ESSAY

BROWN AND THE COLORBLIND CONSTITUTION

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This Essay offers the first in-depth examination of the role of colorblind constitutionalism in the history of Brown v. Board of Education. *In light of the recent Supreme Court ruling in* Parents Involved in Community Schools v. Seattle School District No. 1, *such an examination is needed today more than ever. In this case, Chief Justice John Roberts drew on the history of* Brown *to support his conclusion that racial classifications in school assignment policies are unconstitutional. Particularly controversial was the Chief Justice's use of the words of the NAACP lawyers who argued* Brown *as evidence for his colorblind reading of the landmark school desegregation decision. I argue that while the historical record shows widespread faith in the claims of colorblind constitutionalism at the time of* Brown, *including among the lawyers for the NAACP and their allies, these claims were just one of many ways in which civil rights advocates challenged the constitutionality of school segregation. And, more importantly, any effort to claim* Brown *as a foundation stone for colorblind constitutionalism must confront the fact that the Supreme Court clearly rejected a sweeping anticlassification justification for its decision in* Brown.

"[W]hen it comes to using race to assign children to schools, history will be heard."
— Chief Justice John Roberts (2007).[1]

"[T]he past cannot be allowed to decide for us what it did not have to decide for itself."
— Edmond Cahn (1955).[2]

INTRODUCTION

Brown v. Board of Education[3] has always featured prominently in debates over "colorblind" constitutionalism—the belief that racial classifications by the government are prohibited by the Equal Protec-

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1 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007).

2 Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 153 (1955).

3 347 U.S. 483 (1954).

tion Clause of the Fourteenth Amendment. Yet the June 2007 Supreme Court decision striking down race-based school assignment programs in Louisville and Seattle charted a new course in the Court's use of *Brown*. In his Opinion of the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts unsurprisingly embraced the seminal 1954 school desegregation decision as supporting his conclusion that it is unconstitutional for school districts to take race into account when assigning students to schools. To make this point, he looked beyond the traditional grounds of judicial analysis, namely the text of *Brown* and subsequent desegregation decisions, and ventured into previously unexplored territory for a Supreme Court opinion: the history of the litigation that culminated in *Brown*. Specifically, he turned to the words of National Association for the Advancement of Colored People (NAACP) lawyers who, during the *Brown* litigation, expressed a commitment to the ideal, famously expressed in Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, that "[o]ur Constitution is color-blind."[4] In concluding his opinion, Chief Justice Roberts offered a string of quotations from the briefs and oral arguments of the NAACP lawyers in *Brown*, indicating that these words—more than the bare language of the decision itself—point to the true meaning of the school desegregation decisions.[5]

Surviving members of the NAACP's legal team responded with outrage, accusing the Chief Justice of misrepresenting their position to further an agenda with which they deeply disagree. The Chief Justice's reading of *Brown* was "preposterous";[6] it stood the NAACP's "argument on its head";[7] it was "dirty pool."[8] The dissenting Justices

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4 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

5 *Parents Involved*, 127 S. Ct. at 2767–68. Similarly, Justice Thomas, in addition to analogizing the position of the dissenters in *Parents Involved* to that of the lawyers who opposed the NAACP in *Brown*, also drew on the words of NAACP lawyers to support his reading of *Brown*. *Id.* at 2782–83 (Thomas, J., concurring).

The Supreme Court's treatment of *Brown* dominated media reaction to the *Parents Involved* decision. *See, e.g.*, Stanley Fish, Op-Ed., *History, Principle and Affirmative Action*, N.Y. TIMES, July 14, 2007, at A11; Linda Greenhouse, *Justices, 5-4, Limit Use of Race for School Integration Plans*, N.Y. TIMES, June 29, 2007, at A1; Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24; Juan Williams, Op-Ed., *Don't Mourn* Brown v. Board of Education, N.Y. TIMES, June 29, 2007, at A29; Michael C. Dorf, *The Supreme Court's Split Over Public School Integration: Who Really Betrayed* Brown*'s Legacy?* FINDLAW, July 2, 2007, http://writ.news.findlaw.com/dorf/20070702.html.

6 Liptak, *supra* note 5 (quoting Jack Greenberg).

7 *Id.* (quoting Judge Robert L. Carter).

8 *Id.* (quoting William T. Coleman, Jr.); *see also* Jack Greenberg, *Roberts, Breyer, Louisville, Seattle and Humpty Dumpty*, HUFFINGTON POST, Aug. 10, 2007, http://www.huffingtonpost.com/jack-greenberg/roberts-breyer-louisvil_b_60000.html ("I was among those who argued alongside Marshall in Brown. Nobody at that time had heard of affirmative action. . . . It never occurred to me or anyone else that we were arguing for a color blind constitution that would prohibit government from affirmatively preferring African-

were just as dismayed. Justice John Paul Stevens labeled the Chief Justice's use of *Brown* to justify striking down school integration plans "a cruel irony"[9] and accused the Chief Justice of "rewrit[ing] the history of one of this Court's most important decisions."[10] The majority was neither "loyal" nor "faithful" to *Brown*, wrote Justice Stevens.[11] From the bench, Justice Stephen Breyer gave an uncharacteristically emotional reading of his dissent,[12] in which he accused the majority of forgetting "[t]he lesson of history," and abandoning "the hope and promise of *Brown*."[13] The Chief Justice's critics rejected not only his interpretation of the Fourteenth Amendment, but also his attempt to claim the history of *Brown*.

In this Essay, I take seriously Chief Justice Roberts's assumption that the history of *Brown* offers valuable insight into the meaning of the Fourteenth Amendment. Material that previously had been of interest predominantly to historians has now assumed new significance for constitutional interpretation. By drawing on the language of the NAACP lawyers in *Parents Involved*, the Chief Justice seemed to open the door to an interpretative approach with potentially dramatic implications, even if he was far from self-conscious about what he was doing. Indeed, there may be considerable value in recognizing that constitutional meaning derives not only from the traditional sources of legal interpretation—constitutional text, original understanding, and precedent—but also from the historical experience of contestation over the best reading of the Constitution.[14] The Chief Justice was making a claim that, in essence, elements of the history of the civil rights struggle should be integrated in constitutional analysis. This analytical move raises an array of serious questions for legal interpretation, not the least of which are determinacy problems when the available array of interpretative sources are potentially so dramatically expanded and concerns persist regarding the institutional competence of the judiciary to evaluate these sources. (As legal historians have pointed out over and over, Supreme Court Justices have an igno-

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Americans by promoting integration. All others among surviving counsel for the Brown plaintiffs emphatically disagree with the Roberts characterization and I am confident that those no longer with us would disagree too.").

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

10 *Id.* at 2798.

11 *Id.* at 2800.

12 Greenhouse, *supra* note 5.

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

14 For recent efforts to theorize and defend this point, see Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 CAL. L. REV. 1323 (2006).

minious record when it comes to doing historical interpretation.[15]) Such concerns are not the focus of this Essay, however. Rather, I will use Chief Justice Roberts's turn to the history behind *Brown* as an invitation to explore what this history can actually tell us about the role of colorblind constitutionalism in *Brown*. Once one seriously looks to the history of colorblind constitutionalism in the struggle that led to *Brown*, however, the shortcomings of the Chief Justice's account become readily apparent. Most significantly, the Chief Justice offers no rationale for why he chooses to limit his analysis to a selection of words by the NAACP lawyers who argued *Brown*. To offer a more complete account of the history that Chief Justice Roberts has identified as relevant, in this Essay I go beyond his selective approach by drawing on a broader array of sources that shed light on what the key actors in *Brown* understood themselves as doing.

Colorblind principles have little basis in the original meaning of the Fourteenth Amendment.[16] As *Parents Involved* makes clear, *Brown* has largely replaced the Fourteenth Amendment itself as the preferred historical foundation for proponents of colorblind constitutionalism. Even committed originalists, such as Justices Thomas and Scalia, give scant attention to the framing of the Fourteenth Amendment in justifying their faith in colorblind constitutionalism.[17] Considering the obvious weight that the Court is willing to place on the

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15 Classic works in this genre include CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Gerhard Casper, Jones v. Mayer*: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988).

16 *See, e.g.*, Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 235 n.95 (1991); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

17 *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 137–38 (2005) (noting "the stunning silence of Justices Scalia and Thomas" on the history of the Fourteenth Amendment in explaining their anticlassification stances). Justice Thomas typically defends his reading of the Fourteenth Amendment as establishing an anticlassification requirement by reference to general principles of equality, rather than text or original meaning. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."); *id.* at 378 (warning that benign racial classifications "only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (referring to "the principle of inherent equality that underlies and infuses our Constitution" as prohibiting racial classifications and citing the Declaration of Independence as support for this point); *see also* Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 995 (1987) ("The first principles of equality and liberty should inspire our political and constitutional thinking.").

history of *Brown*, such an examination of the historical material is essential to an informed debate on the merits of colorblind constitutionalism in education and elsewhere in American society.

The historical record demonstrates that the Chief Justice was more right than his critics allow in his characterization of the NAACP: the civil rights lawyers and their allies indeed expressed, repeatedly, in public and private statements, a deep commitment to the principle that use of racial classifications by the government violated the Equal Protection Clause. Principles of colorblind constitutionalism inspired the efforts of many of the NAACP's allies in the struggle against school segregation and, more generally, had a powerful presence in early post–World War II American society. Colorblind constitutionalism was an integral element of the legal and moral challenge to white supremacy at the time of *Brown*.

Nonetheless, Chief Justice Roberts overstated his claim on *Brown*'s history in at least two ways. First, colorblind constitutionalism was only one of a number of arguments offered by the NAACP. During the *Brown* litigation, lawyers advocating a blanket prohibition of racial classifications never put forth these arguments in isolation from other, more context-based, color-conscious arguments relating to the meaning of the Fourteenth Amendment. At a time when the problem of "benign" racial preferences and affirmative action was rarely even considered, civil rights advocates easily moved back and forth between making anticlassification arguments and claims based on what has come to be know as "antisubordination" principles—a distinctly color-conscious interpretation of the equal protection requirement that, in Reva Siegel's concise definition, is based on "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups."[18] Furthermore, when the NAACP lawyers transitioned from defining the equal protection right to defining the scope of the remedy, they recognized the limitations of anticlassification arguments and looked increasingly to antisubordination arguments to guide the Court's implementation of school desegregation. To now isolate the lawyers' anticlassification argument as their only, or even primary, constitutional claim in the school segregation cases fails to do justice to the historical record.

Yet even if we accept the Chief Justice's implication that the NAACP was committed to an anticlassification argument, a second and more significant weakness of Chief Justice Roberts's reading of

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18 Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004). For the seminal articulation of an "antisubordination" reading of the Fourteenth Amendment, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), although Fiss labeled it the "group-disadvantaging principle," *id.* at 108.

Brown is his attempt to extrapolate the views of the Supreme Court Justices as expressed in their school desegregation decisions from the arguments of the advocates in *Brown*. The history on this point is quite clear: Although the members of the *Brown* Court considered basing their desegregation decisions on the anticlassification principle, this approach never came close to reflecting the positions of all nine Justices who committed themselves to the unanimous decisions; it would not have even secured a majority of the Justices at the time of *Brown*. The *Brown* decision actually reflected a conscious effort by the Justices to *not* accept the general principle of colorblind constitutionalism.

Considering the importance the history of *Brown* has assumed in the contemporary debate over colorblind constitutionalism, there have been remarkably few efforts to explore the role of the colorblind principles in the history of *Brown*. This historical investigation is particularly necessary because the dissenting opinions in *Parents Involved* did not engage with the majority opinions on the question of the history behind *Brown*. The primary dissent, written by Justice Breyer, focuses on the experience with school desegregation following the *Brown* decisions—not the preceding litigation history.[19] Among legal scholars, the issue has not been directly examined. The best study of *Brown* and the anticlassification principle is Reva Siegel's 2004 article *Equality Talk*, which examines not the history of the decision itself, but the formation of a colorblind reading of *Brown* in the face of attacks on the decision's legitimacy in the late 1950s and the 1960s.[20] The history of the background of the ruling is outside the scope of her article. Similarly, David A. Strauss's often-cited article *Discriminatory Intent and the Taming of* Brown[21] examines why, in the 1970s and 1980s, the Court chose some interpretations of *Brown* over others and the consequences of those choices. Ian F. Haney López's recent study of what he terms "reactionary colorblindness" gives only cursory attention to the use of colorblind arguments in *Brown*.[22] The only scholar to directly address the role of colorblind arguments in *Brown* itself is Andrew Kull, who included a brief chapter on *Brown* in *The Color-Blind Constitution*.[23] Yet Kull's criticism of *Brown* for failing to embrace the

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19 *See infra* notes 48–53 and accompanying text.

20 Siegel, *supra* note 18.

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

22 *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1000–01 (2007) (limiting discussion to a short section entitled "The Liberal Argument for Colorblindness in *Brown*").

23 ANDREW KULL, THE COLOR-BLIND CONSTITUTION 151–63 (1992).

colorblind principle[24] leads him to inadequately recognize the diversity of the arguments against segregation in the *Brown* litigation.

This lack of attention to the history of *Brown*, including the litigation history, the decision-making process of the Justices,[25] and the immediate reception of the decision, is a major gap in the scholarship on *Brown* and colorblind constitutionalism. Considering the weight the *Parents Involved* majority accorded this history, the shortcomings in the historical record have implications not only for scholarly understanding of *Brown*, but also for present-day equal protection doctrine. The role of colorblind ideals in the history of *Brown* has yet to be examined in all its fullness and complexity. This Essay is an effort to fill this void.

I
PARENTS INVOLVED IN COMMUNITY SCHOOLS AND *BROWN*

In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court struck down the race-based school assignment policies of the Seattle and Louisville school districts as violating the Equal Protection Clause of the Fourteenth Amendment.[26] The districts adopted their programs in efforts to ensure that their schools would retain a certain level of racial diversity.[27] Although Justice Kennedy's concurring opinion seems to leave the door open for the limited use of racial preferences in public school assignments,[28] the Chief Justice's Opinion of the Court and Justice Thomas's concurrence are premised on a sweeping condemnation of racial classifications. While the Chief Justice and Justice Thomas enlisted *Brown* to support their anticlassification positions, the dissenters offered a sharply contrasting interpretation of *Brown*, rejecting the majority's anticlassification arguments in favor of a vision of *Brown* centered on the importance of integrated education. Under this view, *Brown* should be read to encourage—or, at minimum, not to stand in the way of—policies that combat segregated schools.

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24 *See, e.g.*, *id.* at 152 (describing the *Brown* opinion as "historically and legally jejune"); *id.* at 161 (describing the Supreme Court's confusing and contradictory segregation jurisprudence through the 1950s, including *Brown*, as "an intellectual void").

25 A prominent exception in this area is the work of Michael Klarman. *See, e.g*, Klarman, *supra* note 16, at 226–57 (examining the Supreme Court's consideration of the racial classification rule in the post-1937 era).

26 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007).

27 *See id.*

28 *See* Heather K. Gerken, The Supreme Court 2006 Term Comment, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007); James E. Ryan, The Supreme Court 2006 Term Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 135–36 (2007).

Chief Justice Roberts relied on the history of *Brown* as the centerpiece of the concluding section—and rhetorical climax—of his opinion. The bulk of the opinion consists of a description of the social costs of allowing localities to practice racial "balancing" in making their school assignments. To permit racial balancing would "'effectively assur[e] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decision making such irrelevant factors as a human being's race will never be achieved.'"[29] More generally, racial classifications "promote 'notions of racial inferiority and lead to a politics of racial hostility.'"[30] Further, "'race is treated as a forbidden classification [because] it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.'"[31] Roberts then turned to *Brown*, with the pronouncement: "[W]hen it comes to using race to assign children to schools, history will be heard."[32] To demonstrate that his reading of *Brown* as support for the anticlassification principle is in accordance with "the heritage of *Brown*,"[33] he offered the words of the NAACP lawyers who argued the case, believing that their position on this question "could not have been clearer."[34] He quoted from a brief submitted by the NAACP lawyers: "'[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.'"[35] And he quoted NAACP lawyer Robert Carter, who made much the same point in oral argument: "'We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.'"[36] "There is no ambiguity in that statement," the Chief Justice explained. "And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was '[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a*

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29 *Parents Involved*, 127 S. Ct. at 2758 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion of O'Connor, J.)).

30 *Id.* at 2767 (quoting *Croson*, 488 U.S. at 493).

31 *Id.* (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* at 2768 (quoting Brief for Appellants in Nos. 1, 2, and 3 and for Respondents in No. 5 on Reargument at 15, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) (Nos. 1, 2, 3, 5)).

36 *Id.* at 2767–68 (quoting Transcript of Oral Argument at 7, *Brown I*, 347 U.S. 483 (No. 1)).

nondiscriminatory basis,' and what was required was 'determining admission to the public schools *on a nonracial basis*.'"[37]

Roberts concluded his opinion:

> 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. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[38]

In his concurring opinion, Justice Thomas used *Brown* for two purposes. First, he drew on *Brown* to identify a historical pedigree for the "colorblind Constitution." "I am quite comfortable in the company I keep,"[39] Justice Thomas noted in defending the colorblind Constitution. He quoted from Justice Harlan's dissent in *Plessy*, which he embraced as "[m]y view" as well as "the rallying cry for the lawyers who litigated *Brown*."[40] In support of this point, he gave three quotations from NAACP-authored briefs in *Brown* and two quotations from oral arguments[41] and a reference to Thurgood Marshall's admiration of Justice Harlan's *Plessy* dissent.[42]

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37 *Id.* at 2768 (emphasis of Chief Justice Roberts (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955)).

38 *Id.* at 2768 (quoting *Brown II*, 349 U.S. at 300–01) (citation omitted).

39 *Id.* at 2782 (Thomas, J., concurring).

40 *Id.*

41 *Id.* (quoting parenthetically Brief for Appellants in Nos. 1, 2 and 3 and Respondents in No. 5 on Reargument at 65, *Brown I*, 347 U.S. 483 (Nos. 1, 2, 3, 5) ("That the Constitution is color blind is our dedicated belief.")); *id.* (quoting parenthetically Brief for Appellants in No. 1 at 5, *Brown I*, 347 U.S. 483 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone.")); *id.* at 2782 n.20 (quoting parenthetically Statement as to Jurisdiction at 8, Davis v. County Sch. Bd., 347 U.S. 483 (No. 3) (companion case to *Brown I*) ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action.")); *id.* (quoting parenthetically Transcript of Oral Argument at 7, *Brown I*, 347 U.S. 483 (No. 1) ("We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.")); *id.* (quoting parenthetically Transcript of Oral Argument at 50, Briggs v. Elliott, 347 U.S. 483 (No. 2) (companion case to *Brown I*) ("[T]he state is deprived of any power to make any racial classifications in any governmental field.")).

42 *Id.* at 2782–83 (quoting parenthetically IN MEMORIAM, HONORABLE THURGOOD MARSHALL: PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, at x (Nov. 15, 1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal

Second, Justice Thomas drew on *Brown* to attack the dissenting Justices, comparing his colleagues to those who defended segregation in the 1950s. In "giv[ing] school boards a free hand to make decisions on the basis of race," the *Parents Involved* dissenters embraced "an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*."[43] Justice Thomas offered a step-by-step summary of the dissent's position, juxtaposing each argument with the words of the "segregationists" in *Brown*.[44] In response to the dissenters' claim that they could distinguish invidious racial classifications, such as the school segregation laws at issue in *Brown*, from benign racial classifications designed to encourage diversity, Justice Thomas noted that "[t]he segregationists in *Brown* argued that their racial classifications were benign, not invidious."[45] "What was wrong in 1954 cannot be right today,"[46] he concluded.

> Whatever else the Court's rejection of the segregationists' arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision.[47]

The dissenting opinions of Justices Stevens and Breyer do not focus on the history behind *Brown* as much as the history that *Brown* set in motion.[48] Justice Breyer's primary concern was with the "promise

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community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson* . . . . I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days . . .")). In a footnote later in his concurrence, Justice Thomas juxtaposed a quotation from an NAACP brief in *Brown* with a quotation from Justice Breyer's dissent to make this same point. *Id.* at 2786 n.28.

43 *Id.* at 2768; *see also id.* at 2783 (comparing the dissenters to "segregationists in *Brown* [who] embraced the arguments the Court endorsed in *Plessy*").

44 *Id.* at 2783–86.

45 *Id.* at 2786 n.27.

46 *Id.* at 2786.

47 *Id.*

48 Justice Kennedy's concurrence touched on *Brown* only lightly and showed none of the interest in its background history that is evidenced in the opinions of the Chief Justice and Justice Thomas. Nonetheless, *Brown* plays an important symbolic role in Justice Kennedy's concurrence. He turned to *Brown* as a moderating influence—as a testament to the necessary mixture of pragmatism and principle that is necessary to further the compelling state interest in creating a diverse educational environment while avoiding race-based solutions that risk "entrench[ing] the very prejudices we seek to overcome." *Id.* at 2788 (Kennedy, J., concurring). Although he is committed to "[t]he enduring hope is that race

of *Brown*,"[49] a promise best understood through the line of Supreme Court precedents extending from *Brown*, rather than the details of litigation leading up to *Brown*. The majority's use of the history of *Brown*, Justice Breyer argued, is deeply misleading.

> The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.[50]

Since *Brown*, "attitudes toward race in this Nation have changed dramatically," Breyer noted.[51]

> Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty.[52]

This is a "modest request" that the Court should not deny, he concluded.[53]

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should not matter," for Kennedy, a sweeping dismissal of racial classifications is "not sufficient to decide these cases." *Id.* at 2791.

> Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. . . . To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. (citation omitted). If, for Justice Kennedy, the evocation of the ideal of the colorblind Constitution provides the aspirational principle, then *Brown* and the experience of school desegregation it launched demonstrate the real compromises necessary to move the nation toward this ideal. For an insightful analysis of Kennedy's concurrence, see Gerken, *supra* note 28.

49 *Id.* at 2837 (Breyer, J., dissenting).

50 *Id.* at 2836 (quoting *id.* at 2797 (Kennedy, J., concurring)) (citations omitted).

51 *Id.* at 2836–37.

52 *Id.* at 2837.

53 *Id.*

In his own dissent, Justice Stevens praised Justice Breyer's dissent as "eloquent and unanswerable"[54] and then went on to attack the Chief Justice's opinion for abandoning *Brown* and other school desegregation precedents. "There is a cruel irony in the Chief Justice's reliance on our decision in *Brown*," Stevens wrote, since the desegregation decision was concerned less with classifications than the subjugation of a class of people.[55] Application of strict scrutiny to benign racial preference policies such as the school assignment programs under review, Justice Stevens noted, "obscures *Brown*'s clear message."[56] Put simply, "the Chief Justice rewrites the history of one of the Court's most important decisions."[57] Earlier Courts were "more faithful to *Brown*."[58] At one point in his opinion, Justice Stevens wryly quoted from the Chief Justice's recent dissent in a case where Roberts referred to the "familiar adage that history is written by the victors."[59]

II
BROWN AND THE COLORBLIND CONSTITUTION: THE HISTORY

What is one to make of this battle over the history of *Brown*? It is a rather strange turn in the legal debate over school integration policy when the Court treats one of its own opinions almost as if it were constitutional text, with the spare language of the opinion taken as an invitation to delve into the history behind these words and a survey of precedent turned into an exploration of the circumstances and intentions of the decision's formation. Of course *Brown* has never been treated like an ordinary Supreme Court opinion. From the day it was announced, supporters and critics understood the rather mild, even bland, eleven-page opinion to be a transcendent statement of policy and principle. After the early 1970s, when it was no longer acceptable for mainstream politicians to publicly oppose the decision,[60] conservatives and liberals continued to struggle over *Brown*'s meaning. The *Parents Involved* decision is the latest manifestation of this ongoing debate.

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54 *Id.* at 2797 (Stevens, J., dissenting).

55 *Id.* at 2798. To support this conclusion, Justice Stevens offered, in a footnote, a quotation from Charles Black's classic 1960 defense of *Brown*, which emphasized the historical fact that segregation "was imposed on one race by the other race; consent was not invited or required." *Id.* at 2798 n.2 (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960)).

56 *Id.* at 2799.

57 *Id.* at 2798.

58 *Id.* at 2800.

59 *Id.* at 2798 (quoting Brewer v. Quarterman, 550 U.S. 286, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting)).

60 *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 446 (2000).

The most notable element that the opinions of the Chief Justice and of Justice Thomas add to this debate is their interest in not just the legacy of *Brown* (the focus of the dissenting opinions by Justices Breyer and Stevens), but the history of the litigation that led to *Brown*. In attempting to discern the meaning of *Brown*, they argue that the arguments presented to the Court offer additional guidance, with the words of the victorious NAACP lawyers accorded particular—perhaps even conclusive—interpretive authority. This new development in the struggle over the meaning of *Brown* demands a reconsideration of the history on which the Justices are relying. Although a debate over the history of *Brown* is far from the best way to engage with the difficult questions of racial classifications, education, and the Fourteenth Amendment,[61] as long as the Court finds this material useful, a more thorough historical analysis of the role of the principle of a "colorblind Constitution" in *Brown* is warranted.

The problems with trying to determine a definitive "meaning" of *Brown* with regard to the anticlassification principle are numerous. First, there is the question of which historical sources to evaluate. Obviously the first stop must be the text of the *Brown* opinion, along with the text of *Bolling v. Sharpe*,[62] the companion decision to *Brown* that evaluated the constitutionality of segregated schools in Washington, D.C., and the *Brown* implementation ruling of 1955.[63] But what then? *Brown*, perhaps more than any other Supreme Court decision, has always been seen as particularly the product of legal advocacy. As Chief Justice Roberts and Justice Thomas recognized in *Parents Involved*, the courageous work of the NAACP legal team deserves a primary voice in defining *Brown*. Justice Thomas went further, suggesting that the legal claims of the lawyers who opposed the NAACP and argued on behalf of state segregation laws also deserve attention—as examples of arguments that were rightfully discarded in *Brown*. But to rely, as Chief Justice Roberts and Justice Thomas did, solely on these historical grounds to determine the essence of *Brown* is a severely limited

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61 For a forcefully argued alternative approach to this issue, see Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring) ("The Lynn plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks, nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes). [T]he plan does not segregate persons by race. Nor does it involve racial quotas.") (citations omitted); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring) ("[T]here is something unreal about their efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here. I hear the thud of square pegs being pounded into round holes.").

62 347 U.S. 497 (1954).

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

approach to a complex historical question. If their goal was to determine the *meaning* of *Brown* on the question of anticlassification, the approach they chose was overly selective. Other historical materials would seem just as relevant, if not more so, to any serious effort to reconstruct the meaning of *Brown*.

For example, in *Parents Involved*, the Justices did not consider historical materials describing the internal decision-making process of the *Brown* Court, but surely this material is essential to an attempt to determine a definitive meaning of the decision. Also, there were briefs submitted to the Court beyond those of the NAACP and the lawyers for the states that were just as influential (and perhaps more influential) for the Justices of the *Brown* Court. Finally, the immediate reception of *Brown* provides valuable information about what this decision meant to those not directly involved in its creation, but whose views would be integral to the fate of the landmark decision. In *Brown*, as in *Parents Involved*, the Supreme Court Justices and litigants recognized that in the end, their legal arguments and opinions would only be effective if understood and accepted by the nation. This Part examines the historical evidence in each of these areas.

A. Textual Evidence—The Desegregation Opinions

What do the texts of the seminal school desegregation decisions—*Brown I*, *Bolling v. Sharpe*, and *Brown II*—say about racial classifications? Simply stated, not that much.

In the first *Brown* decision, Chief Justice Earl Warren went out of his way to emphasize the limited scope of the holding. The legal reasoning hewed closely to the context of segregation in the area of education, and the decision avoided directly overruling *Plessy*. The central question before the Court was not drawn from any general principle, either based on racial classifications or the "separate-but-equal" doctrine of *Plessy*. Rather, as Warren explained, the question presented was: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[64] To support the Court's conclusion that public school segregation categorically failed to achieve equal educational opportunities, Chief Justice Warren turned to the harm to black children caused by segregation: the "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."[65] At no point in the decision did Chief Justice Warren come close to explicitly re-

64 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 493 (1954).
65 *Id.* at 494.

jecting *Plessy* beyond its applications to schools; nor did he even hint at a blanket condemnation of racial classifications.

Brown's companion decision, *Bolling v. Sharpe*, which ruled on a challenge to segregated schools in Washington, D.C., more directly refers to an anticlassification principle. Because this case reviewed congressional legislative action, the relevant constitutional provision was the Fifth Amendment's Due Process Clause rather than the Fourteenth Amendment's Equal Protection Clause. The Court pushed aside the potential difficulties of fitting an equal protection analysis into the Due Process Clause, noting that "discrimination may be so unjustifiable as to be violative of due process."[66] The Court concluded that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[67]

In terms of textual support for a colorblind interpretation of the school segregation cases, the implementation decision of 1955 provides perhaps the most promising language of these three decisions. Although in *Brown II* Chief Justice Warren defined the holding in *Brown I* narrowly, never suggesting that it applied beyond the schools (it "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional"[68]), he suggested that, within the educational context, anticlassification principles have some resonance. In *Brown II*, Warren stated that *Brown I* was intended to create "a system of public education freed of racial discrimination"[69] and to protect the "personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis."[70] The ultimate goal was "to achieve a system of determining admission to the public schools on a nonracial basis."[71]

Despite the careful delimitation of *Brown* to schools, in the following years the Supreme Court reviewed a series of challenges to segregation statutes that applied to various public facilities and transportation services and, in each case, cited *Brown* as the basis for striking down these laws.[72] These cases, announced in brief per curiam decisions that did little more than cite *Brown*, led many commentators to believe that the Court had effectively abandoned the lim-

66 *Bolling*, 347 U.S. at 499–500.

67 *Id.* at 499.

68 *Brown II*, 349 U.S. at 298.

69 *Id.* at 299.

70 *Id.* at 300.

71 *Id.* at 300–01.

72 *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches).

ited language of *Brown* for a more sweeping condemnation of segregation per se—even if the Court itself, to the frustration of some legal academics,[73] never bothered to explain that this was what it was doing. It would not be until 1964, in *McLaughlin v. Florida*,[74] that the Court clearly stated that racial classifications were presumptively invalid under the Fourteenth Amendment and struck down a law based on this principle.[75] The *McLaughlin* Court cited *Brown* as demonstrating that racial classifications have been held invalid in the context of segregated schools.[76]

The paucity of direct engagement with racial classifications in the *Brown* decisions themselves—despite the fact that an anticlassification position was supported by some of the Justices[77] and was squarely presented in the briefs and oral arguments[78]—makes Chief Justice Roberts's assertion in *Parents Involved* that an anticlassification principle "prevailed" in *Brown*[79] difficult to sustain based on the bare text of these opinions. While *Bolling* and *Brown II* hinted at the principle, the Court's unwillingness to explicitly articulate an interpretation of the Equal Protection Clause at the time indicates that no such principle prevailed in the landmark segregation cases of 1954–55.

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73 Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 60–61 (1979) (describing critical reaction of legal scholars to the per curiam decisions).

74 379 U.S. 184 (1964).

75 *Id.* at 191–92 ("[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."); *see also id.* at 198 (Stewart, J., concurring) ("I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. . . . I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*."); Klarman, *supra* note 16, at 255 ("For the first time the Court in *McLaughlin* both articulated *and* applied a more rigorous review standard to racial classifications, requiring as justification an 'overriding' state purpose as well as a showing that the classification was 'necessary,' rather than just rationally related, to the proffered governmental interest." (footnote omitted)). *But see* KULL, *supra* note 23, at 163 (suggesting that the start of "a brief period during which our Constitution was effectively color-blind" can be marked by the Supreme Court's affirmance of a federal district court opinion in which Judge John Major Wisdom argued that *Brown* had held racial classifications to be "'inherently discriminatory and violative of the Equal Protection Clause'") (quoting Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 151 (E.D. La. 1958), *aff'd mem.*, 359 U.S. 533 (1959)).

76 *McLaughlin*, 379 U.S. at 192.

77 *See infra* Part II.B.

78 *See infra* Part II.C–D.

79 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).

B. The Justices

Although, in the years preceding *Brown*, several Supreme Court Justices had offered, in their opinions, variations on the colorblind principle,[80] during the deliberations in *Brown*, only two Justices voiced a belief that racial classifications were per se unconstitutional. Most of the Justices thought a sweeping anticlassification interpretation of the Equal Protection Clause was unnecessary to decide the school segregation issue and undesirable due to the implications such an interpretation might have for the volatile question of interracial marriage.

Of the Justices who decided *Brown*, Justice William O. Douglas was the most dedicated proponent of the anticlassification principle. "[S]egregation is an easy problem," he explained to the other Justices in their private conference following the first round of arguments in *Brown*. "[N]o classifications [sic] on the bassis [sic] of race can be made[.] [The] 14th amendment prohibits racial classifications, so does [the] due process clause of the 5th."[81] He reiterated this position at the conference following the second round of oral arguments in 1953: "Race and color cannot be a constitutional standard for segregating the schools."[82] This language was consistent with opinions Justice Douglas wrote throughout his judicial career.[83]

The only Justice who echoed Justice Douglas's anticlassification interpretation of the Fourteenth Amendment during the deliberations in *Brown* was Justice Sherman Minton. "[C]lassification on the

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80 *See, e.g.*, South v. Peters, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting) (discrimination based on race is "beyond the pale"); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."); Edwards v. California, 314 U.S. 160, 180, 185 (1941) (Douglas, J., concurring) (referring to race as "constitutionally an irrelevance").

81 Transcription of William O. Douglas, Conference Notes—First *Brown* Conference (Dec. 13, 1952), William O. Douglas Papers, Box 1150, Library of Congress, Manuscript Division, Washington, D.C. (alteration in original) (on file with author) [hereinafter Douglas Conference Notes—First *Brown* Conference].

82 Transcription of William O. Douglas, Conference Notes—Second *Brown* Conference (Dec. 12, 1953), William O. Douglas Papers, Box 1149, Library of Congress, Manuscript Division, Washington, D.C. (on file with author) [hereinafter Douglas Conference Notes—Second *Brown* Conference].

83 Douglas was the first Justice to cite Justice Harlan's *Plessy* dissent and its reference to the colorblind Constitution. Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Douglas, J., concurring). Justice Douglas was also the only Justice on the *Brown* Court still sitting in 1974 when the first challenge to affirmative action in an educational context arrived, DeFunis v. Odegaard, 416 U.S. 312 (1974), and he used this opportunity to denounce all racial classifications as violative of the principle of *Brown*. *Id.* at 342–44 (Douglas, J., dissenting).

basis of race does not add up," Justice Minton explained in conference. "[I]t's invidious and can't be maintained."[84] He repeated this basic point at the second conference, a year later, when he stated, "[you] can't classify on the basis of color."[85]

Justice Hugo Black also seemed intent on committing the Court to a generally applicable and readily defined interpretation of the Fourteenth Amendment, but he never fully embraced the anticlassification argument as did Justices Douglas and Minton. At times, he expressed sympathy for some elements of colorblindness, but he also argued that the primary target of the Fourteenth Amendment was "caste"—not simply classifications or discrimination. As he told the conference: "the [Reconstruction] Amendments have as their basic purpose protection of the negro against discrimination"[86] and "the abolition of such castes."[87] And the purpose of segregation laws was "to discriminate because of color."[88] Although Justice Black offered no indication of how his "anti-caste" reading of the Fourteenth Amendment would extend to situations beyond school segregation, he had no trouble concluding that this interpretation sufficiently justified the Court's holding in *Brown*.[89]

Justices Douglas and Minton (and, to a lesser extent, Justice Black), were, however, the exceptions on the Court at the time of *Brown*. The other Justices were hesitant to embrace any kind of sweeping pronouncement on the scope of the Equal Protection Clause. For example, Justice Robert H. Jackson, who warily recognized that the anticlassification principle lurked behind the entire legal challenge to

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84 Douglas Conference Notes—First *Brown* Conference, *supra* note 81.

85 Douglas Conference Notes—Second *Brown* Conference, *supra* note 82. Douglas recognized Minton as an ally in these cases. Years later, Douglas wrote: "[W]hen it came to the Equal Protection Clause, no one was more adamant than Minton in insisting on equality in the treatment of blacks. He was indeed one of the great mainstays in the early school-desegregation cases." WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 246 (1980). Yet, unlike Douglas, Minton would not take his anticlassification rhetoric to its logical conclusion. When, in the years immediately following *Brown*, the Court received challenges to state anti-miscegenation laws, Minton voted to deny certiorari. *See* Hutchinson, *supra* note 73, at 62 n.525, 64.

86 Douglas Conference Notes—First *Brown* Conference, *supra* note 81.

87 Transcription of Tom Clark, Conference Notes—First *Brown* Conference (n.d.), Tom Clark Papers, Box 27A, Tarlton Law Library, University of Texas (on file with author).

88 Douglas Conference Notes—First *Brown* Conference, *supra* note 81.

89 In the years following *Brown*, Justice Black became more explicitly committed to anticlassification principles, and his retrospective justification for *Brown* changed accordingly. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 342 n.42 (1964) (Black, J., dissenting) ("We agree, of course, that the Fourteenth Amendment is 'color blind,' in the sense that it outlaws all state laws which discriminate merely on account of color. This was the basis upon which the Court struck down state laws requiring school segregation in *Brown v. Board of Education*.").

segregation,[90] believed the best approach was to recognize that the Court was dealing with an essentially political issue, which could require consideration of the pragmatic challenges of nationwide desegregation.[91] Justice Felix Frankfurter too was intensely concerned with protecting the Court's integrity and, in *Brown*, took upon himself the role of the cautious institutional guardian. The reason the Court was able to eventually arrive at its desegregation decision, he believed, was because of the "clear thinking, skillful maneuvering, and disinterested persistence" of Justice Jackson and himself. "I shudder to think the disaster we would have suffered—the country, that is—if the 'libertarians,' the heir of Jefferson [Black] and the heir of Brandeis [Douglas] had had their way!"[92] To Justice Frankfurter, it was a matter of pragmatic statesmanship. Justice Frankfurter, like Justice Jackson, was clearly concerned with the controversial implications of adopting "the all-embracing principle, that no legislation which is based on differentiation of race is valid."[93]

Similarly, newly appointed Chief Justice Earl Warren approached the issue from a basically political, contextual position and showed little interest during the deliberations in basing the *Brown* ruling on a broad, abstract, legal principle. His unwavering support for school desegregation derived from his belief that segregation was an obvious form of racial oppression, his commitment to the importance of education for the welfare of the nation, and his instinctive empathy for children.[94] Chief Justice Warren was also strongly influenced by Justice Frankfurter during his early years on the Court.[95] From start to finish, Chief Justice Warren approached the *Brown* decision primarily

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90 Letter from Robert H. Jackson to Charles Fairman (Apr. 5, 1950), Robert Houghwout Jackson Papers, Container 12, Library of Congress, Manuscript Division, Washington, D.C. ("It seems to present a pretty naked question whether there is any constitutional right to make any classification based on race."); Memorandum by Robert H. Jackson (Mar. 15, 1954), Robert Houghwout Jackson Papers, Box 184, Manuscript Division, Library of Congress, Washington, D.C. .

91 *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 304–07 (2004).

92 Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 839 (1987) (quoting Letter from Justice Frankfurter to Philip Elman (July 21, 1954)).

93 ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55, at 117 (Leon Friedman ed., 1969) [hereinafter ARGUMENT].

94 *See, e.g.*, Interview by Richard Kluger with Earl E. Pollock, former clerk to Chief Justice Earl Warren (Aug. 19, 1974), Brown v. Board of Education Collection, Series 1, Box 5, Warren File, Manuscripts and Archives, Sterling Memorial Library, Yale University, New Haven, Conn. (Statement of Pollock, who helped draft *Brown*, that "If there were three things of great value and stimulation to [Chief Justice Warren], they were (1) equality, (2) education, and (3) young people").

95 *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 146 (1983); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 178 (1982).

as an act of political statesmanship,[96] and references to sweeping propositions of colorblind constitutionalism did not serve this goal.

Of the remaining Justices—Stanley Reed, Harold Burton, Tom Clark—none expressed interest in committing the Court in *Brown* to an anticlassification interpretation of the Equal Protection Clause. Justice Reed, who had personal reservations toward racial integration, was the last Justice to sign on to Warren's opinion. He appeared to believe that the course of history might very well lead to some sort of colorblind constitutionalism,[97] but he came to this conclusion reluctantly, and he certainly was not willing to agree to such an approach at the time of *Brown*.[98] Justice Burton had none of Justice Reed's reluctance on civil rights questions, but he had a conciliatory temperament and moderate approach to the law that pulled him away from the more sweeping principles that attracted Justices Black and Douglas.[99] The ruling "should be done in [as] easy [a] way as possible," he told the other Justices during their first *Brown* conference.[100] Similarly, Justice Clark was much more concerned with the problems of implementation than a general constitutional principle on which the desegregation ruling would be based.[101] Throughout the Court's engagement with the school desegregation issue, Justice Clark had no problem drawing distinctions—between, for example, graduate education and lower levels of schooling—that had little basis in constitutional principle but were aimed at easing the nation's transition to an integrated society.[102]

A particularly powerful factor steering the Justices away from embracing a sweeping anticlassification argument was their interest in keeping the Court away from the hot-button issue of interracial marriage. At the time of *Brown*, when national opinion was moderately in

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96 *See, e.g.*, Memorandum from Earl Warren to the Members of the Court (May 7, 1954), Earl Warren Papers, Container 571, Manuscript Division, Library of Congress, Washington, D.C. (describing his goal that the *Brown* opinion was to be "non-rhetorical, unemotional and, above all, non-accusatory").

97 In a personal memorandum written in 1949, Reed conceded: "It may be that segregation is not a lasting condition. It may be an exception of the moment in the movement toward abolition of all distinctions of people by law." JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 561 (1994).

98 *See id.* at 555–80; RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 595–96, 680, 691–93, 698 (1976).

99 *See generally* MARY FRANCES BERRY, STABILITY, SECURITY, AND CONTINUITY: MR. JUSTICE BURTON AND DECISION-MAKING IN THE SUPREME COURT, 1945–1958 (1978).

100 Transcription of Robert H. Jackson, Conference Notes—First *Brown* Conference, (Dec. 12, 1952), Robert Houghwout Jackson Papers, Box 184, Manuscript Division, Library of Congress, Washington, D.C. (on file with author).

101 Douglas Conference Notes—First *Brown* Conference, *supra* note 81.

102 *See, e.g.*, Memorandum on *Sweatt* and *McLaurin* from Mr. Justice Clark to the Conference (Apr. 7, 1950), *reprinted in* Hutchinson, *supra* note 73, at 89–90.

favor of the Court's school desegregation ruling,[103] overwhelming majorities of white Americans, in both the North and South, opposed interracial marriage.[104] Segregationists regularly sought to rally opposition to school desegregation by characterizing it as the first step toward "open[ing] the bedroom doors of our white women to the Negro men."[105] The volatility of this issue was not lost on the Justices, particularly Justice Frankfurter. In the first round of oral arguments in *Brown*, in 1952, Justice Frankfurter stated the issue bluntly in an exchange with the lawyer for the students in the District of Columbia case. "[I]s it your position," he asked, "that the Fourteenth Amendment or the Fifth, for your purposes, automatically invalidates all legislation which draws a line determined because of race? . . . I wonder whether you would say, right off from your analysis of the Constitution, that marriage laws relating to race are ipso facto on the face of things, unconstitutional?"[106] Justice Frankfurter was clearly skeptical of an "all-embracing principle" prohibiting racial classifications, and he seemed relieved when the lawyer qualified his position by invoking the "immediately suspect" criteria from *Korematsu*.[107] "That simply means that [a racial classification] can be valid," Justice Frankfurter explained. "It is not an absolute prohibition . . . ."[108]

In the aftermath of *Brown*, Justice Frankfurter took it upon himself to protect the Court from having to face the interracial marriage issue. In the fall of 1954, the Court denied certiorari in a challenge to Alabama's miscegenation statute.[109] The issue resurfaced in 1955 in *Naim v. Naim*, a challenge to Virginia's miscegenation law.[110] Justice Burton's clerk bluntly assessed the situation: "In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time."[111] Justice Frankfurter, who told his fellow Justices that considering the "momentum of history, deep feeling, moral and psychological presuppositions" surrounding miscege-

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103 GEORGE H. GALLUP, 2 THE GALLUP POLL: PUBLIC OPINION, 1935–1971, at 1249–51 (1972) (reporting July 1954 polls that found 54% approved of *Brown*, and 41% disapproved).

104 *Id.* at 1572.

105 *Alabama: Marengo Meeting*, S. SCH. NEWS (Nashville), Jan. 6, 1955, at 2, *quoted in* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 446 (2005).

106 ARGUMENT, *supra* note 93, at 116.

107 *Id.* at 117.

108 *Id.*

109 Jackson v. Alabama, 72 So. 2d 114 (Ala. 1954), *cert. denied*, 348 U.S. 888 (1954).

110 Naim v. Naim, 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955) (per curiam), *on remand* 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956) (per curiam).

111 Hutchinson, *supra* note 73, at 63 (quoting Certiorari Memorandum on *Naim v. Naim* from AJM [Clerk] to Justice Burton, at 3 (Oct. Term 1955)).

nation, the Court would be better off avoiding the issue,[112] spearheaded a series of evasive maneuvers to avoid deciding the case, a dance they repeated the following year.[113] In 1957, Justice Frankfurter wrote to Judge Learned Hand that a miscegenation challenge was "vividly in the offing. We twice shunted it away and I pray we may be able to do it again, without being too brazenly evasive."[114] In an effort to convince Judge Hand of the correctness of this judicial policy, he confided to his friend that the Court never intended *Brown* to require a blanket prohibition on racial classifications. The holding "did not rest on the absolute that the XIVth in effect said '[every] state law differentiating between colored and non-colored is forbidden.'"[115] Such a sweeping holding "would not have commanded unanimity" in *Brown*.[116] "I know I would not have agreed to it—nor, I'm sure would several others."[117]

Not until 1964 would the Supreme Court explicitly accept an anticlassification interpretation of the Fourteenth Amendment.[118] It would take another three years for the Court to squarely face the issue it had so diligently avoided following *Brown* and hold anti-miscegenation laws unconstitutional.[119] "At the very least," Chief Justice Warren wrote in *Loving v. Virginia*, "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[120] This step, however, was taken by a very different Court than the one that had decided the *Brown* cases; and it was offered to a nation that had experienced, between 1954 and 1967, a convulsive cultural transformation on questions of race.

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112 Memorandum of Mr. Justice Frankfurter on *Naim v. Naim* (Read at Conference, Nov. 4, 1955), *reproduced in* Hutchinson, *supra* note 73, at 95.

113 *See generally* Hutchinson, *supra* note 73, at 62–67 (discussing the Court's avoidance of *Naim*); Klarman, *supra* note 105, at 446–50 (discussing strategies the Court employed to avoid miscegenation cases). *Cf. also* KULL, *supra* note 23, at 158 ("What seems clear in retrospect . . . is that no amount of argument could have induced the Court to decide the School Segregation Cases on the basis that the Constitution was color-blind, or on any other basis that implied a resolution of issues of racial discrimination not yet before it.").

114 GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 667 (1994) (quoting Letter from Justice Frankfurter to Judge Learned Hand (Sept. 17, 1957)).

115 *Id.* at 669 (quoting Letter from Justice Frankfurter to Judge Learned Hand (Sept. 27, 1957)).

116 *Id.*

117 *Id.*

118 McLaughlin v. Florida, 379 U.S. 184 (1964).

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

120 *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)) (citation omitted).

In sum, although two of the Justices accepted, at least rhetorically, the premise of colorblind constitutionalism at the time of *Brown*, the rest of the Court seemed to view Harlan's *Plessy* dissent and its eloquent mantra, "our Constitution is color-blind," to be a powerful principle, perhaps a useful rallying point in moving the nation toward a greater commitment to racial equality, but too bold to be embraced as a matter of constitutional doctrine. To use the anticlassification argument as the basis for desegregating the schools would call into question *all* racial classifications. For the majority of the Justices on the Court in 1954–55, this went too far, particularly considering the paranoia that surrounded segregationist fears of miscegenation.

C. The NAACP

The basic format of the NAACP's legal argument against segregated education remained remarkably consistent throughout the series of litigation that eventually culminated in *Brown*. The lawyers' first line of attack was an assertion of the anticlassification principle, a claim that was put forth with increasing emphasis and directness as the lawyers' confidence in the Court's sympathy for their attack on segregation grew. Yet this argument was never put forth in isolation from a more contextual and color-conscious analysis of the meaning of the Fourteenth Amendment and the harms of segregation. Anticlassification language was always intertwined with analysis of the social consequences of racial segregation and the value of integration.[121] While often framed as a fallback position from the bolder, more sweeping anticlassification claims, these arguments, all variations on the modern antisubordination interpretation of Equal Protection, actually occupied the lawyers to a far greater degree, in terms of space given in the briefs and time given in oral arguments. For example, in their brief in *Sweatt v. Painter*,[122] a challenge to the exclusion of blacks from the University of Texas Law School, NAACP lawyers drew extensively on anticlassification arguments,[123] yet they as-

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121 This blending of anticlassification and antisubordination claims can be seen in the NAACP's first major school integration case of the postwar period. *See* Brief for Petitioner at 27, Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948) (No. 369) ("Classifications and distinctions based on race or color have no moral or legal validity in our society."); *id.* at 36 ("Segregation in public education helps to preserve and enforce a caste system which is based upon race and color. It is designed and intended to perpetuate the slave tradition sought to be destroyed by the Civil War and to prevent Negroes from attaining the equality guaranteed by the federal Constitution.").

122 339 U.S. 629 (1950).

123 Brief for Petitioner at 6, *Sweatt*, 339 U.S. 629 (No. 44) ("[The Equal Protection Clause] has been interpreted as embodying a fundamental hostility to racial distinctions and classifications, and as incorporating into the fundamental law the democratic credo that governmental action based upon race and blood are necessarily arbitrary."); *see also id.* at 9 ("[U]nder the equal protection clause a governmental classification based upon race

serted that if the Court refused to accept these arguments, they would attack the separate-but-equal doctrine.[124] However, the two strands of argumentation were never fully distinguished. "[A]ll agree that one of [the] primary purposes [of the Fourteenth Amendment] was to raise the Negro to a status of equality and full citizenship," their brief explained in a summary of an antisubordination interpretation of equal protection, but the very same sentence concluded with an assertion of anticlassification principles, citing "a national interest in the maintenance of individual freedom from discrimination based upon race or color."[125] This language encapsulates the civil rights lawyers' unproblematic linkage between a distinctly color-conscious reading of the Fourteenth Amendment with an assertion of the anticlassification principle.[126] Quite simply, they understood the two as mutually reinforcing.

The same arguments—referencing themes of both anticlassification and antisubordination—appeared in briefs to the Supreme Court that the NAACP filed in the public school segregation cases. As the lawyers gained confidence in the prospects for a favorable ruling over the several rounds of arguments, they pressed their anticlassification arguments more assertively, yet they never abandoned color-conscious rationales for desegregation. Indeed, these antisubordination claims still occupied a majority of the space in their briefs. The NAACP's anticlassification argument in the public schools cases was initially tentative and secondary, in terms of the length and depth of analysis (if not ordering), to the primary argument—the argument to which the trial courts had been more receptive—that segregated education caused emotional and psychological damage in children.[127] Over the following years, the NAACP became more confident pushing its anticlassification argument. In a brief filed in 1952, the NAACP proclaimed at the start of its argument summary: "The Fourteenth

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or color is unconstitutional *per se.*"); *id.* at 32–34 (arguing for strict scrutiny of racial classifications).

124 *Id.* at 7.

125 *Id.* at 41; *see also id.* at 75 ("The basic law of our land, as crystallized in our Constitution, rejects any distinctions made by government on the basis of race, creed, or color. This concept of true equality has become synonymous with what is generally defined as 'the American Creed.'")

126 *See, e.g.*, Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101–02 (1951) (describing the equal protection principle as "the right to be free from differences of treatment because of race, color, blood, or national origin," yet noting that "[t]he obligation to furnish equal protection of the laws does not establish an abstract uniformity applicable alike to all persons without regard to circumstances or conditions").

127 *See* Statement as to Jurisdiction at 12, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) (No. 1) (arguing that there was no "legitimate legislative objective" that could be served by drawing racial distinctions).

Amendment precludes a state from imposing distinctions or classifications based upon race and color alone."[128]

In oral argument, the NAACP continued to highlight its anticlassification claims, though when pressed by the Justices, the lawyers were prepared to defend their more race-based, contextual, and historical claims. "We have one fundamental contention which we will seek to develop in the course of this argument," Robert Carter told the Court, "and that contention is that no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[129] When Justice Frankfurter worried that embracing an anticlassification interpretation of the Equal Protection Clause would require deciding the case "by some abstract declaration," a prospect he clearly found problematic,[130] Carter explained that the anticlassification argument was just "one of the bases for our attack,"[131] and then, taking Justice Frankfurter's not-so-subtle hint, moved to the "second part of the main contention,"[132] that segregated schools could never be truly equal because of the stigma that attached to the black schools. But when Justice Black pushed Carter on this damage argument, particularly the psychological evidence on which it was based,[133] Carter retreated back to the anticlassification argument: "Now, of course, under our theory, you do not have to reach the finding of fact or a fact at all in reaching the decision because of the fact that we maintain that this is an unconstitutional classification being based upon race and, therefore, it is arbitrary."[134]

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128 Brief for Appellants at 6–7, *Brown I*, 347 U.S. 483 (1954) (No. 1); *see also id.* at 6–7 ("When the distinctions imposed are based upon race and color alone, the state's action is patently the epitome of that arbitrariness and capriciousness constitutionally impermissive under our system of government.").

129 ARGUMENT, *supra* note 93, at 14; *see also id.* ("It is our position that any legislative or government classification must fall with an even hand on all persons similarly situated."); *id.* at 15 ("[U]nder the decisions of this Court that no state can use race, and race alone, as a basis upon which to ground any legislative, any lawful constitutional authority . . . this Court has indicated that race is arbitrary and an irrational standard . . . ."); *id.* at 25 ("I would think . . . that without regard to the question of its effect on Negroes, that this business of classification, this Court has dealt with it time and time again.").

130 *Id.* at 26; *see also id.* at 117 (recording Justice Frankfurter discussing "the all-embracing principle, that no legislation which is based on differentiation of race is valid").

131 *Id.* at 26.

132 *Id.* at 15, 26; *see also id.* at 35 ("This case could also be decided on the question of equal educational opportunities as they are examined by the approach of *McLaurin* and *Sweatt*.").

133 *Id.* at 34–35.

134 *Id.* at 35; *see also id.* ("Now, to conclude, our feeling is that this case could be decided on the question of the illegality of the classification itself."); *id.* at 171 (recording NAACP lawyer Jack Greenberg retreating from damage argument to anticlassification argument upon being challenged by Justice Black).

Thurgood Marshall also easily moved back and forth between anticlassification claims—which he noted had the benefit of offering a "very clear and logical approach"[135]—and more color-conscious, context-based arguments. He stated in oral argument that "so far as the decisions of this Court, this Court has repeatedly said that you cannot use race as a basis of classification,"[136] but then directly followed this with reference to the argument based on the psychological damage segregated schools inflicted on black schoolchildren.[137] "The primary objective of this recent litigation," Marshall told a conference of civil rights lawyers and educators in 1952, "has been to obtain full and complete integration of all students on all levels of public education without regard to race or color."[138] This quotation perfectly captures the basic assumption of Marshall and others who articulated the color-blind ideal in this period: that it would result in substantive racial integration.

The other lawyers who argued on behalf of the black schoolchildren in the four cases that were consolidated in the *Brown* decision generally followed the same pattern, blending the two lines of argument. The lawyers representing the students in the Washington, D.C. case, *Bolling v. Sharpe*, who were not part of the NAACP legal team, relied more heavily on the anticlassification principle than did the NAACP lawyers in the states cases. ("They would have none of our modulated, less than all-or-nothing approaches," recalled Jack Greenberg.[139]) Yet even here, their attack on racial classifications always emphasized the lived experience of African American subordination under Jim Crow. George E.C. Hayes pressed the Justices to recognize this caste system as an evil to be combated though the ideal of a color-blind Constitution. When asked what possible reason Congress might have for classifying students according to race, Hayes argued that "it was done purely and for no other reason than because of the fact that it pretended to keep for him this place of secondary citizenship."[140] He demanded that opposing lawyers explain the policy of segregated schools as based on anything other than "pure racism."[141] When

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135 *Id.* at 199.

136 *Id.* at 65.

137 *Id.*

138 Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 327 (1952).

139 JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 172 (1994); *see also id.* at 86 ("[James Nabrit] would have nothing to do with anything that faintly suggested that if schools were equalized segregation might be acceptable."); *Discussion of Papers*, 21 J. NEGRO EDUC. 327, 338 (1952) (recording challenge by Professor James M. Nabrit of Marshall to accept anticlassification claim as the central issue).

140 ARGUMENT, *supra* note 93, at 114.

141 *Id.*

pressed on whether his embrace of anticlassification would invalidate interracial marriage prohibitions, Hayes backtracked slightly, noting that heightened scrutiny may allow classifications in limited circumstances—a concession that Hayes intended to apply only to situations such as a threat to national security but which Justice Frankfurter thankfully accepted as a reference to politically threatening situations such as interracial marriage.[142]

The central challenge in determining what the lawyers for the NAACP thought with regard to the conflict between anticlassification and antisubordination principles is that, at the time of *Brown*, they saw no need to choose between the two approaches. They clearly made strong anticlassification arguments. They did so repeatedly and eloquently. But these arguments never stood apart from other arguments that did not rely upon colorblind principles. In making the case for *Brown*, the NAACP lawyers moved back and forth between anticlassification and antisubordination claims. They saw no contradiction in linking arguments that drew on the ideal of a colorblind Constitution with arguments that engaged the history of white supremacy and the intention of the Fourteenth Amendment to protect and elevate the newly freed slaves.

D. The Justice Department

A series of amicus briefs submitted by the Justice Department in support of desegregation were particularly influential with the Court in the school desegregation cases.[143] Thus, they too deserve consideration in an effort to illuminate the role of colorblind constitutionalism in the making of *Brown*. The Justice Department, like the NAACP, presented a strong case for a colorblind interpretation of the Fourteenth Amendment. At times, the government lawyers appeared even more committed to anticlassification principles than the civil rights lawyers. Yet the Justice Department too never made these arguments in isolation from antisubordination claims. The government briefs, like those of the NAACP, put forward the principle of colorblind constitutionalism in the context of an analysis that highlighted the spe-

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142 *Id.* at 116–17; *see also id.* at 118, 119, 121 (argument of James Nabrit).

143 Chief Justice Warren had just arrived on the Court in the fall of 1953, having spent the past decade as California attorney general and then governor, and he especially appreciated the guidance offered by the Justice Department. In an early draft of *Brown* he singled out a government brief as "particularly objective and helpful." Earl Warren, Memorandum 2–3 (n.d.), Earl Warren Papers, Container 571, Manuscript Division, Library of Congress, Washington, D.C. This specific reference to the Justice Department's brief was left out of the final draft of *Brown*. *See* Christopher William Schmidt, Postwar Liberalism and the Origins of *Brown v. Board of Education* 523–24 (2004) (unpublished Ph.D. dissertation, Harvard University) (on file with author), *available at* ProQuest, Doc. ID 813765271.

cific harms of racial segregation and the necessity of integrated education.

Involvement of the executive branch in the issue of school segregation began with a 1947 report issued by the President's Committee on Civil Rights, instituted by President Harry S. Truman.[144] The report, titled *To Secure These Rights*, presented a sweeping condemnation of nationwide practices of racial discrimination. While the document lacked the kind of rousing colorblind rhetoric that would become commonplace in the government's amicus briefs, its authors accepted the general axioms of colorblind ideology: racial distinctions were generally analogous to religious and ethnic differences,[145] individualism was a paramount value of Americanism,[146] and race should be an "irrelevant factor[ ]" in society.[147] This formalistic, idealistic language was balanced with a thorough dissection of the systemic oppression of African Americans in American society. Segregation was wrong not because of the mere fact of government racial classifications; rather, because it "marks groups with the brand of inferior status," it fails to result in equal facilities, and also because of the "incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together."[148] *To Secure These Rights* laid out a basic framework for the liberal civil rights program of the day, combining principles of anticlassification with a critique of racial hierarchies and a commitment to the values of integration.

Government briefs submitted to the Supreme Court in subsequent civil rights cases echoed this blending of anticlassification and antisubordination principles.[149] In *Brown*, the brief submitted by the Justice Department placed the executive branch squarely behind the anticlassification principle:

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144 To Secure These Rights: The Report of Harry S Truman's Committee on Civil Rights (Steven F. Lawson ed., Bedford/St. Martin's 2004) (1947).

145 *Id.* at 55–58.

146 *Id.* at 50 ("The central theme in our American heritage is the importance of the individual person.").

147 *Id.* at 50.

148 *Id.* at 179.

149 Brief for the United States at 14–16, Henderson v. United States, 339 U.S. 816 (1950) (No. 25) (referencing anticlassification arguments); *id.* at 19–23 (attacking segregation in railroad accommodations as violative of associational rights of whites); Brief for the United States as Amicus Curiae at 52, Shelley v. Kramer, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291) ("The decisions of this Court stand in vigorous affirmation of the principle that 'our Constitution is color blind.' The Court has been consistent and unequivocal in its denunciation of discriminations based on color."); *id.* at 54 ("Distinctions based on race or color alone are in most instances irrelevant and, therefore, invidious under the Constitution."); *id.* at 55 (noting that the "primary object" of the Fourteenth Amendment was to protect "the rights and liberties of the Negro").

> [R]acial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a civilized society—under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American*, and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy. The color of a man's skin—like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States—does not diminish or alter his legal status or constitutional rights. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[150]

"Regrettably," the brief noted, when Justice Harlan offered his famous dictum, "he was speaking only for himself, in dissent."[151] Like the NAACP lawyers, the government lawyers never rested their case solely on the anticlassification principle. Concluding their brief, they offered another quotation from Harlan's dissent, this one emphasizing its anti-caste elements: "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law."[152]

Despite the respect Chief Justice Warren and his colleagues accorded the position of the Executive Branch on this momentous issue, the Justices' pragmatic and institutional concerns prevented them from echoing in the *Brown* decisions the sweeping anticlassification language that the Justice Department offered. Nonetheless, this rhetoric both indicates the prevalence of colorblind constitutional principles during the *Brown* era and emphasizes the fact that these principles were never put forth without support from anti-caste arguments.

E. *Brown*'s Reception and Colorblind Constitutionalism in Postwar America

The intertwining of anticlassification and antisubordination claims with neither understood as necessitating exclusion of the

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150 Brief for the United States as Amicus Curiae at 3–4, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)) (footnote omitted).

151 *Id.* at 4 n.2.

152 *Id.* at 32 (quoting *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting)).

other—as done by the lawyers advocating for school desegregation and by the *Brown* Court Justices—was also a prominent theme outside the Court. At the time of *Brown*, supporters of the decision recognized it as both a proclamation of the principle of colorblind constitutionalism and as a statement on the oppressive consequences of segregation and the necessity for racially integrated education in modern American society. Neither interpretation dominated the discourse surrounding the landmark ruling, and commentators, following the lead of the civil rights lawyers, often intertwined anticlassification and antisubordination interpretations of *Brown*.

Many observers approvingly concluded that, in *Brown*, the Court had finally embraced the colorblind reasoning of Justice Harlan's *Plessy* dissent. In an editorial titled *Justice Harlan Concurring*, the *New York Times* explained that, with *Brown*, "the words [Harlan] used in his lonely dissent . . . have become in effect . . . a part of the law of the land."[153] Although the decision was carefully limited to schools, "there was not one word in Chief Justice Warren's opinion that was inconsistent with the earlier views of Justice Harlan."[154] David Fellman proclaimed in the *American Political Science Review*, "For now indeed has Justice Harlan's celebrated declaration in his dissenting opinion in the *Plessy* case, that 'our Constitution is color-blind,' been adopted as law."[155] Edmund Cahn saw the decision as vindicating "Harlan's prophetic phrases."[156]

Yet, as supporters of *Brown* also noted, Harlan's "prophetic phrases," referenced not only the ideal of a colorblind Constitution, but also the need to dismantle the racial caste system in America.[157] The *Chicago Defender* declared that the decision meant "the beginning of the end of the dual society in American life."[158] "It recognizes the growing national feeling that the separation of Negro (or other mi-

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153 *Justice Harlan Concurring*, N.Y. TIMES, May 23, 1954, at E10.

154 *Id.*

155 David Fellman, *Constitutional Law in 1953–1954*, 49 AM. POL. SCI. REV. 63, 96 (1955) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

156 Cahn, *supra* note 2, at 169; *see also* ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 157 (1957) (stating that *Brown* marked the acceptance by the Court of Harlan's dissent in *Plessy*); JOHN P. ROCHE, THE QUEST FOR THE DREAM: THE DEVELOPMENT OF CIVIL RIGHTS AND HUMAN RELATIONS IN MODERN AMERICA 245 (1963) (stating that with *Brown*, the "United States Constitution had become 'color blind'"); Loren P. Beth, *Justice Harlan and the Uses of Dissent*, 49 AM. POL. SCI. REV. 1085, 1092 (1955) (describing Harlan's *Plessy* dissent as "directly and highly influential, one may assume, in the *School Segregation Cases*"); Louis H. Pollak, *The Supreme Court Under Fire*, 6 J. PUB. L. 428, 438 (1957) ("In short, the opinion in the *School Segregation Cases* might have been helped by a crisper statement that . . . 'Our Constitution is color-blind . . . .'" (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting))).

157 "Our Constitution is color-blind, *and neither knows nor tolerates classes among citizens*." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (emphasis added).

158 *Prelude to Freedom*, CHI. DEFENDER, May 29, 1954, at 11.

nority) children from the majority race at school age is an abuse of the democratic process and the democratic principle," wrote the *Boston Herald*.[159] In perhaps the most famous scholarly defense of *Brown*, Yale Law Professor Charles Black saw the decision resting on the "massive historical evidence" showing that segregation "has the designed and generally apprehended effect of putting its victims at a disadvantage."[160]

Commentators also recognized the Court's achievement as simultaneously striking at racial classifications and systemic racial inequality. "The Supreme Court not only upheld Justice John M. Harlan's famous dictum that 'the Constitution is colorblind' today," *New York Times* reporter James Reston explained, "but also based its decision on the primacy of the general welfare."[161] Even those who thought the ideal of colorblind constitutionalism was the motivating principle behind the decision had to recognize that Chief Justice Warren's opinion relied extensively on the harms of segregation on African Americans.[162] At a time when "benign" racial preferences for minorities were nothing more than hypothetical constitutional theorizing, no one saw that abandoning racial classifications while also attacking entrenched segregation and inequality might be a contradictory project. Recognition that these arguments might, in fact, be in tension with one another would only arise out of the struggle over implementation.

F. The Implementation of *Brown* and the Transformation of Colorblind Constitutionalism

The struggle to desegregate schools in the decades following *Brown* transformed the ideological valence of colorblind constitutionalism. The anticlassification claim was the boldest argument in the debate over the meaning of the Fourteenth Amendment that led to *Brown*. If the Court were to accept this rationale, not only would it void all school segregation laws, it would also void all the race-based laws on which Jim Crow had been built, thus delving into areas (such as interracial marriage regulations) that the Court was hoping to avoid for as long as possible. The more context-specific claims—ranging from the argument that segregation had failed to create equal facilities to the even narrower argument focusing on the psychological damage that resulted from separate schools—would allow for a more limited ruling.

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159 *Equality Redefined*, BOSTON HERALD, May 18, 1954, *reprinted in* BROWN V. BOARD OF EDUCATION: A Brief History with Documents 205, 205 (Waldo E. Martin Jr. ed., 1998).

160 Black, *supra* note 55, at 428.

161 James Reston, *A Sociological Decision*, N.Y. TIMES, May 18, 1954, at 14.

162 *See, e.g.*, Cahn, *supra* note 2.

When it came time to debate implementation, however, this situation was reversed. In the struggle to make school desegregation a reality, anticlassification arguments were transformed into the more moderate option. After the first *Brown* decision, the NAACP pressed the colorblind principle as a less revolutionary approach than more substantive, outcome-based guidelines for school desegregation.

This shift was foreshadowed by Thurgood Marshall's first oral argument in the school desegregation cases before the Supreme Court. In an effort to downplay the consequences of a potential desegregation decision, Marshall emphasized that the NAACP was "not asking for affirmative relief," but merely to have legal restrictions lifted.[163] "You mean," Justice Frankfurter asked, "if we reverse, it will not entitle every mother to have her child go to a nonsegregated school in Clarendon County?"[164] Marshall responded, no, this was not what they were asking for.

> If the [school district] lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint. . . . [T]he only thing that would come down would be the decision that whatever rule you set in, if you set it, shall not be on race, either actually or by any other way.[165]

All the plaintiffs were asking for, he emphasized, "is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children."[166] Even in this early discussion of implementation, the transformation of the anticlassification principle from an idealistic "reach" argument for civil rights activists to a relatively moderate position that would minimize the effects of desegregation is evident. Moreover, as the text of *Brown II* indicates through its stronger overtures toward the anticlassification principle than *Brown I*, the Supreme Court was willing to inch further toward the anticlassification principle in discussing the implementation of school desegregation than it had been in its initial ruling. In this context the distinction between "desegregation" and "integration" arose,[167] with those who hoped to minimize the impact of *Brown* favoring the former option and often supporting it with rhetoric about the importance of remov-

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163 ARGUMENT, *supra* note 93, at 47.

164 *Id.*

165 *Id.* at 48.

166 *Id.* at 49; *see also id.* at 78 (recording Spotswood W. Robinson, a lawyer for the students in the Virginia case, arguing that "under the circumstances, what you do is, you simply make all the facilities in the county available to all the pupils, without restriction or assignment to particular schools on the basis of race").

167 Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) ("The Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.").

ing laws that divide students by race.[168] The Virginia Attorney General was moving toward this distinction when, in asking the Court in *Brown II* to allow a period of "gradual adjustment," he described the goal of *Brown* as a move from the "existing segregated system to a system not based on color distinction" but immediately qualified this concession by noting "that does not mean enforced integration to us in Virginia."[169]

In the wake of *Brown II* and subsequent desegregation rulings, what had once seemed a bold assault on the idea that the Constitution could be squared with official categorizations of race that resulted in pervasive, debilitating social inequalities became a moderate approach and gradually gained the adherence of conservative interests. It was a "cooler," more limited way to talk about constitutional equality;[170] it marked a "taming" of the transformative decision.[171] The Court's eventual embrace of an anticlassification reading of *Brown* was a strategic decision made largely in reaction to attacks on the legitimacy of the desegregation ruling. The colorblind Constitution was, as Reva Siegel put it, the "residuum of conflicts over enforcing *Brown*."[172] The victors in this conflict over the meaning of *Brown*, as measured by the Court's constitutional doctrine in recent decades, were conservatives who saw colorblind constitutionalism as a more desirable option than an antisubordination reading of *Brown*.

A qualification is necessary at this point: While an anticlassification interpretation of *Brown* would be pressed with particular urgency as it received a newfound conservative political valence in the 1960s and beyond, this interpretation is more than just a pragmatic defense against the transformative potential of an antisubordination interpretation. Anticlassification claims, while never predominant and never put forth in isolation from more contextual challenges to racial subordination, were a pervasive part of the civil rights debate in the period preceding and immediately following *Brown*. They did not arise only subsequent to the decision in efforts to defend and legitimate the Court's actions.[173]

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168 *See* Mark V. Tushnet, *The Supreme Court's Two Principles of Equality: From* Brown *to 2003*, *in* FROM THE GRASSROOTS TO THE SUPREME COURT: *Brown v. Board of Education* and American Democracy 340 (Peter F. Lau ed., 2004).

169 ARGUMENT, *supra* note 93, at 431–32.

170 Siegel, *supra* note 18, at 1477.

171 Strauss, *supra* note 21.

172 Siegel, *supra* note 18, at 1533.

173 *But see id.* at 1478 ("In law and in popular debate, *Brown* is often invoked as an opinion prohibiting states from classifying on the basis of race. But in so recalling *Brown*, we reason from an understanding that emerged from struggles over enforcement of the decision, rather than from an understanding that prevailed at the time the case was decided.").

The ideal of a legal system that banishes racial distinctions was inspiring to many Americans in the early postwar period; it was not only civil rights lawyers who looked to colorblind ideology as a guiding principle for racial progress.[174] The artificiality of the color line was far from a new theme in American culture, but mid-century liberals took particular interest in the issue to further their argument that the universality of the human race was a central component of the American way of life. According to one historian, in this period a "species-centered" discourse dominated progressive discussions of race (as opposed to the more recent multicultural model of "ethnos-centered" discourse).[175] Universalist arguments were designed to destroy any respectability that remained for theories of scientific racism and ideas of inherent biological differences between the races (and the corollary that certain races were therefore superior to others)—a task made especially urgent after the horrors of the Holocaust. This was the generation that produced popular works with titles such as *One World*,[176] *Brothers Under the Skin*,[177] and *The Family of Man*.[178] "More and more scientists, realizing the dire importance of the race problem to human welfare, are going out of their way to state unequivocally the falseness of the belief that such a difference exists," Walter White, executive secretary of the NAACP, approvingly noted in 1948.[179] For those who saw the courts as a promising path for civil rights reform, the anticlassification principle and the idea of a colorblind Constitution were the legal analogues to this universalist sentiment.

Thus, the post-*Brown* debates emerged in a cultural context in which colorblind principles were more than merely pragmatic defense mechanisms intended to limit the scope of integration remedies. Interpretations of *Brown* as embodying colorblind constitutionalism received renewed urgency in the following years as supporters of *Brown* drew on the anticlassification principle to defend the legitimacy of the decision, and this inaugurated a new era of colorblind constitutionalism in which it would become the favored interpretation of conservatives. But this new era had its roots in a deep commitment among liberal Americans at the time of *Brown* to the idea of a colorblind society. Anticlassification claims were a powerful, if far from exclusive, or even prevailing, element of the civil rights debate in the period preceding and immediately following *Brown*.

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174 *See generally* Schmidt, *supra* note 143, at 24–111.

175 David A. Hollinger, Postethnic America: Beyond Multiculturalism 51–77 (1995).

176 Wendell L. Willkie, One World (1943).

177 Carey McWilliams, Brothers Under the Skin (1943).

178 Edward Steichen, The Family of Man (1955).

179 Walter White, A Man Called White 364 (1948).

The post-*Brown* transformation of colorblind constitutionalism into a more moderate, and eventually a conservative, reading of the Fourteenth Amendment was both an extension of ideas that were prevalent at the time of *Brown* and a shift in the discourse. At the time of *Brown*, anticlassification principles were widely recognized as ambitious, even quixotic. In the following decades, with attacks on the Supreme Court's supposed lack of neutrality in *Brown* and with the rise of affirmative action, colorblind constitutionalism had become a centerpiece of conservative constitutional interpretation.

Conclusion

By pressing beyond the text of *Brown* and subsequent school desegregation decisions and drawing on the history behind *Brown* to inform the Court's equal protection doctrine, Chief Justice Roberts's *Parents Involved* opinion gives rise to an array of challenging questions, concerning the difficulties of both historical understanding and constitutional interpretation. The obvious threshold question is whether it is possible to divine from the complexities of history a clear "meaning" or "lesson" of *Brown*. Both sides of the debate surrounding the *Parents Involved* decision seem to think so. Chief Justice Roberts concluded that the meaning of *Brown* is unambiguous. Justice Stevens argued that the majority misread the history, and the lawyers who took part in the *Brown* litigation have accused the Court of misunderstanding their work. Guiding assumptions here are that *Brown* meant *something* and that the decision's meaning can be defined with sufficient clarity to inform today's debate over the proper reading of the Equal Protection Clause. But as the preceding survey of the history of *Brown* indicates, the decision meant different things to different people at different times, and it is far too simplistic to take a snapshot of a single moment and a single perspective—from the early 1950s or from today—and declare it as *the* meaning of *Brown*.

The Court's use of the history of *Brown* as a basis for a colorblind reading of the Fourteenth Amendment should not be easily dismissed. Although the words of the NAACP lawyers might not be as unambiguous as Chief Justice Roberts assumed, he did identify a central component of their argument. And this argument was far from unique to the NAACP legal team or aberrational in postwar America. Debates over civil rights from the mid-1940s through the 1960s were permeated with articulations of the anticlassification principle and admiring references to Justice Harlan's admonishment that "[o]ur Constitution is color-blind." By the time of *Brown*, anticlassification arguments had assumed a front-line position in the NAACP's legal assault on Jim Crow. Furthermore, these arguments were embraced by lawyers in the United States Justice Department and were supported

by at least two Supreme Court Justices. Many supporters of *Brown* saw the decision as establishing a new norm under which classifications based on race were presumptively, or perhaps categorically, prohibited. Colorblind constitutionalism proved particularly attractive to a generation of liberals who were committed to a universalist ideology premised on the ideas that racial identity was a legal and moral irrelevance and that progressive racial policy should move beyond racial categorizations. Anticlassification was not merely a pragmatic defense of a controversial decision. It was also an aspiration for a new era of American life. The colorblind ideal resonated; it was an important, although likely not essential, selling point for the new departure of *Brown*. So to now assume that integration was the sole legitimate meaning of *Brown* tells only part of the history.

This is far from the end of the story, however. Before *Brown* can be used as a foundation stone for a colorblind Constitution, certain qualifications are necessary. NAACP lawyers and their allies who embraced anticlassification arguments never made these arguments in isolation from other arguments that fall into the category of what has come to be known as antisubordination claims. Even if the NAACP and Justice Department briefs in *Brown* led with calls for a colorblind interpretation of the Fourteenth Amendment, the bulk of these briefs were dedicated to demonstrating the dangers of a racial caste system and the harms of segregated schools to children. These lawyers saw no need to decide between anticlassification and antisubordination claims; at the time of *Brown*, they did not even see them as mutually exclusive. To now portray the NAACP as embracing one claim to the exclusion of the other distorts the historical record.

Furthermore, the Supreme Court soundly rejected an anticlassification rationale for *Brown*. In arguing that the *Brown* Court actually accepted the anticlassification argument of the NAACP, Chief Justice Roberts is simply wrong. Because the *Brown* Court sought to limit its holding to school desegregation—and especially to avoid the hot-button topic of miscegenation—it was never a real option for the Court to embrace an all-encompassing prohibition on racial classifications. In short, for those who seek to construct an historical foundation for a colorblind reading of the Fourteenth Amendment, the history of *Brown* offers, at best, only qualified support.