of the pre-1900 realities of race and racialism<sup>370</sup> and arguing that the separate-but-equal doctrine did not “destroy the legal equality of the two races,”<sup>371</sup> the Court fallaciously questioned the veracity of those who challenged segregation as the Justices looked to and made law on the basis of a formalism divorced from and indifferent to (indeed, contrary to) history and then-extant circumstances. But, as Homer Plessy and Justice Harlan knew, Louisiana’s white supremacist order intentionally demeaned and subordinated blacks in real, concrete, and harmful ways.<sup>372</sup>

The respective plurality and concurring opinions of Chief Justice Roberts and Justice Thomas contain and resurrect certain features of *Plessy*’s problematical analysis of the Equal Protection Clause. In both cases, integration proponents who believed in and pursued the racial integration project failed to persuade a majority of the Court that their efforts were grounded in and were consistent with the animating purposes and principles of the clause. In both cases, the Court stood in the way of those who invoked the Constitution as they sought to change the racial status quo in ways that would bring to real life, and not in some imagined and hypothesized world, the legal and moral imperative of responding to and seeking ways around or over the exclusionary and stigmatizing race-based barriers erected by public and private actors. Finally, in both cases the Court, having the final say on the operative

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<sup>368</sup> François, *supra* note 363, at 987.

<sup>369</sup> See *supra* Part II.B.1.

<sup>370</sup> Whether Justice Brown’s majority opinion in *Plessy* “reflects the honest assessment of the majority of people at that time is unclear.” HELLMAN, *supra* note 332, at 72.

<sup>371</sup> *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

<sup>372</sup> See *supra* Part II.B.2.

meaning(s) of the Equal Protection Clause, reduced complex and multifaceted legal, social, and political issues to ahistorical, acontextual, and abstractional slogans—separate is not unequal in *Plessy* and, in *Parents Involved*, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>373</sup>

Additionally and interestingly, one can find in the pages of the *Parents Involved* decision a present-day critique and questioning of the utility of law in promoting social equality reminiscent of *Plessy*’s (1) rejection of the proposition that “social prejudices may be overcome by legislation” and (2) declaration that “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”<sup>374</sup> In his *Parents Involved* concurrence, Justice Thomas opined that “[t]here is no guarantee . . . that students of different races in the same school will actually spend time with one another.”<sup>375</sup> Nor was Thomas convinced that increased contact between students of different races improves racial understandings and relations; indeed, he argued, “racial mixing” could lead to “deterioration in racial attitudes.”<sup>376</sup> In other words, Seattle and Louisville’s voluntary integration plans will not reduce, and may even increase, social prejudice. This suggestion that governmental efforts to promote and achieve racial integration can actually be harmful is more than just a *Plessy*-like approach to the Equal Protection Clause. As James Fleming argues, “[i]t seems to me that, ironically, Thomas is not only rewriting *Brown* and resurrecting *Plessy*, but perhaps even rewriting *Brown* as resurrecting *Plessy*! For hereafter, *Brown* is to be interpreted through a worldview analogous to that of *Plessy*.”<sup>377</sup>

In sum, the *Parents Involved* plurality, like the *Plessy* Court, adopted a formalistic approach to, and view of, race and made it more difficult to respond to the racial segregation and isolation addressed in Seattle and Louisville’s voluntary integration plans. In my view, the sociopolitical meanings of race, and whether and how those meanings and existing racial realities impact and adversely affect the lives and opportunities of the racialized, are not issues and questions fully answerable by a formalist analysis or by a reliance on a faux and contrived symmetry of dissimilarly situated persons.<sup>378</sup> Nor can these issues be meaningfully assessed by resort to a memorable passage in the opinion of a dissenting Justice

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<sup>373</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (plurality opinion); see *supra* Part VII.A.1.

<sup>374</sup> *Plessy*, 163 U.S. at 551; see *supra* Part II.B.1.

<sup>375</sup> *Parents Involved*, 127 S. Ct. at 2780 (Thomas, J., concurring).

<sup>376</sup> *Id.* at 2781.

<sup>377</sup> Fleming, *supra* note 84, at 1149.

<sup>378</sup> “Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined).” *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting).

Harlan, written more than one hundred years ago. To decide the constitutionality of the at-issue plans with no regard for or recognition of the history and the factual contexts of those communities' voluntary promulgation and implementation of race-conscious student assignment policies; to not even acknowledge the arc from slavery to the failed post-Civil War Reconstruction and new slavery and Jim and Jane Crow to *Brown* and beyond; to act as though the present is not connected to the past: this hermetically sealed Equal Protection Clause protects, not integration and change, but "the inertial persistence of entrenched patterns of racial hierarchy."<sup>379</sup>

## VII. CONCLUSION

In 1896, the Supreme Court told Homer Plessy and the Nation that state-mandated racial segregation did not violate the Equal Protection Clause in a decision oblivious to or disingenuously dismissive of the history, realities, and manifestation of an entrenched and subordinating racial hierarchy. In 2007, more than a half century after *Brown's* racial realism rejected *Plessy's* formalism, the Court in *Parents Involved* told Seattle and Louisville and the Nation that voluntary efforts to racially integrate those communities' public schools violated the clause.

As discussed in this Article, the ahistorical, acontextual, and abstractional approaches to the Equal Protection Clause taken in the opinions of Chief Justice Roberts and Justice Thomas are reminiscent of and resurrect certain problematical aspects of *Plessy's* construction and constriction of the Equal Protection Clause. That resurrection places yet another obstacle in the path of those who value integration and seek "the creation of a community of relationships among people who view one another as valuable, who take pride in one another's contributions, and who appreciate differences and know that commonalities and synergies outweigh any extra efforts that bridging differences may require."<sup>380</sup>

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<sup>379</sup> López, *supra* note 96, at 1062.

<sup>380</sup> Minow, *supra* note 330, at 602.