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The Original Meaning of *Brown*: *Seattle*, Segregation and the Rewriting of History

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The Original Meaning of *Brown*: *Seattle*, Segregation and the Rewriting of History

For Michael Lee and Dukwon

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In two historic instances Negro Americans have been beneficiaries—as well as victims—of the national compulsion to level or to blur distinctions. The first leveling ended the legal status of slavery, the second the legal system of segregation. Both abolitions left the beneficiaries still suffering under handicaps inflicted by the system abolished.[1]

I. INTRODUCTION: *BROWN* AND THE SECOND RECONSTRUCTION

Abraham Lincoln prophetically captured the spirit of reconstruction,[2] "As I would not be a *slave*, so I would not be *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is not a democracy."[3] In this worldview freedom, democracy, and equality between citizens are indissolubly linked. The reconstruction amendments were a crystallization of this linkage. As Justice Harlan noted in his dissent in *Plessy v. Ferguson*,

> It [the thirteenth amendment] not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery . . . . It decreed universal civil freedom in this country. . . . it was followed by the Fourteenth Amendment, which . . . declare[ed] that "all persons born . . . in the United States . . . are citizens of the United States and of the State wherein they reside" . . . . These two amendments, if enforced . . . will protect all the civil rights that pertain to freedom and citizenship.[4]

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1. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 219-220 (2002) (1955)

2. Reconstruction is the period of American history following the Civil War in which Congress enacted a panoply of civil rights protections on behalf of blacks (including the 13th, 14th and 15th Amendments). Eric Foner dates this period from 1867 (when "Radical Republicans" in Congress "swept away southern governments and fastened black suffrage upon the defeated south") to 1877 the date of the Hayes-Tilden Compromise. In exchange for favorable resolution of a dispute over the presidency the Republicans agreed to remove the northern troops which had enforced civil rights laws. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, at xix (1988).

3. ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 427 (Roy P. Basler ed., 2001)

4. Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

These reconstruction amendments represented, in many ways, a new constitution. The infamous compromise, by which the Constitution of 1789 condoned slavery although never mentioning it by name, was the enabling premise of the union. This was also America's original sin. By rejecting the illicit original "deal" the reconstruction amendments were both redemptive and revolutionary. But reconstruction would begin a tragic pattern: Congress proposed but the Supreme Court disposed.

As a practical matter the project of reconstruction was scuttled when, to settle a disputed election, northern troops were removed from the South in the Hayes-Tilden compromise of 1877. Reconstruction—i.e., the project of achieving equal citizenship for blacks—ended, really, when the last union soldier left. It ended formally with the decision in *Plessy*.

Plessy infamously held that the state sponsored segregation of blacks and whites on Louisiana Railroad cars was constitutional. *Plessy* illustrates how the politics of race and the politics of constitutional interpretation become entangled. While the fourteenth amendment guaranteed citizenship it did not define its meaning. *Plessy* divided the rights of citizenship between the social and the political.[5]

> The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.[6]

On the basis of this ingenious parsing of citizenship, which conveniently found harmony with the prejudices of whites in southern states, *Plessy* ushered in the era of segregation. If equality was America's dream, segregation was its "nightmare."[7] *Plessy*'s framework was used to justify a system of interlocking laws and customs in which blacks were relegated to "second-class citizenship." It was so vast and so pervasive that W.E.B. Du Bois said, "[T]he problem of the Twentieth Century is the problem of the color line."[8] Gunnar Myrdal famously identified the significance of this color line as the American dilemma.[9] It was "the ever-

5. Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1700 (2005).

6. *Plessy*, 163 U.S. at 544, *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

7. *See* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 7 (2004).

8. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK, at xxiii (Modern Library ed., 1996) (1953).

9. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944). Another author's interpretation is helpful here. "The wide gap between rather high levels of white support for ideals and lower levels of white approval of governmental action to implement these ideals has been a persistent feature of contemporary American racial

raging conflict between . . . the valuations preserved on the general plane which we shall call the 'American Creed,'" and another level at which "personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice . . . dominate his outlook."[10] As Mary Dudziak points out, after World War II this dilemma took on a deep political dimension: America's pattern of segregation hobbled its efforts to gain influence in third-world countries.[11]

The significance of *Brown*[12] was that it formally resolved this dilemma. It outlawed segregation in education, and it, on paper, brought the law in harmony with the law's basic ideals. *Brown* was in many ways a failure as a constitutional project. But its language and ideals gave birth to the civil rights era and more specifically to an era of reform which included the passage of equal opportunity laws. *Brown* served, for those it inspired, as a second constitution, a charter for "the second reconstruction."[13]

But while *Brown* denounced segregation, segregation was not defined. There are at least two senses in which segregation has been traditionally understood. At the surface level segregation was a distinction based on race either authorized or required by law. This is segregation as a discrete decision or a discrete intentional act. This is clearly outlawed in *Brown.* But segregation has effects. For example, as the *Brown* court famously noted, segregation caused "the negro children" who were excluded under the Jim Crow regime to experience "stigmatic harm".

But which sense did *Brown* give to "segregation": Was it an evil of discrete decisions or an evil of its stigmatizing effects? By failing to explicitly resolve these questions, the *Brown* Court not only left *Brown* itself unclear, but it also failed to resolve the dilemma. Since *Brown*, schools have largely resegregated. Blacks in inner cities are increasingly socially isolated. This social isolation perpetuates past discrimination.

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attitudes." Edward G. Carmines & W. Richard Merriman, Jr., *The Changing American Dilemma: Liberal Values and Racial Policies*, *in* PREJUDICE, POLITICS, AND THE AMERICAN DILEMMA 237, 238 (Paul M. Sniderman et al. eds.,1993).

10. MYRDAL, *supra* note 9, at xlvii (emphasis omitted).

11. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988).

12. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

13. The "second reconstruction" is synonymous with "the civil rights era." C. Venn Woodward originates this phrase. C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 107 (1993) (The phrase originates with an earlier edition. The book was published first in 1960.); *see also* MANNING MARABLE, RACE, REFORM, AND REBELLION 3 (rev.2d ed. 1991) ("Almost a century later, a 'Second Reconstruction' occurred. Like the former period, the Second Reconstruction was a series of massive confrontations concerning the status of African-American and other national minorities . . . .").

The effect or result of this isolation is often the same sense of stigma experienced by the children in *Brown*. At the same time, this result typically cannot be traced to a specific decision but rather is directly caused by the operation of institutional and sociological factors. Is this twenty-first century apartheid prohibited as "segregation" within the meaning of *Brown*? Or not?

A. Parents Involved v. Seattle[14]: *The Structure of the Decision*

In *Parents Involved*, the Court consolidated two cases, one from Seattle, Washington, and one from Jefferson County, Kentucky, raising the exact same issue: Can a school, without a relevant history of *de jure* segregation, classify students by race and then engage in race-conscious measures to achieve "racial balance" in the schools?[15]

In the Seattle case, the school board settled a case brought by the NAACP by agreeing to a mandatory busing plan.[16] By 1999, this evolved into a program in which the school district classified all students by race. They then determined what was an acceptable ratio of black and white students. When a school was "oversubscribed" by a particular racial group, the race of competing students, each "qualified" to go to the school, became a tiebreaker.[17] In Jefferson County, the school system had been under a desegregation order beginning in 1975, but the order was dissolved in 2001.[18] Jefferson County used a "choice plan." Students were grouped according to a cluster of schools.[19] Students got their specific school unless it was overcrowded, or unless their assignment would tip the school into racial imbalance.[20]

Let's start with the doctrinal debate in *Parents Involved*. We will soon see that the doctrinal debate is a cover for a disagreement about competing conceptions of equality. But, in turn we see that the duality of equality becomes, for the two warring camps within the court, a window through which they conceptualize the injury to blacks. Thus, the Court explicitly identifies the meaning of segregation as the ultimate issue. Each side defines this harm in a diametrically different way. They fail to resolve the meaning of segregation, because they never get beyond the text of *Brown*. *Brown* can only be understood contextually.

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14. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).
15. *Id.* at 2746.
16. *Id.* at 2803–04 (Breyer, J., dissenting).
17. *Id.* at 2747.
18. *Id.* at 2749.
19. *Id.*
20. *Id.* at 2749–50.

1. THE DOCTRINAL DEBATE

The Court frames the debate in terms of two issues; one is what the level of scrutiny should be. It is hornbook law to say that racial classifications trigger "strict scrutiny." It follows that once "strict scrutiny" applies, the legislation in question only survives if the government can show it has a compelling reason for the racial classification. But the dissent argues that this "rule" which treats race as an inherently invidious classification should not be universal.[21] Defenders of affirmative action argue that affirmative action is "a welcome mat rather than a keep out sign."[22] In the same vein, the dissenters argue that what is happening in this case is a social good, not an evil.[23] The majority and dissent pivot between two doctrines: a one-size-fits-all concept of equal protection and one which is multi-layered and contextual. The Roberts Court rejects this contextualism. Roberts states, "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."[24] The second issue is what constitutes a compelling reason. The dissent says, among other things, that addressing social isolation of "black students" is a compelling reason.[25] The majority disagrees, saying that racial isolation may result from many reasons, but the Court has authority to intervene only if the imbalance can be traced to specific, identified discrimination.[26] For the dissent, social isolation is enough because, intentional or not, such isolation itself can lead to stigmatic harm. For the majority, this is not dispositive. They insist there are "race neutral" ways to address the problem of imbalance.[27] Justice Kennedy stated, "A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted."[28] In this back-and-forth, the two sides of the Court talk past each other. They are separated by two different views of the world. At one level it is a different view of what equality is.

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21. *Id.* at 2798–99 (Stevens, J., dissenting).

22. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

23. The court stated, "They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2818 (2007) (Breyer, J., dissenting).

24. *Id.* at 2764 (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 500 (1989)).

25. *See id.* at 2820–2824 (Breyer, J., dissenting).

26. *See id.* at 2755–2759.

27. *Id.* at 2759–2760.

28. *Id.* at 2797 (Kennedy, J., concurring).

2. The Dualities of Equality

i. The Individual v. The Social

For the majority, equal protection rights are individual and inalienable. They speak in a voice that is classically liberal, quintessentially contractarian. For the dissenters, equal protection is a social concept—equality must be broad enough to address discrimination as a systemic problem to allow for "social engineering." Like the visionaries in *Brown*, they want to march toward an integrationist ideal. As legal realists, the dissenters believe that, to quote Justice Blackmun in *Bakke*,[29] "In order to get beyond racism, we must first take account of race. There is no other way."[30] The majority, as legal formalists, dismiss this as so much "social theory."

ii. Intent v. Effects

For the majority, racial imbalance in itself is insignificant. "We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"[31] The source of this is what many scholars refer to as the model of "corrective justice." This model sees discrimination in particularistic terms, much like a tort.

> The violation consists of acts and effects. Under the prevailing interpretation of the Constitution, a defendant "violates" the equal protection clause only if (1) its own actions, not those of unnamed or unnamable parties, are (2) racially-based or intentionally discriminatory acts, not simply acts that have an adverse racial effect.[32]

By "acts," the theory refers to specific decisions. This discriminatory act or decision defines the scope of the remedy.

> The second element of the structure of corrective arguments is a concept of linkage between the remedy and the violation. The defendant's violation is not simply a trigger for judicially-mandated action, unleashing a freewheeling judicial policy-making power. Rather, the remedy must be linked to the violation as a corrective, a measure that seeks to eliminate the violation's harmful effects.[33]

Also, "'[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or

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29. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

30. *Id.* at 407 (Blackmun, J., concurring).

31. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752 (2007) (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)).

32. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 Colum. L. Rev. 728, 732 (1986).

33. *Id.*

does not flow from such a violation.' Courts, in other words, are not free to provide 'remedies' for conditions that are not caused by a violation of law."[34] The conceptual frames of individual rights versus group rights, intent versus effects, and corrective justice versus the integrationist ideal are all simply efforts to define the scope of equality. But these philosophical antinomies are so abstract as to be indeterminate. They can be argued either way, but more importantly, they do not get at the substantive core of what the Court is truly fighting about. What divides the Roberts Court at bottom is not something abstract, but something concrete. It is clear that *Brown* exists to address a constitutional evil, the evil of segregation. This was something very real rather than abstract for all those involved at the time. What segregation was becomes the pivot for the debate in the Court. Justice Thomas defines the ultimate question precisely: "Because this Court has authorized and required race-based remedial measures to address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance."[35] This is true because from the standpoint of corrective justice, the scope of equal protection remedies is as broad as the evil it seeks to address. This sends us unerringly to the question of how broad or narrow the evil of segregation is.

Let me emphasize the critical importance of "the meaning of segregation" another way. Constitutional law takes place at several levels at once. On the surface, there is the level of doctrine. Below that is a dialogue about our deepest ideals. These ideals are ultimately defined by our historical experience, or more exactly, the "historical narrative" we take from that experience. As Walter Benjamin has written,

> [N]o fact that is a cause is for that very reason historical. It became historical posthumously, as it were, through events that may be separated from it by thousands of years. A historian who takes this as his point of departure stops telling the sequence of events like the beads of a rosary. Instead, he grasps the constellation which his own era has formed with a definite earlier one.[36]

Thus, constitutional interpretation is often historical interpretation. The majority and the dissent seem to agree on the importance of the historical narrative: Our "break" with segregation defines who we are. It becomes key to define what constituted the break.

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34. *Id.* at 733.

35. *Parents Involved*, 127 S. Ct. at 2768–69 (Thomas, J., concurring).

36. WALTER BENJAMIN, *Theses on the Philosophy of History*, *in* ILLUMINATIONS 253, 263 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1969) (1955).

B. *Level Three—The Meaning of Segregation*

The two sides do address this issue of what segregation is, but only rhetorically. Thus Justice Roberts writes, "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons."[37] Stevens replies, with profound eloquence,

> 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. In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions.[38]

Neither side definitively resolves the issue of what segregation was because they confine their arguments about the meaning of *Brown* to the text of the case. Both sides in *Parents Involved* address the question of what segregation was, but only by appealing to the plain meaning of the words. This is like trying to determine the meaning of a constitution by only looking to its "plain meaning." One legal scholar defines formalism[39] as the notion that the text is opaque; We can't see through it to the context or the policies behind the text.[40]

I am reminded of the words of Alasdair MacIntyre, speaking of the decline of "moral language," that tell a story about a people trying to reconstruct knowledge after a disaster when all they have are fragments of books here and there. Imagine an "enlightened people [who] seek to revive science, although they have largely forgotten what it was. But all that they possess are fragments: a knowledge of experiments detached from any knowledge of the theoretical context which gave them significance . . . ."[41] Like that "enlightened people" in MacIntyre's story, the majority seemed to have forgotten the near history of segregation, and

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37. *Parents Involved*, 127 S. Ct. at 2768.

38. *Id.* at 2798 (Stevens, J., dissenting) (internal citations omitted).

39. For a comprehensive understanding of "formalism" as a concept of constitutional interpretation please see Steven Winter, *Chief Justice Roberts Formalist Nightmare*, 63 U. MIAMI L. REV. (forthcoming) expounding on the many different senses in which "formalism" may be used. My work is primarily an interrogation of the Roberts opinion based on the historical record. Professor Winter's critique delves deeply into the opinion in terms of its failure both as analytical and moral reasoning.

40. *See generally* Burt Neuborne, *The House Was Quiet and the World Was Calm The Reader Became the Book: Reading the Bill of Rights as a Poem: An Essay in Honor of the Fiftieth Anniversary of* Brown v. Board of Education, 57 VAND. L. REV. 2007 (2004) (arguing for a holistic reading of the Bill of Rights, that legal text matters, and discussing methods of interpreting legal texts).

41. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 1 (1981).

having forgotten this, impoverish the "moral language" of equal protection law by speaking in an abstract, textualist way. The purpose of my article is to look at the context that the Roberts Court obscures.

The first thing to do in expanding this inquiry beyond the text is to look at the assumptions each side of the *Parents Involved* decision brings to the discussion. Then I want to test the assumptions historically to see which are true and which are false.

Each side of the Roberts Court answers these questions in a way that constitutes a different "story" about what segregation is, why it is wrong, and when courts have a warrant to correct the wrong. The disagreements in this story concerning the nature and meaning of segregation mirror their competing concepts of equal rights.

	Dissenters	Majority
What is it?	A systemic problem	A problem of specific identifiable governmental decisions
Why is it wrong?	Carries a stigma	Violates principles of colorblindness
Source of stigma	Slavery	Government classifies based on race
Legal significance	Harmful effects: perpetuates racism	When it is intentional

I can show that historical segregation simply cannot be described the way the Roberts Court describes it. Courts during the time of *Brown*, particularly the Supreme Court, operated from a very different paradigm. More specifically, I can show that between 1954 and 1968, for the period of what I want to call the second reconstruction, courts took a "realist" approach toward civil rights issues. The linchpin of that "realism" was an explicit denunciation of segregation as it was: first of all, as a system rooted in slavery and white supremacy, and, most importantly, as something harmful because of its effect on "black children." This era of thinking was swept away by the rise of process theory in the 1970s. But this paradigm shift must not obscure the fact that for a brief moment in our legal history courts operated from a more realistic approach.

Was *Brown* about black children or was *Brown* about individual children? It all hinges on how segregation was understood at the time.

II. THE MEANING OF SEGREGATION IN 1954[42]

> Then does segregation offend against equality? . . . But if a whole race of people finds itself confined within a system which is set up

42. "Of any particular thing ask, What is it in itself, and by its constitution?" MARCUS AURELIUS, MARCUS AURELIUS ANTONINUS TO HIMSELF 96 (Gerald Henry Rendall trans., 1945) (1902).

> and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded . . . I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.[43]

James W. Loewen has stated that segregation was a system of "second-class citizenship" for blacks.[44] According to Juan Francisco Perea, segregation was "a system of racial etiquette that keeps the oppressed group separate from the oppressor when both are doing equal tasks."[45] Further, Loewen describes it as "a system of norms that dictated every aspect of human behavior from how one drove, to whether one shook hands, to how one person glanced at another."[46] Whatever segregation was, it was not something that could be simplistically reduced to a set of discrete decisions by wrong-thinking individuals. As W.E.B. Du Bois wrote, "Race segregation in the United States too often presents itself as an individual problem; a question of my admission to this church or that theatre . . .In fact, this matter of segregation is a group matter with long historical roots."[47] It was, in other words, systemic. The systemic nature of segregation is expressed first of all by its universality throughout "the South." In 1954 all southern states imposed segregation by state law.[48]

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43. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

44. JAMES W. LOEWEN, LIES MY TEACHER TOLD ME 163 (2d ed. 2007).

45. JUAN FRANCISCO PEREA, MI PROFUNDO AZUL: *Why Latinos Have a Right To Sing the Blues*, *in* "COLORED MEN" AND "HOMBRES AQUÍ" 92 (Michael A. Olivas ed., 2006) (quoting LOEWEN, *supra* note 43, at 163).

46. JAMES W. LOEWEN, LIES ACROSS AMERICA: WHAT OUR HISTORIC SITES GET WRONG 222 (1999).

47. W.E.B. DU BOIS, AN ABC OF COLOR: SELECTIONS CHOSEN BY THE AUTHOR FROM OVER A HALF CENTURY OF HIS WRITINGS 171 (Int'l Publishers Co. 1970) (1963).

48. As then Harvard professor Arthur E. Sutherland wrote, "'The South' . . . includes in it 13 states—Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia." Arthur E. Sutherland, *Segregation by Race in Public Schools: Retrospect and Prospect*, 20 LAW & CONTEMP. PROBS. 169, 169 n.1 (1955). All of these states and several northern states explicitly required segregation. *See* ALA. CONST. art. XIV, § 256 (amended 1956); DEL. CONST. art. X, § 2 (amended 1995); FLA. CONST. of 1885, art. XII, §12; KY. CONST. § 187 (amended 1996); LA. CONST. of 1921, art. XII, § 1; MISS. CONST. art. VIII, § 207 (repealed 1978); MO. CONST. art. XI, § 3 (amended 1945); N.C. CONST. art. IX, § 2 (amended 1970); OKLA. CONST. art. XIII, § 3 (repealed 1966); OKLA. CONST. art. I, § 5 (amended 1978); S.C. CONST. art. XI, § 7 (repealed 1973); TENN. CONST. art. XI, § 12 (amended 1978); TEX. CONST. art. VII, § 7 (repealed 1969); VA. CONST. art. IX, § 140 (repealed 1971); W. VA. CONST. art. XII, § 8 (repealed 1994); ALA. CODE tit. 52, § 167 (1940) (repealed); ARK. CODE ANN. § 80-509(c) (1931); D.C. CODE ANN. § 31-1011 (1951) (repealed 1970); D.C. CODE ANN. §§ 31-1110, 31-1111, 31-1113 (1951) (repealed 1975); FLA. STAT. ANN. § 228.09 (1953) (repealed 1965); GA. CODE ANN. § 32-909 (1933) (amended 1961); KY. REV. STAT. ANN. §§ 158.020, 158.021, 158.025 (1953) (repealed 1966); N.C. GEN. STAT. ANN. § 115-2 (1955) (repealed 1981); OKLA. STAT. tit. 70, §§ 5-1, 5-5 (1949) (repealed 1965); S.C. CODE ANN. § 21-751 (1952) (repealed); TENN. CODE ANN. § 2377 (1932) (repealed); TEX. REV. CIV. STAT. ANN. art. 2900, § 2897-8 (1951) (repealed); W. VA. CODE §§ 1775, 1894 (1949) (repealed).

The systemic nature of segregation, the fact that it was so pervasive as to be inescapable, was what made it so pernicious.

> Black school children are not injured as much by a school board's placement of them in a school different from that in which it has placed white school children, so much as by the reality that the school exists within a larger system that defines it as the inferior school and its pupils as inferior persons.[49]

But in 1954 school segregation was but one department in a vast empire of social control. After *Plessy* one newspaper satirized the case as follows:

> If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss. It would be advisable also to have a Jim Crow section in county auditors' and treasurers' offices for the accommodation of colored taxpayers. The two races are dreadfully mixed in these offices for weeks every year, especially about Christmas. . . .[50]

But, as a historian, no detail was too small. All of the arbitrary racial distinctions satirized came true. As C. Vann Woodard writes,

> The extremes to which caste penalties and separation were carried in parts of the South could hardly find a counterpart short of the latitudes of India and South Africa. In 1909 Mobile passed a curfew law applying exclusively to Negroes and requiring them to be off the streets by 10 p.m. The Oklahoma legislature in 1915 authorized its Corporation Commission to require telephone companies 'to maintain separate booths for white and colored patrons.' North Carolina and Florida required that textbooks used by the public-school children of one race be kept separate from those used by the other, and the Florida law specified separation even while the books were in storage. . . . A New Orleans ordinance segregated white and Negro prostitutes in separate districts. Ray Stannard Baker found Jim Crow Bibles for Negro witnesses in Atlanta courts and Jim Crow elevators for Negro passengers in Atlanta buildings.[51]

There were not only separate railroad cars but separate water fountains,

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49. Joe R. Feagin & Bernice McNair Barnett, *Success* and *Failure: How Systemic Racism Trumped the* Brown v. Board of Education *Decision*, 2004 U. ILL. L. REV. 1099, 1103–04 (2004) (quoting Charles Lawrence, *"One More River To Cross"—Recognizing the Real Injury in* Brown*: A Prerequisite to Shaping New Remedies, in* SHADES OF *BROWN*: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 49, 53 (Derrick Bell ed., 1980)).

50. WOODWARD, *supra* note 1, at 68.

51. *Id.* at 101–02.

waiting rooms, and ticket windows. Some states "required Negro nurses for Negro patients."[52] During WWII, German prisoners could eat with white soldiers but black American soldiers could not.[53] In *Bound For Freedom*, Flamming describes the segregation of swimming pools in California beginning in the 1920s. "In Pasadena, the public pools were open to colored people one day a week, 'International Day,' after which the water was drained . . . ."[54] Other towns had similar restrictions.

In 1944 Gunnar Myrdal wrote, "Segregation is now becoming so complete that the white Southerner practically never sees a Negro except as his servant and in other standardized and formalized caste situations."[55] Segregation was the deliberate division of society into two distinct worlds.

> In those days, black people in their community had all the things that they had, because they were set aside from the white community, and we had all the things we needed to sustain us. . . . We had no affiliation with the whites [in school] whatsoever. Everything was separate and unequal. . . . We had aspirations but we were limited since we were in the black world, that's where we lived. . . . You thought . . . that everything was alright, and we were not looking out onto the white world because if you ventured out, you were stopped before you could even get started. And in those days there was just a definite dividing line of black or white. White over here; black over here. . . . It was a black and white world. No coming together on anything.[56]

In many states blacks could not marry whites and vice versa.[57]

But, with the exception of school segregation, the most pervasive form of segregation was housing segregation. There were separate parks, in some cities separate districts, in which blacks could live.[58] Segregation in housing was for many years an actual policy, i.e., the standard operating procedure, of the federal government.

It is now well-established and indisputable that housing segregation

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52. *Id.* at 99.

53. AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 246–47 (rev. ed. 1970) (1966).

54. DOUGLAS FLAMMING, BOUND FOR FREEDOM: BLACK LOS ANGELES IN JIM CROW AMERICA 216 (2005).

55. MYRDAL, *supra* note 9, at 41.

56. Feagin & Barnett, *supra* note 48, at 1104–05.

57. *See* Loving v. Virginia, 388 U.S. 1, 4 (1967) ("The two statutes under which appellants were convicted and sentences are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. . . . Other central provisions in the Virginia statutory scheme [are designed to] automatically void[ ] all marriages between 'a white person and a colored person' without any judicial proceeding . . . .") .

58. WOODWARD, *supra* note 1, at 100. "Virginia . . . authorized city councils to divide territories into segregated districts and to prohibit either race from living in the other's district . . . ." *Id.*

> as we know it today remains the result of deliberate and systematic racist programs and policies of the federal government, assisted in its institutional racism by the banking, real estate, and insurance industries. The current patterns of housing segregation began to develop after the turn of the twentieth century. . . . By the 1930s, through deliberate and state-sanctioned acts of racial zoning, restrictive covenants, and public works projects, the segregation of blacks in inner city neighborhoods was becoming the norm.[59]

And "[t]he FHA was operated in a racially discriminatory manner since its inception in 1937 and set itself up as the 'protector of all white neighborhoods,' using its field agents to 'keep Negroes and other minorities from buying houses in white neighborhoods.'"[60] The system of housing segregation was facilitated by a strategy of government-sponsored "redlining."

> The Federal Housing Administration (FHA) adopted the practice of "red-lining," a discriminatory rating system used by FHA to evaluate the risks associated with loans made to borrowers in specific urban neighborhoods. The vast majority of the loans went to the two top categories of the rating system, the highest of which included areas that were "new, homogenous, and in demand in good times and bad." The second highest category was comprised of mostly stable areas that were still desirable. The third category, and the level at which discriminatory "red-lining" began, consisted of working class neighborhoods near black residences that were "within such a low price or rent range as to attract an undesirable element." Black areas were placed in the fourth category.[61]

Of course, to this wall separating a black world and a white world in education, housing, public accommodations, water fountains, and swimming pools, we must add the voting booth. As Michael Klarman writes,

> Though its timing and method varied, the general pattern of black disenfranchisement was consistent across states. First, whites reduced black political participation by force and fraud, which they justified as "necessary to prevent the [South] from falling back into the control of the inferior race." Then, Democratic legislatures enacted laws, such as complex voter registration requirements, which further reduced black voting and Republican representation. This facilitated state constitutional changes, such as poll taxes and literacy tests,

59. Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 39 (2001) (internal citation omitted).

60. Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 93 (1998).

61. *Id.* at 92.

which consummated black disenfranchisement.[62]

According to Congressional records, these practices were so effective that as late as 1965, just prior to the passage of the Voting Rights Act, blacks were still systematically and deliberately disenfranchised.

> These obstacles meant that black registration in Dallas County lagged substantially behind white registration. Figures from the 1960 census showed that Dallas County was 57.6 percent black. Its voting age population was 29,515—14,000 whites and 15,115 blacks. Yet when the Selma campaign began on January 18, of those 9,877 who were registered to vote, 9,542 were white and only 335 were black. Between May 1962 and August 1964, only 8.5 percent (93 of the 795) of blacks who applied to register were enrolled, while during the same period 77 percent (945 of the 1,232) of applications from whites were accepted.[63]

The best description of segregation is that it was a system of racial caste. Du Bois attempts to capture the interlocking, seeming universal, and continuous practice of racial exlusion through the metaphor of a wall.

> Then it dawned upon me with a certain suddenness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil. . . . The shades of the prison-house closed round about us all: walls strait [sic] and stubborn to the whitest, but relentlessly narrow, tall, and unscalable to sons of night who must plod darkly on in resignation, or beat unavailing palms against the stone, or steadily, half hopelessly, watch the streak of blue above.[64]

A system of racial caste cannot be reduced to something that must be traced to a discrete individual decision. Said another way, the model of segregation adopted by the Court is incommensurable with historical segregation as it actually was. It doesn't fit. It is stunningly ahistorical and inaccurate. Similarly, a model limited to identifying and punishing discrete, identifiable violators suffers from the same incommensurablity.

Also, in order for the Warren Court in *Brown* to deny segregation as a systemic, social, and historical pattern, the Warren Court had to adopt a rigid formalistic account of interpretation. This doesn't make sense because *Brown* is methodologically anti-formal. Formalism, as we have said, is a refusal to look past the text. For example, a formal approach to interpretation would be to find the original intent of the

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62. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 30 (2004).

63. *Voting Rights Act of 1965: Essay*, CONGRESSLINK, 2006. http://www.congresslink.org/print_basics_histmats_votingrights_essay.htm.

64. DU BOIS, *supra* note 8, at 4–5.

Fourteenth Amendment as to the acceptability of segregation. This is the classic instance of originalism. *Brown* is famous in part because the Court boldly rejected originalism as a source of constitutional interpretation. Looking past the text again, the Court considered sociological evidence in the form of the Brandeis briefs.

Of course the Roberts Court would say it does not matter what segregation actually was, or how the Warren Court in *Brown* actually understood it. What matters is the meaning of equal protection, and equal protection only reaches intentional acts; barriers, effects are beyond the normative scope. This certainly has been the mantra of the conservatives on the Court. But the court seems blissfully unaware that its current emphasis on intent is a radical break with an earlier tradition.

The intent model is a relatively recent doctrinal innovation. The intent model of equal protection was not utilized significantly in desegregation cases until 1971. It was not firmly entrenched until 1976. Prior to that time, the harm of segregation was explicitly, widely conceived of by courts in objective terms as a barrier or effect. In *Brown* itself, the opinion implicitly relies upon an effects model. "In 1954, when *Brown v. Board of Education*, finally overturned the rule of 'separate but equal,' the Court stressed the stigmatic *effect* segregated schools had on black children. The *Brown* opinion cited extensive empirical evidence for its finding of psychological injury, with no mention of discriminatory intent."[65] In later cases this becomes explicit.[66]

A. Palmer v. Thompson

Up until 1962, Jackson, Mississippi operated five swimming pools. "Four of the swimming pools were used by whites only and one by Negroes only."[67] In 1962 the district court for the Southern District of Mississippi declared that enforced segregation of Jackson, Mississippi pools was unconstitutional.[68] Rather than integrate the pools, the city closed them, claiming it was not economically feasible to operate the

65. Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1306–07 (1995).

66. Palmer v. Thompson, 403 U.S. 217, 266–67 (1971) (White, J., dissenting) ("As stated at the outset of this opinion, by closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility . . . . But such an official position may not be enforced by designating certain pools for use by whites and others for the use of Negroes. Closing the pools without a colorable nondiscriminatory reason was . . . an official endorsement of the notion that Negroes are not equal to whites . . . ."); *see also id.* at 268 ("Negroes . . . are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal.").

67. *Id.* at 218 (Black, J., majority opinion).

68. *Id.* at 219; *see also* Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962).

pools on an integrated basis.[69] Blacks sued to reopen the pools, arguing that the decision to close the pools, rather than integrate them, was motivated by racial animus,[70] which it obviously was. The Supreme Court denied relief on the ground that, even if true, the city's motive in closing the pools was irrelevant.

> But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. The pitfalls of such analysis were set forth clearly in the landmark opinion of Mr. Chief Justice Marshall in *Fletcher v. Peck*, where the Court declined to set aside the Georgia Legislature's sale of lands on the theory that its members were corruptly motivated in passing the bill.[71]

The Court does not stop there. It affirmatively states that the harm it is after in equal protection cases goes to the "effect" of what the government has done.

> It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. *Griffin v. County School Board*, [377 U.S. 218 (1964)]; *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did.[72]

The Court could hardly have been more clear.

In the same vein, congressional hearings on the problem of discrimination confirm the idea of segregation as a systemic problem, a structural problem in today's terms. This was the mainstream view.

> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[73]

It is only in 1973, in *Keyes*,[74] that the Court holds that "segregative intent" was dispositive in a case.[75] But *Keyes*, while focusing on "segre-

69. *Palmer*, 403 U.S. at 219 ("The District Court found that the closing was justified . . . because the pools could not be operated economically on an integrated basis.").

70. *Id.* at 219, 224.

71. *Id.* at 224 (internal citation omitted).

72. *Id.* at 225.

73. S. REP. No. 92-415, at 5 (1971).

74. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

75. *Id.* at 208–09.

gative intent," arrives at a finding of intent by way of a presumption that the dissenters argued was result-oriented.[76] It was consistent with a notion that segregation was a system, and that remedial measures needed to be "systemic." The intent test was not officially established until *Washington v. Davis*[77] in 1976. But in *Washington*, I was struck by the fact that neither the plaintiff nor the defendant briefed or talked about the issue of whether effects could constitute discrimination, without more. That issue had not yet, in courts, become a frame of analysis or discussion.

There is a paradigm shift between *Palmer* and *Washington*. The paradigm shift had its roots in a series of articles by John Hart Ely and Paul Brest, both process theorists, who argued that it was the intent that mattered.[78]

B. *What Makes Segregation Wrong*

> Segregation in the South comes down in apostolic succession from slavery and the *Dred Scott* case. The South fought to keep slavery, and lost. Then it tried the Black Codes, and lost. Then it looked around for something else and found segregation. The movement for segregation was an integral part of the movement to maintain and further "white supremacy" . . . .[79]

The harm of segregation is social stigma. *Brown* itself emphasized that racial segregation of negro children "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."[80]

The concept of stigma was definitively explored by Erving Goffman, who traces the origins of the term to the ancient Greeks. Ancient Greeks originated the term "stigma" to refer to a system of markings typically burned or cut onto the bodies of criminals, traitors, and prostitutes as a way of identifying them as people "to be discredited, scorned, and avoided."[81]

It is only because of this appreciation of stigma[82] that the Court

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76. *See id.* at 224 (Powell, J., concurring in part and dissenting in part).

77. Washington v. Davis, 426 U.S. 229 (1976).

78. *See* Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 130–31 (1971); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1228–30 (1970).

79. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–25 (1960).

80. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1953).

81. Steven L. Neuberg et al., *Why People Stigmatize: Toward a Biocultural Framework*, *in* THE SOCIAL PSYCHOLOGY OF STIGMA 31 (Todd F. Heatherton et al. eds., 2003).

82. The *Plessy* framework of "separate but equal" assumed that while blacks did not have access to the same facilities, each party was treated with equal dignity. "Laws permitting, and

overrules *Plessy*. What is key in this concept of stigma is that it was a message about blacks. Thus David Strauss explains, "[t]his approach focuses less on the concrete effects that a government action has on a group's position and more on the message that the action conveys to others. Stigma in this sense is related to defamation."[83] Defamation by its target is the reputation of a person or, if one follows *Beauharnais*,[84] the reputation of a group. Defamation always takes its meaning from context.

For the Roberts court the stigma—the negative message—flows entirely from the message the government sends when it classifies an individual. For the dissenters stigma flows the message segregation sends about a "negroes" as group. Superficially, there is a tenuous basis for the Roberts court linkage between stigma and the colorless individual.

The Warren court stated the harm of segregation is "made worse" by the sanction of law. This language is, really, the final refuge for a formalistic reading of *Brown*. From this the Roberts court infers in effect that the evil of segregation is in the government decision to classify an individual along racial lines. It does not matter to the Roberts court that the individual is black or white. Armed with this universalism the Court in *Seattle*, just as in Croson and *Adarand*, subjects the Seattle school board's efforts to achieve racial balance to the same level of scrutiny the court applied to the historic segregation experienced by blacks.[85] But this reduction of the harm of segregation to what it says about colorless individuals substitutes abstract conceptualism for history.

The stigma of segregation traces to two sources. Both are linked contextually to the unique historical experience of blacks. The first is the fact that the dominant racial group imposed segregation on blacks as powerless minorities. The second source of stigma is the experience of blacks with slavery.

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even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . ." Plessy v. Ferguson, 163 U.S. 537, 544 (1896). *Plessy* was overruled because the Court recognized the psychological harm that segregation caused. *Brown*, 347 U.S. at 494.

83. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 942 (1989).

84. Beauharnais v. Illinois, 343 U.S. 250 (1952).

85. Doctrinally this equation of race conscious affirmative action plans with historic segregation begins with *Croson v. City of Richmond v. J. A. Croson Co.* 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d. 854 (1988). *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). In *Adarand*, an O'Connor opinion the court was explicit as to why they felt the equivalence was true, "a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." 515 U.S. 200 at 229.

As Douglas writes in 1963, "[A] relic of slavery—an institution that has cast a long shadow across the land, resulting today in a second-class citizenship in this area of public accommodations."[86] He goes on to say, "The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes . . . ."[87]

Slavery and the message of black inferiority are mutually intertwined.[88] Segregation was rooted in slavery and slavery could only be rationalized, as Taney's *Dred Scott* opinion attests, by a story of black inferiority.[89] Black inferiority in turn is simply the flip side of white supremacy. The message of segregation was a message of white supremacy, i.e., that blacks were an inferior order of human life.

> The whole thing is unreasonable, unscientific and based upon unadulterated prejudice. We see the results of all of this warped thinking in the poor under-privileged and frightened attitude of so many of the Negroes in the southern states; and in the sadistic insistence of the "white supremacists" in declaring that their will must be imposed irrespective of rights of other citizens. This claim of "white supremacy", [sic] while fantastic and without foundation, is really believed by them for we have had repeated declarations from leading politicians and governors of this state and other states declaring that "white supremacy" will be endangered by the abolition of segregation.[90]

In the context of *Brown*, it was not all children who were threatened by this message, it was black children. This is especially true because segregation was commonly understood as an extension of slavery, not the property relations, but the hierarchical relations. The harm of segregation was its implicit marking of blacks as members of a lower caste linked to slavery. As Justice Breyer noted,

> But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their

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86. Bell v. Maryland, 378 U.S. 226, 246 (1964).

87. *Id.* at 247.

88. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 454 (1993). I spend much of my time in this article exploring the porous boundary between slavery and racial ideology. I have specifically explored *Dred Scott* as an example of how racial ideology can capture legal analysis. *See also* D. MARVIN JONES, RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE (2005).

89. In *Dred Scott*, Taney famously wrote,

> They [negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

90. Briggs v. Elliot, 98 F. Supp. 529, 542 (E.D.S.C. 1951).

> skin," (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination.[91]

Breyer makes the point about the objective historical meaning of segregation. It is important to add, however, that it was precisely this linkage between segregation and slavery which animated courts in this period to dismantle it. Slavery is inextricably bound up in both the historical exegesis of segregation as well as its received meaning.

Perhaps the most stunning denunciation of segregation as a message of white supremacy occurs in *Loving v. Virginia*. In *Loving*, the Court addressed a Virginia anti-miscegenation statute which prevented blacks from marrying whites and vice-versa.[92] Today the case is understood in terms of process theory. But at the time, the Court looked at the case through the lens of the nations experience in World War II, a war against Nazism and fascism.

The notion of blacks as a separate caste was explicit in the Virginia judge's rationale for the statute:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[93]

The Court begins its analysis by focusing on the motive or reason behind the statute. "[T]he state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' [and] 'a mongrel breed of citizens'. . . ."[94] The Court notes that this was obviously an endorsement of the doctrine of White Supremacy.[95]

While most scholars try to understand *Loving* as resting on a notion of privacy, many scholars understand *Loving* as a case that flows from how it read the message of segregation. Virginia's anti-miscegenation law represented a message of white supremacy which was unacceptable. *Brown* and *Loving* can be read in the same way. "*Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that Black children are an untouchable caste, unfit to be educated with white children."[96] *Loving*'s denunciation of the message of white supremacy follows an arc tracing back to

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91. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2836 (2007) (internal citation omitted) (Breyer, J., dissenting).

92. Loving v. Virginia, 388 U.S. 1 (1967).

93. *Id.* at 3.

94. *Id.* at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (1955)).

95. *Id.*

96. MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ

Brown's denunciation of the message of "negro inferiority." Both of these cases hearken back to *Strauder v. West Virginia.*[97]

The point is this: The Supreme Court in *Loving* and elsewhere explicitly traces the stigma of segregation to an historical linkage between blacks and slavery. This message is conveyed through practices of exclusion imposed without the consent of blacks themselves. This intertwining of slavery and powerlessness is unique to blacks.

When the Seattle school board decided to exclude whites from its program it was an example of the dominant group deciding to disadvantage itself. Inasmuch as these were the elected representatives of all of Seattle residents, this was, in the context of democracy, with the consent of the governed. Also, Joshua, the white child who challenged the school assignment policy of Jefferson County in *Parents Involved*, is not a member of a group which experienced slavery. Finally, while the exclusion was intentional, injury to Joshua was not. Any unfairness is a secondary feature, something unintended and incidental to a program designed to promote a social good. Historically segregation was designed deliberately and primarily to enforce the supremacy of whites.

There is no comparison, no symmetry. For blacks, the Roberts Court opinion operates as erasure: It erases their historical experience in favor of an artificial, abstract ahistorical formalism. For the Warren Court it operates as appropriation. It appropriates the deeply historicized "moral vocabulary" the Warren Court had developed to denounce the evil of "segregation." Then it uses the same language, out of its *legal* historical context, to mean the opposite of what the Warren Court—the Court that decided *Brown*—would have meant.

III. POST-*BROWN* THEORY

> "[*T*]*he work goes on, the cause endures, the hope still lives, and the dream shall never die.*"[98]

The Roberts Court canonizes the formal holding of *Brown*: In the field of education, segregation has no place. The Roberts Court resound-

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WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 59 (1993).

97. Strauder v. West Virginia, 100 U.S. 303, 308 (1879) ("The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.").

98. Senator Ted Kennedy, quoting Tennyson, made this statement at the 2008 Democratic Convention. *See* Michael Powell, *For Some, Echoes of a Distant Past*, N.Y. TIMES, Aug. 26, 2008.

ingly affirms that. But segregation is defined in a peculiar way. Segregation is something that occurs whenever the government classifies "children" on the basis of race. Governments may not openly classify on the basis of race, now not even for the purpose of achieving racial balance. It follows that having defined the cause so narrowly we can declare a victory. Segregation as we confronted it in 1954 is a thing of the past. We have broken with the dark history of racism. We have achieved "equal opportunity under law." For the Roberts court that is the true meaning of Brown.

But what is the meaning of *Brown* today to the black children of urban areas? The segregation that Linda Brown experienced has been replaced with the resegregation of inner-city schools. Today 2.4 million children go to schools that are 99–100% students of color.[99] The social isolation is most severe in the urban centers of the Northeast. In Boston in 1992, half of the black students in the region attended schools with fewer than 10% whites, and one in three went to schools that are 99% or more minority.[100] As of 2001, seventy percent of black students attended schools where nearly two-thirds of students were black and Hispanic.[101] It is drastically worse in the inner city. In Miami, many of the same schools which were segregated in the 1950s are still over 90% black.[102]

This gross statistical disparity vastly understates the intensity of segregation experienced by black children, because it does not take classroom segregation into account. The magnet school program, in theory a program to help foster integration, is frequently itself segregated, and while the school building may be integrated the impact of largely white magnet school programs perpetuate the historic problem. Consider R.R. Moton elementary school in Perrine.

> The building was desegregated—52% black, 38% white, and 10% Hispanic—but "in regular classrooms outside of the magnet program, 75% of the fifth- and sixth-graders [we]re black, and 95% of the kindergartners [we]re black." Most of the minority students at Moton experienced segregation in their classrooms. In a computer theme partial-magnet in Milwaukee, Wisconsin, only the 500 students participating in the magnet portion of school enjoy an integrated education while the rest of the students (the nonmagnet student body, which is predominantly minority) attend segregated classes. Similarly, at Enloe High School, a partial-site magnet school in Raleigh,

99. John A. Powell & Stephen Menendian, *Little Rock and the Legacy of* Dred Scott, 52 ST. LOUIS U. L.J. 1153, 1181 (2008).

100. Larry Tye, *US Sounds Retreat in School Integration*, BOSTON GLOBE, Jan. 5, 1992, at 1.

101. Juan Williams, *Don't Mourn* Brown v. Board of Education, N.Y. TIMES, June 29, 2007, at 29.

102. Donald Jones, *Race: Integration Benefits All*, MIAMI HERALD, July 28, 2007, at A35.

> North Carolina, there is simply an "absolute lack of integrated classrooms."[103]

Nonetheless the Miami-Dade school system was declared desegregated in 2001.[104] The highest levels of social isolation occur in the Northeast.

> In 2000, according to the Education Trust, New York school districts with the highest concentration of white students received $2,034 more per student in state and local funding than those with the highest concentration of minorities—a difference of more than $50,000 per classroom.[105]

This socioeconomic disparity was portrayed in a recent television documentary. In "Hard times at Douglass High," the head of the English Department stated that when a reading test was given to three or four hundred ninth-grade students, only three or four passed at grade level, the vast majority were at least three grade levels behind. During the standardized Maryland testing only 10% of the students passed English, and 1% passed algebra. Even worse, at Douglass the drop out rate runs at 50% in the ninth grade. Part of the problem is that as principal, Isabel Grant states in the film, the teaching staff is two-thirds non-certified while many substitutes are unqualified for the subjects that they teach.

But the most moving portrait of the plight of black children in the nation's resegregated schools takes place in the series "The Wire."[106] Two of the most memorable characters were Michael Lee and Dukwon. Michael Lee's mother is a crack addict; Dukwon is essentially homeless but still tries to go to school. These characters eloquently articulate through their circumstances why schools like Douglass High are failing. As schools resegregate, poverty is concentrated, and in so doing, problems are concentrated, like those of Dukwon and Michael.

IV. CAUSES OF RESEGREGATION

There are many causes of resegregation of inner-city schools. These "causes" are scarcely distinct from the causes of the social isolation of urban blacks. The creeping apartheid in our schools is related to the "American Apartheid"[107] of housing segregation and the related problem

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103. Kimberly C. West, *A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567, 2575–76 (1994).

104. FLORIDA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, DESEGREGATION IN PUBLIC SCHOOLS IN FLORIDA: 18 PUBLIC SCHOOL DISTRICTS HAVE UNITARY STATUS, 16 DISTRICTS REMAIN UNDER COURT JURISDICTION 10 (2007), *available at* http://www.usccr.gov/pubs/022007_FloridaDesegreport.pdf.

105. Sharon Smith, *The Resegregation of U.S. Schools*, SOCIALIST WORKER, May 16, 2003, at 7.

106. "The Wire" is an HBO police drama, created by David Simon and set in Baltimore, Maryland. It is virtually the only television show, *per se*, that I watch.

107. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION

that the economic infrastructure of the inner city has collapsed.[108]

A. *White Flight*

"Residential segregation is the 'structural linchpin' of the nation's racial inequality."[109] In a famous song by a sixties singing group called the Temptations, Dennis Edwards sings, "People movin' out, people movin' in. Why? Because of the color of their skin." While conservatives attribute the concentration of blacks in inner-city schools largely to private choices people make about where to live, Sheryll Cashin, in her book, *The Failures of Integration*, suggests that Dennis Edwards' untutored observation may be sociologically correct.[110] She has presented evidence that "whites place a premium" on living in neighborhoods that are "all-white."[111] Personal preference may indeed play a strong role. But a variety of factors—from "steering," to vast income disparity, to the hostility of some communities to people who are different—combine in the causal chain. Private choice exists within a vortex of institutional forces which strongly continue an inertia toward "separatism."

B. *Black Flight*

Between 1970 and 1995, seven million blacks moved to the suburbs—more than during the "great migration" of blacks from the South to the North.[112] Urban blacks today are a result of suburbanization of both whites and middle-class blacks in a condition Douglas Massey calls "hypersegregated."[113] The term "hypersegregation" refers to a "deep wall of isolation and concentrated poverty. Poor black people are highly segregated from *all* other groups, and their levels of segregation remained essentially the same in the last third of the twentieth century."[114]

AND THE MAKING OF THE UNDERCLASS 9 (1993) (arguing that "racial segregation—and its characteristic institutional form, the black ghetto—are the key structural factors responsible for the perpetuation of black poverty in the United States").

108. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996).

109. John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1444 (1997); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 33 (1995) (noting that the "structural linchpin" of American racial inequality is residential segregation).

110. *See* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM, at x–xii (2004).

111. *Id.* at 10.

112. *Id.* at 134.

113. MASSEY & DENTON, *supra* note 106, at 74.

114. Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 279 n.100 (2006) (quoting CASHIN, *supra* note 109, at 96).

C. *"Integration Fatigue"*[115]

Whites, like Joshua's parents, overtly challenge all coercive governmental measures to achieve integration on moral as well as legal grounds. Middle-class blacks, from their physical and moral distance in the suburbs, simply have little interest in the issues of inner-city schools. The socioeconomic distance between middle-class blacks and the black urban underclass reflects a cultural chasm. In addition, middle-class blacks widely view inner-city blacks in stereotypical terms such as lazy, crime-prone, and ignorant. Bill Cosby's famous tirade captures the essence of the black middle class's frustration with a cruel distance from those still trapped in the postindustrial ghetto. To white resistance, black middle-class apathy must be added to the mainstream sociological attitude: Somewhere between Moynihan's critique of the black family as dysfunctional and the mainstream sociological evaluation of the underclass in terms of "cultural pathology," the integrationist ideal has been lost. We have achieved integration for those blacks who are deserving, and those in the inner city are simply "the undeserving poor." All of these arguments in my view are mere rationalizations for failing to face the problem of "structural racism." We rationalize because we are just too tired.

D. *The Supreme Court Decisions from 1988 to the Present*

By far the most important reason resegregation is taking place because the Supreme Court has enabled it. As Gary Orfield and Chungmei Lee write,

> [D]esegregation of black students continued to increase in the South until the late 1980s, possibly reflecting the gradual decline in residential segregation levels. Then, beginning in the 1990s, segregation began to increase in spite of evidence from the 2000 Census of further declines in residential segregation during this decade. This resegregation is linked to the impact of three Supreme Court decisions between 1991 and 1995 limiting school desegregation and authorizing a return to segregated neighborhood schools . . . .[116]

E. *Where Do We Go From Here*

Brown failed as a framework for social change through the courts.

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115. This phrase captures the social underpinning of the Roberts Court's analysis. This term originates with John Calmore: "there is a profound integration fatigue that is compounded by the alienation and distrust of whites that is associated with the black experience of having 'integrated' dominant institutions and parts of society." John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1107–08 (1998).

116. ORFIELD & LEE, *supra* note 7, at 18.

It was successful as a catalyst for political change through the civil rights movement that followed. *Brown* gave birth to the Civil Rights Era. The fact that it has been effectively overruled marks the end of that era. Derrick Bell aptly refers to this as the end of the second reconstruction.[117] Ironically while the Civil Rights Era is clearly over, in the post-industrial ghetto things are worse not better.

We have noted that this tragic social reversal reflects a paradigm shift in the courts. Scholars of color need to make a paradigm shift as well. Our scholarly agenda is based on the answer to three questions: Who do we speak to? How do we believe change takes place? Where do we go from here? In the past, our answers to these questions seem to generally have proceeded from the following assumption: Change comes from the top down—the audience was the Court or at least the goal is, typically, to influence the Court's decisions. We should address our writings to the Court or to the profession or to legislative bodies to influence national policy at the highest level. This deconstructs to a top-down theory of change.

Civil rights victories are permanent—in a sense, we seem to presuppose that the era of 1954–1988 was a break with history, that the era of segregation ended and the era of formal equal opportunity began. The notion seems to be that formal equal opportunity is assured and that we need to translate formal equal opportunity into "real equal opportunity." If we disagree with mainstream scholars we view this as disagreement within a larger consensus.

America has made great progress—the trajectory of narrative points toward a narrative of racial transcendence. Conservative scholars sometimes add a narrative of "black deviance." This is the notion that groups who remain socially isolated remain so due to their poor choices.

These themes and narratives form the core of much of the scholarship that precedes this article. It is well intentioned. I feel that at many levels I have marched in step with the cadences of these narratives. But all these narratives are themes that are rooted in a story about *Brown*, and its redemption of America from its historic dilemma. But as a Supreme Court Justice himself has intimated, *Brown* has been quietly overruled. Not explicitly, but in the way, we have rewritten its meaning. In the aftermath of the demise of *Brown* we can no longer write the same articles, or advance the themes listed above. To claim racial transcendence in any form is merely a species of denial, or worse, complicity. We need a new realism, racial realism in Derrick Bell's terms. We need to begin with the assumption that the Warren Court is no longer sitting

117. DERRICK A. BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 195 (2004).

and that the business we can get done before the Court is limited in ways that have never been so starkly clear.

Perhaps we need to shift from integration to simply trying to improve the quality of inner-city schools; from affirmative action to finding ways to develop the economic infrastructure of urban areas; from trying to address our arguments to the Supreme Court or the profession to addressing our arguments to a broader audience.

Whatever our post-*Brown* theoretic becomes it must be grounded in a realistic theory of change. *Brown* was merely a spark to a revolution culminating in civil rights acts and, erstwhile, affirmative action programs. It was a spark that ignited the kindling of a coalition of blacks, northern liberals, and intellectuals who brought about change through the public space of discourse and the political space of demonstrations, hearings, and legislation at many different levels. We need to determine how to recreate that coalition. I dream wistfully that our work be the spark of a new revolution of social justice: for the children of the post-*Brown* era.

Whatever the theoretics of this postreform period are, there is one fixed star. Segregation did not end. So we must continue the struggle to end it. We must do so not only to save the "hearts and minds" of Michael Lee and Dukwon. In the words of Dr. King:

> [H]istory has proven that social systems have a great last-minute breathing power and the guardians of the status quo are always on hand with their oxygen tents to keep the old order alive. So my friends, segregation is still a fact. But we know this evening as we assemble here that if democracy is to live segregation must die.[118]

118. 4 THE PAPERS OF MARTIN LUTHER KING, JR. 173 (Clayborne Carson et al. eds., 2000).