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> Before it was over, they fired him from the little schoolhouse at which he had taught devotedly for ten years. And they fired his wife and two of his sisters and a niece. And they threatened him with bodily harm. And they sued him on trumped-up charges and convicted him in a kangaroo court and left him with a judgment that denied him credit from any bank. And they burned his house to the ground while the fire department stood around watching the flames consume the night. And they stoned the church at which he pastored. And fired shotguns at him out of the dark. But he was not Job, and so he fired back and called the police, who did not come and kept not coming. Then he fled, driving north at eighty-five miles an hour over country roads, until he was across the state line. Soon after, they burned his church to the ground and charged him, for having shot back that night, with felonious assault with a deadly weapon, and so he became an official fugitive from justice. . . .
>
> All of this happened because he was black and brave. And because others followed when he had decided the time had come to lead.[1]

For Rev. J.A. DeLaine, law was experienced as a system and structure of life, not the law of the books.[2] "Separate but equal" supported and fostered the Jim Crow economic and political domination based on race that permeated Clarendon County, South Carolina, site of *Briggs v. Elliot*,[3] one of four cases consolidated by *Brown v. Board of Education of Topeka*.[4] But Delaine's time was not the only period in which race shaped the constitutional understanding of liberty, driving and being driven by a dominant political economy essential to racial subordina-

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1. RICHARD KLUGER, SIMPLE JUSTICE 3 (1976).

2. *See id.* at 12–25.

3. 98 F. Supp. 529, 531 (E.D.S.C. 1951).

4. 347 U.S. 483 (1954). Occasioned by its fiftieth anniversary, many symposia have celebrated and evaluated the *Brown* decision. *See, e.g.*, Symposium, Brown *at Fifty*, 117 HARV. L. REV. 1301 (2004); Symposium, Brown v. Board of Education, *Footnote Eleven, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005); Symposium, *With All Deliberate Speed:* Brown II *and Desegregation's Children*, 24 LAW & INEQ. 1 (2006).

tion.[5] It has always been so in this country.

Our entire constitutional history has linked race and our conceptions of liberty. Indeed, in each period following the adoption of the Fourteenth Amendment, equality as enforced by equal protection was itself articulated as an aspect of liberty rather than equality per se. In the United States, judicial interpretations of the Constitution shifted: from Liberty as vested property acquisition and *Dred Scott v. Sandford*,[6] to Liberty as contract and voluntary association and *Plessy v. Ferguson*,[7] to Liberty as participation in a fair political process and *Brown,* to Liberty as exclusion from social responsibility and *Parents Involved in Community Schools v. Seattle School District No. 1*.[8] Liberty is thus the overarching frame of judicial intervention in or reinforcement of governmental allocation of power to private actors. After outlining each period of the political economy of liberty, I will show how the *Carolene Products* footnote four[9] context of the decision in *Brown*—the real meaning of Clarendon County—undermines the reasoning of the plurality decision in *Parents Involved.*

I. Constitutional Economy and Race

As a corollary of enlightenment liberalism, James Madison wrote in the Federalist Papers, the first object of our national government was the protection and regulation of property acquisition; for how else could each individual go their own way without the control of resources?[10] But furthermore in keeping with popular sovereignty, Justice John Marshall in *Marbury v. Madison*[11] understood this logic to require that the definition of property must be property politically determined by elected representatives. In this way property protected by *judicially* enforceable constitutional liberty was vested only when in conformity to positive law. The Constitution protected Marbury's commission by specifying

5. *See* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 Va. L. Rev. 1537, 1574 (2004) ("[C]ourts, and particularly the U.S. Supreme Court, tend, over time, to reflect the views of national political majorities and national political elites. Constitutional doctrine changes gradually in response to political mobilizations and countermobilizations. Minority rights gain constitutional protection as minorities become sufficiently important players in national coalitions and can appeal to the interests, values, and self-conception of majorities, but minority rights will gain protection only to the extent that they do not interfere too greatly with the developing interests of majorities."). *Id.*

6. 60 U.S. 393 (1857).

7. 163 U.S. 537 (1896).

8. 127 S. Ct. 2738 (2007).

9. United States v. Carolene Prods., 304 U.S. 144, 152–53 n. 4 (1938).

10. *See* The Federalist No. 10, at 58 (James Madison).

11. 5 U.S. 137 (1803).

when the office vested, in contradistinction to the President's claim under the common law that all the steps had not been completed.

In *Dred Scott*, Chief Justice Taney found this positivist logic crucial in explaining that the Constitution would never have been ratified by the southern slave-holding states if federal power were available to interfere with the vested property definitions ordained by each state, including property in a human being as chattel of another. Each state defined the resources necessary to its own economic base or system, the nation of states being largely a collection of local economies. Just as there could be no federal power to legislate the Missouri Compromise, there was no federal citizenship that could provide Dred Scott with standing to use the federal courts. Scott's master must be as free to take Scott as property defined by Georgia's slavery statute to the Missouri territory as he would be free to take any other form of personal property. Liberty as vested property acquisition defined by state law or the Constitution itself depended upon the protection of state vested slavery.[12] We fought a revolution and it gave us *Dred Scott*.

The striking down of the Missouri Compromise was one of the efficient causes of the Civil War. The victory of the North changed the relationship between constitutional Liberty and the state definition of property acquisition. While each state still defined property per its own interests, they could not do so without limits based in a new ideal of liberty itself. The end of slavery and the Thirteenth Amendment meant free labor. Each individual was free to seek the best deal he or she could get in return for their work. Mutuality required the same protection for capital. National mobility of labor and other resources was the concomitant of free labor. Thus Liberty consisted of voluntary contract, or writ larger, voluntary association. Liberty as free contract protected from public interference proved an important engine of rapid industrialization and at-will labor contracts. But this Constitutional economy also led to *Plessy v. Ferguson*. Just as each side, workers and capitalists, were virtually completely free to voluntarily contract over jobs, each race must be able to voluntarily associate with each other, or not. Laws that preserved this "voluntarism" for those who wished no association, even if

12. *See* Dred Scott v. Sandford, 60 U.S. 393, 452 (1857).

> And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.
>
> Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States . . . is not warranted by the Constitution . . . .

Id.

one race wished integration, must be upheld.[13] We fought a Civil War and it gave us *Plessy*.

Unfortunately, by the late 1920s, virtually unlimited contracting that ignored bargaining power imbalances had led to such an imbalance between labor and capital that wages became too low to allow demand to clear product markets of supply. Companies began to go out of business. Spurred by the collapse of stock speculation, this situation in turn caused product markets to further collapse, putting more and more workers out of work. Then even lower demand increased the downward spiral into the Great Depression.[14] Not only were manufactured products a glut on the market, but so were foodstuffs and workers themselves, as one-third of the population became unemployed, and two-thirds of those who were working were underemployed. Products might rust, or foodstuffs might rot in the field, until an equilibrium of supply and demand returned, but the same result for surplus workers would not be tolerated. Liberty as free contract no longer could be sustained.

People looked to government for solutions such as unemployment insurance, minimum wages, and labor organization. Laws that interfered with contracting, like those considered in *West Coast Hotel v. Parrish*,[15] and restructured markets, like those considered in *N.L.R.B. v. Jones & Laughlin Steel Corporation*,[16] were upheld under the deferential judicial review of minimum rationality and substantial relation to interstate commerce. Any substantive judicial review of legislation lacked credibility until the famous footnote four of *Carolene Products*. Deference to democratically defined public welfare, including what should be regulated and who should be subsidized, could seemingly be overridden only if democratic choice was unfair itself, or rigged. Thus if legislation interfered with a higher ordered constitutionally legislated set of protected values, or if the legislative process itself was a rigged political game, or if it aimed at a political minority defined by an unchangeable trait who by definition could not protect themselves in the political process, then and only then judges were justified in reviewing legislation with strict scrutiny.[17] Liberty was defined as fair participation in a fair political

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

14. ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 11–14 (1966).

15. 300 U.S. 379, 398 (1937).

16. 301 U.S. 1, 49 (1937).

17. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1520 (2d ed. 1988) ("[S]trict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or

process kept fair by the judiciary. Individuals were free to pursue their dreams either through the economic or the political market. This is the form of liberty and equality that leads to the decision of *Brown v. Board of Education*.[18]

Even though African-Americans outnumbered whites by four to one in Clarendon County, South Carolina, a combination of exclusionary devices including voter registration, voting, and segregated, inferior schools kept African-Americans from advancing economically and achieving mobility out of the county. Black and white schools were separate but very unequal.[19] This inequality ensured a captive labor force for the largely tenant farming economy there. Providing a truly equal education would endanger the entire social structure of the area as young people could be expected to leave for better jobs, and even those who stayed would challenge for jobs traditionally held by whites. It is in this context that the Court in *Brown* wrote about the importance of education. It wasn't that education was itself a constitutionally protected right, but that race separation by the state perpetuated a system of inequality, of caste.[20]

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indifference to the interests of that group."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77 (1980) ("I have suggested that both *Carolene Products* themes are concerned with participation: they ask us to focus . . . on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.").

18. I am writing here of the judicial predicate to the doctrine announced in *Brown*. I recognize that many social and political events such as the change in labor force composition occasioned by the "great migration" and World War II greatly contributed to the context in which the case could be decided at all. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 107 (2000) ("*Brown* was an essential and long-overdue affirmation of the story of race and American democracy that the government had already promoted abroad.").

19. Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483, 486 n.1 (1954). .

20. In *Brown*, the Court quotes approvingly from *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1880):

> [I]n regard to the colored race, for whose protection the amendment was primarily designed . . . no discrimination shall be made against them by law because of their color[.] The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctly as colored,—exemption 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 conditions of a subject race.*

Brown, 347 U.S. at 490–91 n. 5 (emphasis added) (citing *Strauder*, 100 U.S. at 307–08). Thus:

> Today [education] 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.

Brown, 347 U.S. at 493.

Understood in this way, *Brown* was not about the state's use of race per se, or even racial separation per se, but rather the use of race to perpetuate racial subordination as part of a political-economic system.[21] In Clarendon County, race separation *was* inherently stigmatizing and a marker of class socio-economic structure. This is why the remedy of *desegregation* by dismantling the *dual* race system was necessary in *Brown II*,[22] not just the removal of racial classification. We survived a Great Depression and it gave us *Brown*.

However, *Brown* left open the issue of how and when the state would be responsible for causing racial subordination. Indeed, the decision itself led to white flight from predominantly black center cities to suburban enclaves. Whether these enclaves could be reached, at least for remedial purposes, depended on how state causality and thus responsibility would be subsequently characterized.[23]

The next shift in the political economy of liberty is more complicated and not yet complete. Perhaps this is true because in recent decades there has not been as deep a social upheaval generating and being generated by legal change. However, the upholding of the constitutionality of the Civil Rights Act and Voting Rights Act in the 1960s under deferential judicial review[24] comes closest to achieving the liberty and equality presaged by *Carolene Products* and *Brown*. But just as that liberty grows, the economy shrinks and changes—plant closings, mine shutdowns, downsized municipal payrolls dry up actual opportunities. At the turn into the 1970s, a combination of backlash against desegregation, the civil rights movement of the 1960s, and deep divisions about the Vietnam War left many Americans with a desire to escape from those unlike themselves into private enclaves. Also, as work shifted from a manufacturing economy to lesser paying service jobs, the skew in distribution of incomes widened, and lower paid jobs seemed more like simply a spur to individualistic competition for the means to escape into rampant consumption. Escape meant less concern for others and more

21. *See* Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 DUKE L.J. 1591, 1594 (2005) ("The system of Jim Crow, given early encouragement by the Supreme Court, was not just a legal structure. It was a total social system, in which public and private behaviors were interlaced to maintain the subordination of a race.").

22. Brown v. Bd. of Educ. of Topeka, Kan. (*Brown II*), 349 U.S. 294 (1955).

23. Michael Klarman has downplayed the instrumental effectiveness of the *Brown* opinion in leading to de-segregation. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). I do not argue with that thesis here. I am interested in the fit between judicial review and encouraging a dominant political economy that also blocks progress toward racial equality.

24. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

embrace of isolation.[25]

At the same time, a new Supreme Court membership began to rewrite constitutional interpretation by limiting state responsibility and thus reinterpreting *Brown*. First, reinforcing white flight into suburban enclaves, the Court in *Milliken v. Bradley*[26] prevented interdistrict desegregation even where center cities were left with an overwhelming number of black school children, making racial balance impossible even where there was proof of past school segregation. Second, in *Pasadena v. Spangler*,[27] Justice Rehnquist held that remedial racial separation must be caused directly by the state.[28] Private housing decisions, no matter how racially motivated or perpetuating of segregation, were not prohibited by the Constitution. It did not matter that using neighborhood school sites reintroduced racially separate schools. The state was not classifying by race.[29]

The next steps—from Justice Powell's concurring opinion in *Bakke*,[30] to *City of Richmond's*[31] plurality, and to the opinion in *Adarand*,[32]—completed protection of enclaves by turning *Brown* into a prohibition of any state use of race affecting an individual absent a compelling state interest. The state could not use race to impact individuals, but the state could reinforce community and educational racial segregation indirectly by insulating private choices from direct state orders.

Moreover, education was still the gateway to economic and social opportunity. Housing availability and lack of transportation still isolated many from mobility for better jobs. In a society in which people moved often, local boundaries and traffic barriers shaped urban/suburban development. Thus the constitutional *system* of liberty as exclusion from private responsibility perpetuated and was perpetuated by the same racial ills as in Clarendon County—community and labor force subordination

25. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 203, 257, 283–84 (2005).

26. 418 U.S. 717, 745 (1974).

27. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

28. Despite plaintiff's claim that "white flight" resulted from the desgregation decree itself, and the district court's finding only that results matched the state pattern as a whole, school resegregation "apparently resulted from people randomly moving into, out of, and around the [Pasadena School District] area. This quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools." *Id.* at 435–36.

29. This decision was part of a broad reinterpretation of the Constitution via standing, state action, equitable relief, section 1983, and rights themselves. *See* Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 293–94 (2000).

30. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).

31. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989).

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

by race. The country underwent social and political upheaval and it gave us *Parents Involved.*

II. RACE AND THE *SEATTLE* PLURALITY

In announcing the decision of the Court, and writing for the plurality, Chief Justice Roberts claimed to answer a very narrow question: whether the race-based assignment of individual school attendance, in order to create mixed race education, was sufficiently narrowly tailored to meet a compelling interest of integrated education. His opinion claimed to rest simply on precedent to the effect that any individual could claim that treatment by race was inherently suspect and could not be accomplished absent a compelling non-discriminatory interest through means narrowly tailored to that interest. However, the opinion is vulnerable to the extent either that the conclusion does not follow from the precedent, or the precedents have been misinterpreted. Indeed the opinion is rampant with invalid logical conclusions, exaggerations of past reasoning, and self-referential choice of minority opinions. This comment focuses on the non-contextualized reinterpretation of the key modern case of *Brown* that creates three conceptual defects in the reasoning of *Parents Involved.*

First, *Brown* is characterized as standing for the proposition that any use of race by the state is invidious and contrary to equality.[33] This, of course, is only correct if the *Carolene Products*' antisubordination basis for *Brown* is ignored. Certainly any use of race formally discriminates by race, but that does not mean it is subordinating. Affirmatively making up for past discrimination by the state should be considered remedial rather than subordinating, though by definition it uses race.[34]

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33. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752, 2764 (2007). *But see id.* at 2836 (Breyer, J. dissenting) ("But segregation 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 [eighty] years of legalized subordination.").

34. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms Of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142 (1997). Siegel notes:

> [B]y abstracting the history of racial status regulation into a narrative of "racial classifications," the Court obscures the multiple and mutable forms of racial status regulation that have subordinated African-Americans since the Founding—including the facially neutral forms of state action that, since Reconstruction, have regulated racial status in matters of employment, political participation, and criminal justice. From this highly abstracted standpoint—one that is inattentive to the social meaning of racial status regulation or the various and evolving forms it has assumed over the course of American history—it "makes sense" to apply "skeptical scrutiny" to race-conscious remedies, while reviewing facially neutral regulation deferentially, on the premise that it is enacted in good faith.

Id.

As the dissent argues, it is not clear why, understanding *Brown* in context, such action even merits strict scrutiny.[35] But Justice Roberts writes that making up for private or social discrimination having no state involvement has never even been held to represent a compelling interest. He repeats that the Seattle school district was merely assigning attendance following racial demographics, which to him meant the remedy was inherently insufficiently tailored to the goal of an improved race mixed education.[36] This ignores how neighborhood schools symbiotically relate to housing enclaves, each helping to shape the racial makeup of the other, and also ignores the role of the state in shaping the demographics of housing enclaves.

Second, a past case, *Swann v. Charlotte-Mecklenburg*,[37] should prove embarrassing at this point. Justice Burger explained that while judicial remediation of past discrimination would be limited by the harm done, legislative bodies such as school boards might decide to create racial balance in schools for their own objectives absent invidious goals.[38] Justice Roberts simply dismisses this part of *Swann* as mere dicta unnecessary to the decision on scope of judicial relief under *Brown*. In this he is clearly mistaken. Justice Burger's claim about legislative authority was tied to the *Carolene Products* justification of judicial use of temporary quotas and school busing to dismantle a system that had been found to have discriminated in the past.[39] The distinguishing between judicial and legislative choice depended on normal judicial deference to elected bodies absent invidious motive or subordination that would justify judicial equitable remedy. The legislative institution was more free to act proactively.

A third weakness with the *Parents Involved* plurality opinion stems from an assertion that Justice Roberts supposes is required: that compelling governmental interests do not include making up for social discrimination.[40] This view is almost a return to *Plessy*. It protects the universe of exclusionary acts fostered by the state but not carried out in its name. It protects the link between segregated neighborhoods and schools against marginal acts—all else equal—to integrate the area most directly reachable by the state and most likely to shape future improvement for all education. The state is still connected to much private choice, includ-

35. *See Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting).

36. *See id.* at 2755–56 (Roberts, J., plurality opinion).

37. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

38. *Id.* at 16.

39. This is most clear by the next paragraphs' discussion of Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (2000), limiting equitable relief of federal courts in de facto segregation. *Swann*, 402 U.S. at 16–18.

40. *Parents Involved*, 127 S. Ct. at 2758.

ing housing decisions, in ways that reinforce segregation.[41]

Furthermore, overcoming the harms of segregation, no matter how it is accomplished, is neither invidious nor subordinating. In fact, overcoming spatial divisions might well lead to integration of workplaces closer to labor force participation, something that is artificially prevented by race and wealth exclusion from enclaves and by segregation and inequality in schools. It is true that a broader conception of individual social responsibility and causality than that held by the Roberts group would make the argument easier, but community organization, boundaries, subsidies, and other government acts[42] do not create a constant vacuum in which private housing choices and school choices take place. These actions shape resources, consumer preferences, private investment strategies, and the subdivisions near which schools are built. It may be that constitutional remedies cannot reach unsubsidized private schools, but public institutions can be prevented from contributing to economic and political subordination within the present rubric of *Brown*. To see the individual in his or her historical and social context, whether favored or disfavored, is to treat the individual as a true, living person rather than a formal placeholder in a scheme of empty classification.[43]

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Revolution, property and slavery; civil war, contract and segregation; depression, political participation and desegregation; division, exclusion and enclave segregation—are not accidentally correlated. Each represents a constitutional economy which reflects and reinforces political-economic social structure. It should not matter that slavery to free labor to citizen to resident/consumer as stages of identity each rep-

41. Martha R. Mahoney, *Segregation, Whiteness and Transformation*, 143 U. PA. L. REV. 1659, 1669–70 (1995).

42. *See* Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 803–04 (1996) ("A host of private, public, and governmental actors deliberately created residential segregation."); Bryan K. Fair, *Taking Educational Caste Seriously: Why* Grutter *Will Help Very Little*, 78 TUL. L. REV. 1843, 1848 (2004) ("Only after the government eliminates the performance and attainment disparities that it helped create will it be possible to talk about judging persons based on the content of their character, rather than the color of their skin."); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 749 (2000) ("[G]overnments should be cautious about any sort of intervention into increasing returns markets.").

43. Justice Breyer in dissent in *Parents Involved* concluded about *Brown*:

> It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Parents Involved, 127 S. Ct. at 2836 (Breyer, J., dissenting).

resented a partial emancipation for all individuals including African-Americans. Racial subordination still exists. Even if the state is not formally directing subordination, the state is still connected to the resulting social structure even though invisible to the Supreme Court. With regard to the connection of liberty and race, we can remember a better direction and a better lesson from *Brown*.