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Not Hearing History: A Critique of Chief Justice Roberts's Reinterpretation of *Brown*

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I. INTRODUCTION

In the principal opinion in the 2007 school desegregation cases,[1] Chief Justice Roberts claimed that *Brown v. Board of Education*[2] prohibited essentially all use of racial classifications, and he associated the attorneys who represented the school children in that historic litigation with that position. Chief Justice Roberts's discussion of *Brown* accounted for only three paragraphs in a 30-plus page opinion, came at the very end of the opinion, was not necessary to decide the case, and in fact did not command a majority of the Court.[3] Nonetheless, those three paragraphs constitute one of the most important and interesting parts of his opinion, and one which is deeply troubling.

The closing section of the Roberts opinion is "important and interesting" for a variety of reasons. First, it deals with *Brown*, an iconic decision[4] the

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* Vincent C. Immel Professor of Law, Saint Louis University School of Law. Earlier versions of this paper were presented at a symposium on The School Desegregation Cases and the Uncertain Future of Racial Equality at the Moritz College of Law of The Ohio State University on February 21, 2008, and at faculty workshops at University of Maine School of Law and at Saint Louis University School of Law and I am grateful to those present for their helpful comments. I appreciate the invitation from professor john a. powell to participate in this symposium and conversations with him have educated me about the subjects discussed here and other matters. I am also grateful to William Marshall, Charles A. Miller, Brad Snyder, and Anders Walker who read earlier versions of this paper and provided helpful comments, to Meaghan Fuchs, Ryan Hardy, Molly Quinn, David Poell and Margaret McDermott, Esq. for research assistance, and, as always, to Mary Dougherty for patiently retyping this manuscript, and to Dean Jeffrey Lewis and Saint Louis University School of Law for institutional support. I alone am responsible for all views and shortcomings of this work.

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

[2] 347 U.S. 483 (1954).

[3] Justices Scalia, Thomas and Alito joined the discussion of *Brown* as well as the rest of Chief Justice Roberts's opinion. Justice Kennedy did not join the discussion of *Brown*. *Parents Involved*, 127 S. Ct. at 2767–68.

[4] *See, e.g.*, Jack M. Balkin, Brown *as Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: AMERICA'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3 (Jack M. Balkin ed.) (2001); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY vii (2004) ("Every teacher of constitutional law must ultimately make peace with *Brown*

metaphoric significance of which increases with each new anniversary. *Brown*'s central place in American history and jurisprudence lends importance to any discussion of it by the Court or by a significant number of its justices. Second, the Chief Justice's essential claim, that *Brown* embraced a "color-blind Constitution" under which all racial classifications are impermissible, potentially impacts the meaning of the Equal Protection Clause generally and the constitutionality of a range of specific measures in which official bodies use racial classifications to help racial minorities or to promote integration. Third, the claim commanded the support of four of the nine members of the Court, including the three youngest justices[5] and a fourth, Justice Scalia, who gives every appearance of remaining in his current position well into the future. The lengthy duration of their anticipated service on the Court means that the appointment of one additional so called "strict constructionist" within the next three or four presidential terms could convert the Roberts view into Court doctrine. Fourth, Chief Justice Roberts's passionate embrace of this position signals his willingness to lead vigorously in this direction. And his willingness to so interpret *Brown,* when he might have distinguished or ignored it, reflects an assertive new attitude of the fortified conservative wing of the Court in the aftermath of Justice O'Connor's retirement.

The Chief Justice's discussion of *Brown* is troubling in part because of its implications for the future of equal protection jurisprudence. Those who share Justice Blackmun's belief that "[i]n order to get beyond racism, we must first take account of race"[6] will find no comfort in the realization that the Court is one vote away from holding that the Equal Protection Clause prohibits all official uses of race to foster integration and that Chief Justice Roberts and his colleagues hope to use *Brown* to fortify that position.

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v. Board of Education (1954), which is widely deemed to be the most important Supreme Court decision of the twentieth century."); Earl Maltz, *Brown v. Board of Education and 'Originalism' in* GREAT CASES IN CONSTITUTIONAL LAW 136, 142 (Robert P. George ed.) (2000) (*Brown* is "constitutional icon"); David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. L. U. L. J. 1065, 1065 (2008) (*Brown* is "icon"); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 335 (2007) ("[A]t the Supreme Court, there is no rampart more protected than *Brown v. Board of Education* . . . ."). *See generally*, ROBERT J. COTTREL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE AND THE CONSTITUTION (2003); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN* V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

[5] Chief Justice Roberts and Justices Alito and Thomas.

[6] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

Beyond these impacts, Chief Justice Roberts's discussion of *Brown* is also instructive, and disturbing, as a case study in judicial reasoning. The arguments Chief Justice Roberts made about *Brown* purported to be historical claims, in one instance about the positions of advocates in the early 1950s, in the other about what a case decided. Yet his discussion made little effort even to acknowledge the circumstances in which the arguments were made or in which *Brown* was decided, and his interpretation, perhaps accordingly, was entirely inconsistent with that historical context. In associating the lawyers who prevailed in *Brown* with modern day anticlassificationists, Chief Justice Roberts stretched and distorted the arguments the civil rights attorneys made, in part, by selectively lifting fragments of language from its context to attribute to them a claim they did not make. In claiming that *Brown* itself vindicates the anticlassificationist position, Chief Justice Roberts ignored that part of the decision which compels a contrary reading and relied on language excised from its context. Moreover, the Court overlooked *Bolling v. Sharpe*,[7] *Brown*'s companion case, which suggested that some official uses of race were sustainable. Chief Justice Roberts's discussion of *Brown* reconstructed history in a disingenuous way apparently to support the outcome those in the plurality favored. In building an equal protection jurisprudence based on false history, it camouflaged the constitutional arguments which really drove its analysis. The plurality's approach thus raises concerns regarding the way in which Supreme Court decisions are reasoned and justified.

This paper proceeds as follows. Section II sketches Chief Justice Roberts's discussion in *Parents Involved* and outlines his treatment of *Brown*. Section III examines the Chief Justice's discussion of the arguments which Thurgood Marshall, Robert Carter and the other advocates for the plaintiffs in *Brown* made. It shows that his presentation takes a few comments out of context and distorts the argument made. Section IV argues that *Brown* cannot fairly be understood to stand for the anticlassification principle which the Chief Justice attributes to the decision. Section V considers some of the consequences of the Chief Justice's approach for American constitutional law and the work of the Court.

II. THE PLURALITY'S REINTERPRETATION OF *BROWN*

Brown played an incidental role in the Court's decision in *Parents Involved*. In *Parents Involved*, the Court considered a challenge to the Louisville and Seattle student assignment plans, which considered student

[7] 347 U.S. 497 (1954).

race as one factor in student assignments in order to create more racially integrated schools. The Court held the Louisville and Seattle plans unconstitutional before so much as discussing *Brown* in the final paragraphs of the opinion. Having outlined the facts in section I of his opinion and established the Court's subject matter jurisdiction in section II, Chief Justice Roberts disposed of the substantive constitutional issues in section III. There the Court suggested that the school districts had not invoked a compelling state interest, certainly not a diversity rationale which the Court's decision in *Grutter v. Bollinger*[8] would protect (III.A.). Moreover, the Louisville and Seattle plans failed to survive the Court's strict scrutiny because they were not narrowly tailored to advance the interest the districts asserted (III.C.). The fourteen paragraphs of III.A. and III.C. represent the substantive portion of the Court's opinion and held that the Seattle and Louisville plans violated the Equal Protection Clause.[9] The next eighteen paragraphs of Chief Justice Roberts's opinion constituted a specific rebuttal to Justice Breyer's dissent. Chief Justice Roberts completed this rather pointed response to his colleague's dissent without relying on *Brown*, although he did *in passing* cite *Brown II*, the Court's controversial decision issued the following year to address remedial issues, for the proposition that the Equal Protection Clause protects the "personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis."[10]

The substantive issues having been decided and Justice Breyer's errors having been exposed and corrected, Chief Justice Roberts concluded his opinion with a five paragraph section advancing a per se rule against racial classification. This argument rested largely on *Brown*; indeed, three of the final five paragraphs discussed that case.[11]

Chief Justice Roberts began this section by identifying some of the hazards of racial classification (e.g., promoting race-based reasoning, racial balkanization and racial hostility) with reference to language from some of the Court's more recent precedents in cases outside the field of education. The dangers are "true enough" in those contexts "but when it comes to using

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[8] 539 U.S. 306 (2003).

[9] Justice Kennedy did not join Section III.B. of Chief Justice Roberts's opinion which characterized the plans as seeking racial balance which the Court said was not a compelling interest as required to survive strict scrutiny.

[10] *Parents Involved*, 127 S. Ct. at 2765 (citing Brown v. Topeka Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955) (emphasis omitted)).

[11] *Parents Involved*, 127 S. Ct. at 2767 (Roberts, C.J., plurality).

race to assign children to schools, history will be heard."[12] The "history" that the Chief Justice invoked all related to *Brown* and was designed to support

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[12] The three paragraphs of Chief Justice Roberts's discussion on *Brown* read as follows:

> All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct.. 686, 98 L.Ed. 873 (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. *Id.*, at 493–494, 74 S. Ct.. 686. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.*, at 494, 74 S. Ct.. 686 ("'The impact [of segregation] is greater when it has the sanction of the law'"). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*." *Brown II*, 349 U.S., at 300–301, 75 S. Ct.. 753 (emphasis added).
>
> The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I*, O.T.1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "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." Tr. of Oral Arg. in *Brown I*, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. 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 nondiscriminatory basis*," and what was required was "determining admission to the public schools *on a nonracial basis*." *Brown II*, *supra*, at 300–301, 75 S. Ct.. 753 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?
>
> 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," *Brown II*, 349 U.S., at 300–301, 75 S. Ct.. 753,

the Chief Justice's claim that *Brown* proscribed any use of racial classifications.

The Chief Justice made two essential claims regarding *Brown*. First,[13] he argued that plaintiffs, through their attorneys from the NAACP Legal Defense Fund, "could not have been clearer" in advancing a strict anticlassification position.[14] Chief Justice Roberts noted that in their brief in *Brown* on reargument, plaintiffs stated that "the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[15] Moreover, one of the schoolchildren's advocates, Robert L. Carter, declared that "[w]e 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."[16]

Second, Chief Justice Roberts suggested that *Brown* itself adopted the anticlassification position. He wrote that in *Brown* "we held that segregation deprived black children of equal educational opportunities . . . because government classification and separation on grounds of race themselves denoted inferiority."[17] "It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954,"[18] he wrote. "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin,"[19] Chief Justice Roberts wrote. He claimed that *Brown* adopted Mr. Carter's anticlassification argument to end that practice.[20] And *Brown II* required school districts to admit children to public

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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.

Parents Involved, 127 S. Ct. at 2767–68.

[13] I have reversed the order in which Chief Justice Roberts made the two claims for purposes of presentation.

[14] *See* note 12 *supra*.

[15] *Parents Involved*, 127 S. Ct. at 2767 (quoting Brief for Appellants in Nos. 1, 2, 4 and for Respondents in No. 10 on Reargument at 15, *Brown*, 347 U.S. 483 (No. 8)).

[16] *Id.* at 2767–68 (quoting Transcript of Oral Argument at 7, *Brown*, 347 U.S. 483 (No. 8)).

[17] *Id.* at 2767 (citing *Brown*, 347 U.S. 483, 493–94).

[18] *Id.*

[19] *Id.* at 2768.

[20] *Id.*

schools "*on a nonracial basis*," [21] language he quoted in three successive paragraphs, twice adding emphasis. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[22] the Chief Justice declared before his closing sentence announcing the reversal of the decisions of the Courts of Appeals of the Sixth and Ninth Circuits.

Chief Justice Roberts's claims associate *Brown* and its successful litigants with the anticlassificationist interpretation of the Equal Protection Clause. There is general agreement that the Equal Protection Clause prohibits at least most governmental classifications based on race. Division exists, however, on the rationale that supports that conclusion. Anticlassificationists believe the Equal Protection Clause forbids government from drawing lines based on race. The reason or motive for the racial classification is essentially immaterial; the vice is the racial classification itself. Accordingly, racial classifications to give disadvantaged racial minorities opportunity or to foster integration are just as suspect as the more traditional racial classification designed to hurt minorities or separate them from others.

Antisubordinationists often accept the idea of a "color blind" Constitution as an aspiration,[23] yet they tend to believe that the Equal Protection Clause outlaws only those racial classifications which demean racial minorities. Antisubordinationists tend to be receptive to affirmative action programs and racial classifications to overcome past societal discrimination or to foster integration.

Although every Supreme Court justice during the last thirty years has agreed that racial classifications deserve some special scrutiny,[24] anticlassificationists believe that all racial classifications should receive the *same* brand of strict scrutiny.[25] That view, of course, is consistent with their belief that the Equal Protection Clause targets racial classification, not those instances when race is used for a malevolent purpose. Antisubordinationists

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[21] *Id.* (quoting *Brown II*, 349 U.S. at 300–301 (emphasis added by Chief Justice Roberts).

[22] *Id.*

[23] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Brennan, White, Marshall, and Blackmun JJ., concurring in judgment) (colorblind Constitution is aspiration).

[24] *See, e.g., id.* at 359 (Brennan, White, Marshall, and Blackmun JJ., concurring in judgment) (advocating intermediate scrutiny); Gratz v. Bollinger, 539 U.S. 244, 298–302 (2003) (Ginsburg, J., dissenting, joined by Souter and Breyer, JJ.); Adarand Construction Inc. v. Pena, 515 U.S. 200, 243–45 (1995) (Stevens, J., dissenting).

[25] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 378–79 (2003) (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.).

tend to favor intermediate scrutiny for affirmative action programs.[26] That level of review would uphold racial classifications which are substantially related to important government purposes.

Lacking access to Court files and personnel, it is difficult for an outsider to recreate the intellectual path which led Chief Justice Roberts to include his two-pronged reinterpretation of *Brown*. The following is, however, clear.

First, prior to *Parents Involved* there were relatively few occasions when members of the Court clearly associated *Brown* with an anticlassification view in cases in which racial classifications were used to benefit racial minorities or to foster integration. When *Brown* was so used, it was generally done in an opinion which represented the views of only one[27] or two[28] justices, and the claim often was made in passing with little consideration of *Brown*.[29] Prior to *Parents Involved*, the Court's most elaborate discussion of the point came in Justice Thomas's solitary opinion in *Missouri v. Jenkins*.[30]

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[26] Johnson v. California, 543 U.S. 499, 516 (2005) (Ginsburg, J., concurring joined by Souter and Breyer, JJ.) (advocating less stringent review of actions to address past discrimination); *Gratz*, 539 U.S. at 298–302 (Ginsburg, J., dissenting, joined by Souter and Breyer, JJ.); *Bakke*, 438 U.S. at 356–362 (Brennan, J.).

[27] *See, e.g.*, Defunis v. Odegaard, 416 U.S. 312, 342–343 (1974) (Douglas, J., dissenting) (*Brown* et al. sought to eliminate racial classification).

[28] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 493 (1979) (Rehnquist, J., dissenting, joined by Powell, J.) (*Brown* prohibited school assignments based on race); *Bakke*, 438 U.S. at 294 (1978) (Powell, J., joined by White, J.) (recognizing that *Brown* et al. involved discrimination by majority against minority but stating case need not be so read).

[29] *See, e.g.*, *Penick*, 443 U.S. at 493 (Rehnquist, J., dissenting) (anticlassification interpretation of *Brown* asserted without analysis); *Defunis*, 416 U.S. at 343 (same). *But cf.* United States v. Fordice, 505 U.S. 717, 754 (1992) (Scalia, J.) (expressing antisubordination interpretation of *Brown*); *id.* at 761 (*Brown* sought to destroy stigma of black inferiority).

[30] 515 U.S. 70, 120–21 (1995). Justice Thomas wrote:

> It is clear that the District Court misunderstood the meaning of *Brown I*. *Brown I* did not say that "racially isolated" schools were inherently inferior; the harm that it identified was tied purely to *de jure* segregation, not *de facto* segregation. Indeed, *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. See McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995). As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown I*, *supra*, at 495. At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this

Although Justice Thomas began by correcting the lower court's interpretation of *Brown*, he did so with respect to whether *Brown* applied to de facto or simply de jure segregation. When he shifted to his discussion of anticlassification versus antisubordination, he moved from interpreter to critic. Justice Thomas stopped short of claiming that *Brown* was decided on an anticlassification basis. Although some conclude that Justice Thomas interpreted *Brown* in *Jenkins*,[31] his discussion of it with regard to the anticlassification point really constituted criticism of the rationale of *Brown*. Justice Thomas seemed to suggest that the Court improperly rested its holding that segregation was unconstitutional on its conclusion that segregation produced feelings of inferiority when it should have simply

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reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime, see *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944)) has proven automatically fatal.

Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources—making blacks "feel" superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.

Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race . . . .

Id.

[31] *See, e.g.*, Michelle Adams, *Shifting Sands: the Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L. J. 795, 812 (2004) (characterizing Thomas's discussion as "interpretation"); Kevin D. Brown, Brown v. Board of Education*:* *Reexamination of the Desegregation of Public Education From the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773, 788–789 n. 69 (2004) (citing Thomas's *Jenkins* concurrence as support that some people interpret *Brown* as being anticlassificationist). *But see* Scott Gerber, Affirmative Action Symposium, 28 S. ILL. U. L.J. 519, 549 (2004) (calling Thomas one of the first to criticize *Brown* for relying on social science evidence rather than constitutional principle); Dora W. Klein, *Beyond* Brown v. Board of Education: *The Need to Remedy the Achievement Gap*, 31 J.L. & Educ. 431, 450 (2002) (citing it as an example of a "what *Brown* should have said" type of analysis); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 473 (2000) (characterizing it as a "rejection" of *Brown*'s "integrative ideal").

found segregation unconstitutional for classifying based on race.[32] As such, Justice Thomas's *Jenkins* opinion acknowledged that *Brown* did not rest on an anticlassification rationale and criticized it accordingly. In this respect, Justice Thomas's treatment of *Brown* in *Jenkins* was consistent with views he expressed before he went on the bench. Then, he had recognized that *Brown* rested on an antisubordination rationale rather than on the first Justice Harlan's "color blind" constitution metaphor which Justice Thomas preferred.[33]

Second, the brief of the United States as amicus curiae advanced the anticlassificationist interpretation of *Brown*. Solicitor General Paul D. Clement wrote that in *Brown* "the Court held that intentionally classifying students on the basis of race violates the Equal Protection Clause," and declared the ultimate remedial goal in eliminating such *de jure* segregation to be "achiev[ing] a system of determining admission to the public schools on a nonracial basis."[34] Mr. Clement emphasized the language from *Brown II* calling for admission on a "nonracial basis" by quoting it three times in his thirty page brief,[35] a pattern of repetition which did not rival that of Chief Justice Roberts but which was still sufficiently frequent to demonstrate enthusiasm for the passage (apparently with good reason since Chief Justice Roberts embraced it). Indeed, Mr. Clement's brief made more muted claims regarding *Brown* than did the Chief Justice. It recognized that *Brown's* holding was that "state laws that intentionally *segregate* public school students on the basis of race violate the Equal Protection Clause,"[36] an obvious point of distinction which the Chief Justice did not address. Mr.

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[32] *See Jenkins*, 515 U.S. at 120 (*Brown* did not "need" to rely upon social science evidence to conclude government cannot discriminate); *id.* at 121 ("Segregation was not unconstitutional because it might have caused psychological feelings of inferiority."). Justice Thomas's reliance on Judge McConnell's article, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 947 (1995), is also suggestive. Judge McConnell argued that the original intent of the Fourteenth Amendment supported *Brown*. Yet the Court specifically found such history "inconclusive." Justice Thomas's reliance on Judge McConnell's scholarship specifically indicates that he believes *Brown* should have rested on a different rationale.

[33] Clarence Thomas, *Toward a 'Plain Reading' of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L. J. 983, 990–91 (1987).

[34] Brief for the United States as Amicus Curiae Supporting Petitioner at 6, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 and 05-915).

[35] *Id.* at 6, 7, 29.

[36] *Id.* at 7 (emphasis added).

Clement also did not base his position on the arguments of counsel in *Brown*. Indeed, none of the briefs or oral arguments invoked counsels' arguments.

Third, Chief Justice Roberts foreshadowed his view of *Brown* during oral argument. He brought *Brown* into the discussion for the first time, saying: "I mean, everyone got a seat in *Brown* as well; but because they were assigned to those seats on the basis of race, it violated equal protection."[37] The Chief Justice's comment at oral argument was consistent with the view his opinion expressed that *Brown* prohibited using race to classify.

Finally, Justice Thomas wrote a solitary concurrence in which he invoked counsels' arguments in *Brown*.[38] He did not discuss *Brown* itself, perhaps because Chief Justice Roberts had done so in the principal opinion. Justice Thomas primarily discussed counsels' arguments in *Brown* in order to equate Justice Breyer's claim for deference to local officials to the approach of *Plessy* and to the view of the segregationists in *Brown*. This comparison is specious. Like *Plessy* and the segregationists and, for that matter, judicial conservatives in a number of cases,[39] Justice Breyer did argue for deference to local decisions. He did so because the constitutional norm he recognized allowed state officials some discretion to use race to promote integration and he viewed the actions under review as falling within that discretion. The "separate but equal" norm also accorded state officials discretion to operate separate (but equal) schools but *Brown* unanimously rejected this norm. The similarity between Justice Breyer and the segregationists was simply that they both recognized constitutional norms which allowed political officials an area of discretion. The norms they each recognized, however, were totally different.

Justice Thomas did, however, make some of the same claims regarding counsels' arguments in *Brown* as did Chief Justice Roberts. Perhaps his concurring opinion was the source of the arguments in the plurality opinion. He gave more examples but they encounter the same defects as do those in the main opinion which are addressed below.

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[37] Transcript of Oral Argument at 48, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 and 05-915); *see also id.* at 50 ("There's no effort here on the part of the school to separate students on the basis of race. It's an assignment on the basis of race, correct?").

[38] *Parents Involved*, 127 S. Ct. at 22768.

[39] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 131–32 (1995) (Thomas, J., concurring) (recognizing desirability of local control of schools); Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (Burger, C.J.) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for our public schools and to quality of the educational process.").

Arguments of counsel in an earlier case are not a standard instrument of constitutional interpretation. Even the arguments of successful counsel, of course, have no precedential value. Those in the Roberts plurality meant to claim the imprimatur of Marshall, Carter et al., by suggesting that the lawyers who argued *Brown* embraced an anticlassification position. Although Chief Justice Roberts obliquely acknowledged this motivation for invoking their arguments,[40] Justice Thomas made the reason explicit. He wrote:

> The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality . . . . But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." . . . *And my view was the rallying cry for the lawyers who litigated* Brown . . . .[41]

Chief Justice Roberts's premise was that the history of *Brown* was relevant to deciding *Parents Involved.* He invoked two types of historical arguments—one relating to the nature of the claims attorneys made in *Brown*, the other to the meaning of the judicial precedents which the case generated. When it comes to characterizing those arguments, "history will be heard" but a more complete history than the Chief Justice presented.

III. THE ADVOCATES' ARGUMENT IN BROWN

To be sure, plaintiffs' counsel in *Brown* did make the two statements which Chief Justice Roberts quoted in his opinion, and, standing alone, they seem to suggest that the Equal Protection Clause proscribes any use of race in distributing educational benefits to school children. But the Chief Justice's declaration of victory[42] was premature and misguided for his basic argument is fallacious in several ways.

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[40] *Parents Involved*, 127 S. Ct. at 2767 ("The parties and their *amici* debate which side is more faithful to the heritage of *Brown* . . . .").

[41] *Id.* at 2783 (Thomas, J., concurring) (emphasis added) (citations omitted).

[42] *Id.* at 2768 (stating "There is no ambiguity in that statement" referring to Judge Carter's oral argument statement that "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.").

A. *Contextual Fallacy*

First, the plurality's argument suffers from a contextual fallacy.[43] The statements quoted, *taken alone*, may unambiguously support Chief Justice Roberts's interpretation. The problem is that they were not uttered alone but in a context that included the circumstances in which they were used and the language surrounding the quoted words. When restored to their context they do not provide the unambiguous support the Chief Justice claimed.[44] In fact, they do not support him at all.

To understand the arguments the civil rights attorney used in *Brown* we must try to think of the issues they addressed, not as we would do, with the benefit and burden of our exposure to the history of the intervening decades, but as people did in 1952 and 1953. Meanings that occur naturally to us were not part of the understandings of those who had quite different experiences or faced different challenges. The salient question then regarding the Equal Protection Clause was whether state governments could use racial

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[43] *See generally* Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251, 314–17 (criticizing Roberts's discussion of *Brown* as acontextual).

[44] Chief Justice Roberts's reliance on these two fragments removed from their context is reminiscent of the perennial misuse of the first Justice Harlan's "color blind constitution" metaphor from his *Plessy* dissent by excising it from a paragraph laden with language that associated the Fourteenth Amendment with an effort to eliminate caste. The entire paragraph reads as follows:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Plessy v. Fergusson, 163 U.S. 537, 559 (1896). To be sure, Justice Harlan's dissent stated that the Constitution is "color-blind," but he also said it knew no caste, and that antisubordination view shaped part of the context in which the color-blind metaphor appeared. And the prohibition on regulating "solely upon the basis or race" is subject to different interpretation.

classifications to separate black Americans from white Americans. Official racial classifications were used then entirely to deny rights to blacks and to separate them from whites. The concept of using race to achieve integration, diversity or societal recompense was not on the judicial agenda. Government-imposed racial classifications were used for one purpose; race preferences ran in one direction.

When the Court, or the advocates before it, discussed racial classifications in the early and mid 1950s they were thinking about that practice, not as we do today but as they did then. A racial classification was a tool the white majority used to separate itself from the black minority. It reflected racism. It was not an instrument to achieve integration or to redress past wrongs. This natural association, between racial classifications and subordinating Negroes, was often made explicit.[45] Neither the Court nor the civil rights advocates expressed a position on those forms of race classifications which did not emerge for another decade or two. It is misleading, to say the least, to use the 1952 or 1953 words the civil rights attorneys used to make claims about what they meant *then* based on the way those words are used and understood *now*.

Moreover, *Brown* was a case in which black plaintiffs sought to vindicate rights of black children by challenging segregation of public schools which the white majority had imposed as part of the Jim Crow regime. They sought to integrate schools in part because they identified integrated schools with equal opportunity and as the route to equal protection.[46] Chief Justice Roberts distorted history by ignoring the goal of the *Brown* litigation to integrate schools.[47]

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[45] *See, e.g.*, Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument at 21, *Brown*, 347 U.S. 483 (No. 8), *reprinted in* 49 LANDMARK BRIEFS, at 534 (1975): "This Court in a long line of decisions has made it plain that the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power. Time and again this Court has held that if a state's power has been exercised in such a way as to deprive a Negro of a right which he would have freely enjoyed if he had been white, then that state's action violated the Fourteenth Amendment." *Id.* at 30, *reprinted in* 49 LANDMARK BRIEFS, at 543 (1975) (school segregation statutes within prohibited "category of racism").

[46] Robert L. Carter, *Reexamining* Brown *Twenty-Five Years Later: Looking Backward Into the Future*, 14 HARV. C.R.– C.L. L. REV 615 (1979) (NAACP strategy, which identified integrated education with *Brown* did not produce equal educational opportunity).

[47] James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 152 (2007) ("To detach the underlying goal—school integration—from the arguments made in advance of that goal is to distort history.").

The Chief Justice's argument was also defective in ignoring the linguistic context of the quoted sentences. The statements Chief Justice Roberts quoted were surrounded by other language. When restored to their context they suggest an altogether different meaning from the one Chief Justice Roberts advanced. Take Mr. Carter's 1952 oral argument in *Brown*. After summarizing the pertinent evidence and the district court's findings, Mr. Carter outlined his basic argument, including the "one fundamental contention" sentence which the Chief Justice quoted. Mr. Carter said the following:

> In short, the sole basis for our appeal here on the constitutionality of the statute in Kansas is that it empowers the maintenance and operation of racially segregated schools, and under that basis we say, on the basis of the fact that the schools are segregated, that Negro children are denied equal protection of the laws, and they cannot secure equality in educational opportunity . . . .
>
> 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.
>
> We say that for two reasons: First, we say that a division of citizens by the states for public school purposes on the basis of race and color effects an unlawful and an unconstitutional classification within the meaning of the equal protection clause; and, secondly, we say that where public school attendance is determined on the basis of race and color, that it is impossible for Negro children to secure equal educational opportunities within the meaning of the equal protection of the laws.[48]

This fuller statement of Mr. Carter's argument suggests quite different conclusions than the one Chief Justice Roberts advanced. Mr. Carter's arguments were made in the context of challenging the use of race to segregate, not integrate, public schools. Indeed, "the sole basis" for challenging the constitutionality of the Kansas statute was that it authorized racially segregated schools.[49] Mr. Carter attacked "a *division* of citizens by the states for public school purposes on the basis of race and color," not any use of race, or even the use of racial classification to bring together children

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[48] Transcript of Oral Argument of Robert L. Carter, Esq., on Behalf of Petitioners at 3–4, *Brown*, 347 US. 483 (No. 8), *reprinted in* 49 LANDMARK BRIEFS, at 280–81 (1975).

[49] *Id.*

of different races and colors.[50] That Mr. Carter thought racial classifications were impermissible to *segregate* schools does not mean that he thought they could not be used to *integrate* schools. That question was not before the Court in *Brown* and Mr. Carter did not address it.

Moreover, Mr. Carter's "one fundamental contention" was made on behalf of "Negro children."[51] He did not represent, nor did he seek to vindicate the rights of, all children. In the two paragraphs surrounding the "one fundamental contention" sentence, Mr. Carter made clear that his claim addressed the impact of racial classification on Negro children. That Mr. Carter thought race could not be used to separate black children from their peers does not mean that he thought race could not be used for other less pernicious purposes.

Even without the surrounding linguistic context, the truth of these two points—that Mr. Carter challenged the use of race to segregate, not integrate, and that he did so on behalf of Negro children, not all children—were obvious characteristics of *Brown*. Restoring the "one fundamental contention" sentence to its linguistic context made explicit and vivid the noncontroversial historical context of *Brown*. Mr. Carter did not restate those contextual anchors in each sentence; one does not generally do so. He did repeat them often enough, however, so that even a visitor from another planet could not have missed their significance. Certainly everyone in the courtroom understood them as the reality against which he framed his argument in 1952 and 1953.

In a third respect, however, the linguistic context further undercuts Chief Justice Roberts's claim that Mr. Carter made an unambiguous anticlassification argument. Mr. Carter's "one fundamental contention" that the Equal Protection Clause denied the state authority "to use race as a factor in affording educational opportunities among its citizens" rested on two reasons which he articulated in the very next sentence. First, an official division of citizens by race for public school purposes was an unconstitutional classification; second, a racial classification made it "impossible for Negro children to secure equal educational opportunities."[52] In essence, Mr. Carter made alternative arguments, one attacking racial classification and one attacking racial subordination.

Mr. Carter continued the argument beyond the paragraphs quoted above and in doing so he further articulated both the anticlassification and antisubordination arguments. Regarding the former, Mr. Carter referred to

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[50] *Id.* (emphasis added).

[51] *Id.*

[52] *Id.*

"our classification argument"[53] and stated that the Court precedents made clear that legislative classifications had to "rest upon some differentiation fairly related to the object which the state seeks to regulate."[54] Here Negro and white children were divided based solely on race; this division based solely on race was inconsistent with precedents indicating that race was an "arbitrary and an irrational standard."[55] Accordingly, the Kansas statute authorizing school segregation was an unconstitutional race classification.

Contrary to Chief Justice Roberts's implication, the anticlassification rationale did not dominate Mr. Carter's argument. Mr. Carter also made clear that his antisubordination argument presented "a second ground for the unconstitutionality of the statute."[56] "A second part of the main contention is that this type of segregation makes it impossible for Negro children and appellants in this case to receive equal educational opportunities," he said.[57] The district court in *Brown* had found that racial segregation signaled that black children were inferior and that this message placed black children at a disadvantage relative to their white peers. From the existence of "educational inequality, in fact . . . it necessarily follows that educational inequality in the law is also present,"[58] Mr. Carter said. Segregation violated the Equal Protection Clause because it subordinated Negro children.

Chief Justice Roberts's reliance on the fragment from the Brief for Appellants suffers from similar defects. It is useful to begin by restoring the quoted sentence, which appears at the end of the first paragraph below, to the context in which it appeared.

> The substantive question common to all is whether a state can, consistently with the Constitution, exclude children solely on the ground that they are Negroes, from public schools which otherwise they would be qualified to attend. It is the thesis of this brief, submitted on behalf of the excluded children, that the answer to the question is in the negative: the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race . . . .

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[53] *Id.* at 5, *reprinted in* 49 LANDMARK BRIEFS, at 282 (1975).

[54] Transcript of Oral Argument of Carter, *supra* note 48, at 4, *reprinted in* 49 LANDMARK BRIEFS, at 281 (1975).

[55] Transcript of Oral Argument of Carter, *supra* note 48, at 5, *reprinted in* 49 Landmark Briefs, at 282 (1975).

[56] *Id.* at 6, *reprinted in* 49 LANDMARK BRIEFS, at 281 (1975).

[57] *Id.*

[58] Transcript of Oral Argument of Carter, *supra* note 48, at 6, *reprinted in* 49 LANDMARK BRIEFS, at 283 (1975).

> The procedural question common to all the cases is the role to be played, and the time-table to be followed, by this Court and the lower Courts in directing an end to the challenged exclusion, in the event that this Court determines, with respect to the substantive question, that exclusion of Negroes, *qua* Negroes, from public schools contravenes the Constitution.
>
> The importance to our American democracy of the substantive question can hardly be overstated. The question is whether a nation founded on the proposition that 'all men are created equal' is honoring its commitments to grant 'due process of law' and 'the equal protection of the laws' to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.[59]

Appellants then made several arguments. First, "[d]istinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment" in part because it is indisputable that the primary purpose of the Fourteenth Amendment "was to complete the emancipation provided by the Thirteenth Amendment by ensuring to the Negro equality before the law."[60] Alternatively, "[e]ven if the Fourteenth Amendment did not *per se* invalidate racial distinctions as a matter of law, the racial segregation" Appellants challenged was unconstitutional because the "racial classifications here have no reasonable relation to any valid legislative purpose."[61] Finally, the "separate but equal" doctrine of *Plessy v. Ferguson*[62] was unconstitutional. "Candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery. But the primary purpose of the Fourteenth Amendment was to deprive the states of *all* power to perpetuate such a caste system."[63]

Once again, restoring the surrounding language puts an altogether different gloss on the quoted fragment. In the brief, as in Mr. Carter's oral argument, the context made explicit the implicit reality that the anticlassification argument was made (a) to attack segregation, not integration, and (b) on behalf of a racial minority. Moreover, the anticlassification formulation was not Appellants' sole position but one

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[59] Brief for Appellants, *supra* note 45, at 15–16, *reprinted in* 49 LANDMARK BRIEFS, at 528–529 (1975).

[60] *Id.* at 16, *reprinted in* 49 LANDMARK BRIEFS, at 529 (1975).

[61] *Id.*

[62] 163 U.S. 537 (1896).

[63] Brief for Appellants, *supra* note 45, at 16–17, *reprinted in* 49 LANDMARK BRIEFS, at 530 (1975).

argument among several. Indeed, the second argument in the prior paragraph was a qualified anticlassificationist position, i.e. the racial classifications challenged here lacked a "reasonable relation to any valid legislative purpose."[64] Implicitly, a classification which had such a relationship to such a purpose could be valid. The third argument was a strong antisubordination statement that racially segregated education violated the Fourteenth Amendment because "the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery."[65] Such subordination violated the Fourteenth Amendment because "the primary purpose of the Fourteenth Amendment was to deprive the state of *all* power to perpetuate such a caste system."[66] And even the association of the anticlassification point ("Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment") with the reminder of the particularistic purpose of the Fourteenth Amendment (it was "indisputable" that the "primary purpose" of the Fourteenth Amendment "was to complete the emancipation provided by the Thirteenth Amendment by ensuring to the Negro equality before the law") undercuts Chief Justice Roberts's argument that the civil rights attorneys favored a symmetrical anticlassification principle.[67] It is difficult to understand how Chief Justice Roberts could fairly conclude that the Brief could not have been clearer in reflecting an anticlassification position when it said, on the very next page, that "the primary purpose of the Fourteenth Amendment" was to deprive states of power to perpetuate the caste system which assigned Negroes "an inferior status."[68]

Most of the examples Justice Thomas cited[69] overlapped with those in the Chief Justice's opinion or lent themselves to similar analysis. Justice Thomas cited the 1953 statement in brief "[t]hat the Constitution is color blind is our dedicated belief."[70] Justice Thomas's premise—that the civil rights attorneys in 1953 meant by the statement what he meant when he cited it in 2007—may or may not be true but its truth certainly cannot be assumed. The surrounding language, which focused on segregation laws adverse to Negroes and "the racist notions of the perpetuators of segregation" suggest

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[64] *Id.* at 16, *reprinted in* 49 LANDMARK BRIEFS, at 529 (1975).

[65] *Id.* at 16–17.

[66] *Id.*

[67] *Id.* at 16.

[68] *Id.* at 16–17.

[69] *Parents Involved*, 127 S. Ct. at 2782–83.

[70] *Id.* at 2782.

the civil rights attorneys had a narrower focus in using that metaphor.[71] Moreover, many who subscribe to a color blind Constitution as an aspiration may still believe race conscious means may be necessary to make that vision reality. That is a plausible position for those who, unlike Justice Thomas, believe constitutional meaning is dynamic, not static.

The arguments of the civil rights attorneys continued for six days in December, 1952 and 1953. They cannot be easily condensed. At times, counsel did state that racial classification was inconsistent with equal protection.[72] Yet a fair review of these arguments makes two conclusions inescapable. First, they focused on the way in which segregation in accordance with the separate but equal doctrine mistreated African Americans. For instance, Thurgood Marshall began his rebuttal argument in *Briggs v. Elliott* by stating that

> [A]t this point, it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states. There is nothing involved in this case other than race and color . . . ." [73]

The only way South Carolina could sustain its statute was to show "that Negroes as Negroes—all Negroes—are different from everybody else."[74] In

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[71] Brief for Appellants, *supra* note 45, at 65, *reprinted in* LANDMARK BRIEFS, at 578 (1975).

[72] *See e.g.*, Oral Argument of Carter, *supra* note 48, at 5, *reprinted in* 49 LANDMARK BRIEFS, at 282 (1975). "[U]nder the decisions of this Court . . . no state can use race, and race alone, as a basis upon which to ground any legislative—any lawful constitutional authority ... [I]f the normal rules of classification, the equal protection doctrine of classification, apply to this case . . . on this ground, and this ground alone, the statute should be struck down."

[73] Oral Argument of Thurgood Marshall on Behalf of Appellants at 10, Briggs v. Elliot, 347 U.S. 483 (1954) (No. 101), *reprinted in* 49 LANDMARK BRIEFS, at 339.

[74] *Id.* at 12, *reprinted in* 49 LANDMARK BRIEFS, at 341. Similarly, Spottswood W. Robinson, III emphasized this point in his 1952 argument in the Virginia school case. The Civil War Amendments "were passed to eliminate disabilities" imposed on Negroes. Transcript of Oral Argument of Spottswood W. Robinson, III, Esq., on Behalf of Appellants at 9, Davis v. County Sch. Bd., 347 U.S. 483 (1954) (No. 191), *reprinted in* 49 LANDMARK BRIEFS, at 356. He outlined a pattern of inequality in the schools provided to black children. "Our evidence in this case shows not only these inequalities, but clearly demonstrated that these inequalities in themselves handicap Negro students in their educational endeavors and make it impossible for Negro students to obtain educational opportunities and advantages equal to those afforded white students." *Id.* at 10–11, *reprinted in* 49 LANDMARK BRIEFS, at 357–58. Moreover, "the segregation laws

the argument in *Bolling v. Sharpe*, George E. C. Hayes stated a fundamental premise of the antisegregation argument "that legislation of this character was pointed solely at the Negro, and 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. I think it could have no other conceivable purpose."[75]

Moreover, an antisubjugation interpretation echoed through the arguments of Mr. Marshall and his colleagues. For instance in 1953, Mr. Robinson opened his argument in *Briggs v. Elliott* by arguing that the Fourteenth Amendment was designed to eliminate all vestiges of a caste system. He said:

> First, that the Amendment had as its purpose and effect the complete legal equality of all persons, irrespective of race, and the prohibition of all state-imposed caste and class systems based upon race.
>
> And secondly, that segregation in public schools, constituting as it does legislation of this type, is necessarily embraced within the prohibitions of the Amendment.[76]

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themselves . . . were intended to limit the educational opportunities of the Negro, and place him in a position where he could not obtain in the State's educational system opportunities and benefits from the public educational program equal to those which flowed to white students." *Id.* at 38, *reprinted in* 49 LANDMARK BRIEFS, at 385. *See also* Transcript of Oral Argument of James M. Nabrit, Jr., Esq., on Behalf of Petitioners at 8, Bolling v. Sharpe, 347 U.S. 497 (1954), *reprinted in* 49A LANDMARK BRIEFS, at 571. ("First, none of this exhaustive discussion of history, however illuminating it may be, can conceal the blunt fact that under a system of legalized segregation millions of American Negroes live in this land of opportunity, equality and democracy as second-class citizens, suffering all types of civil disabilities imposed upon them in every aspect of their daily lives solely because of their race and color. Today we deal only with one significant aspect of it, segregation in public school education."); *Id.* at 14, *reprinted in* 49A LANDMARK BRIEFS, at 577 (arguing the federal government was "without power in the District of Columbia to discriminate or segregate the Negro pupils solely on the basis of race and color.").

[75] Transcript of Oral Argument of George E.C. Hayes, Esq., on Behalf of Petitioners at 7, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 413), *reprinted in* 49 LANDMARK BRIEFS, at 402.

[76] Transcript of Oral Arguments of Spottswood W. Robinson, III, Esq., on Behalf of Appellants at 3, Briggs v. Elliott, 347 U.S. 483 (1954) (Nos. 101 and 191), *reprinted in* 49A LANDMARK BRIEFS, at 451.

The framers intended "to broadly proscribe all caste and class legislation based upon race or color."[77] They were well aware of the Black Codes which "were designed to maintain essentially the same inferior position which Negroes had occupied prior to the abolition of slavery."[78]

Mr. Robinson clearly saw the Fourteenth Amendment as addressing racial castes. To be sure, his concluding clause presented an example in which one of the civil rights attorneys suggested that the framers intended the Fourteenth Amendment to prohibit "any racial classification in respect of civil rights."[79] Yet any effort to associate him with modern-day anticlassificationists encounters at least two problems. Historically, the classifications that were outlawed were those adverse to blacks. And the anticlassification statement appears alongside the antisubordination alternative.

Moreover, the civil rights attorneys took several positions which are inconsistent with the anticlassification claim Chief Justice Roberts attributed to them. At times they explicitly disassociated themselves from the claim that the government could never classify based on race. Towards the end of his 1952 argument in *Bolling v. Sharpe*, James M. Nabrit, Jr. said:

> I cannot make the statement that there is no situation in which Congress might not use race. I do not know of one right now, except the war powers. But that certainly leaves it open for determination by this Court. But at the same time, I assert that there is absolutely no basis that can be produced that would be accepted in our country in 1952 that would justify Congress making it such a racial basis for the exclusion of a student from a high school in the District of Columbia.[80]

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[77] *Id.* at 4, *reprinted in* 49A LANDMARK BRIEFS, at 452. *See also id.* (arguing the Fourteenth Amendment would prohibit governmental caste systems).

[78] *Id.* Mr. Robinson concluded: "I think it is very clear that the framers intended to destroy the Black Codes. I think it is clear that they intended to deprive the states of all power to enact similar laws in the future. I think the evidence overall is clear that it was contemplated and understood that the state would not be permitted to use its power to maintain a class or caste system based upon race or color, and that the Fourteenth Amendment would operate as a prohibition against the imposition of any racial classification in respect of civil rights." *Id.* at 17, *reprinted in* 49A LANDMARK BRIEFS, at 465.

[79] *Id.* at 17, *reprinted in* 49A LANDMARK BRIEFS, at 465.

[80] Transcript of Oral Argument of James M. Nabrit, Jr., Esq., on Behalf of Petitioners at 15, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 413), *reprinted in* 49 LANDMARK BRIEFS, at 410.

Mr. Nabrit did not believe Congress could use race to exclude black children from school—the only people then excluded by official racial classifications. Although he could not in 1952 imagine permissible racial classifications, he was not prepared to preclude that possibility. Moreover, the civil rights attorneys frequently suggested that the purpose of the Fourteenth Amendment was to protect African Americans from discrimination.[81] As such, they did not view the Fourteenth Amendment in the symmetrical fashion implicit in the anticlassification position of those who joined the Roberts plurality.

Finally, Mr. Marshall and his colleagues attached importance to the fact that the racial classifications they attacked were imposed by a majority race on a minority race. A fundamental premise of their argument was that racial majorities could not, consistent with equal protection or due process, oppress a racial minority, and that part of the Court's essential function was to police that imperative. Indeed, Mr. Marshall specifically argued that "these individual rights of minority people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this Court." [82] He later pointed out that Southern legislative bodies were ill-equipped to give fair consideration to the claims of African Americans. "I think, considering the legislatures, that we have to bear in mind that I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not."[83] "I think . . . that the ultimate authority for the asserted right by an individual in a minority group is in a body set aside to interpret our Constitution, which is our Court," he argued.[84] He concluded that "the rights of the minorities, as has been our whole form of government, have been

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[81] *See, e.g.*, Brief for Appellants in Nos. 1, 2, and 4, *supra* note 45, at 33, *reprinted in* 49 LANDMARK BRIEFS, at 546 ("So convinced was the Court that the overriding purpose of the Fourteenth Amendment was to protect the Negro against discrimination" the Court in the *Slaughter-House Cases* doubted any claim by other races could be made under it); *id.* at 42, *reprinted in* 49 LANDMARK BRIEFS, at 555 ("But the very purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established usages, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man."); *id.* at 45, *reprinted in* 49 LANDMARK BRIEFS, at 558 ("[T]he Fourteenth Amendment, the primary purpose of which was the protection of Negroes . . . .").

[82] Transcript of Oral Argument of Marshall, *supra* note 73, at 10, *reprinted in* 49 LANDMARK BRIEFS, at 339.

[83] *Id.* at 16, *reprinted in* 49 LANDMARK BRIEFS, at 345.

[84] *Id.* at 17, *reprinted in* 49 LANDMARK BRIEFS, at 346.

protected by our Constitution, and the ultimate authority for determining that is this Court."[85]

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[85] *Id.*; *see also* Transcript of Oral Argument of Carter, *supra* note 48, at 17, *reprinted in* 49 LANDMARK BRIEFS, at 294 ("But our feeling on the reach of equal protection, the equal protection clause, is that as these appellants, as members of a minority group—whatever the majority may feel that they can do with their rights for whatever purpose, that the equal protection clause was intended to protect them against the whims, as they come and go."). The Court has, of course, held in a series of cases that all racial classifications merit strict scrutiny. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[Racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."); Gratz v. Bollinger, 539 U.S. 244, 277 (2003) ("[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification . . . under the strictest judicial scrutiny."). The Court has generally been badly divided in reaching this conclusion. *See, e.g.*, *Gratz*, 539 U.S. at 244; *Adarand*, 515 U.S. at 270–71 (Souter, J., dissenting) (arguing that the majority's application of strict scrutiny to all governmental race-based classifications—regardless of whether the classification's purpose was "remedial" or "benign"—was an unnecessary departure from the Court's precedents (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)); Regents of the University of California v. Bakke, 438 U.S. 265, 359 (1977) (opinion of Brennan, White, Marshall, and Blackmun, JJ.) (suggesting that remedial use of racial classification is permissible if it serves "important governmental objectives" and is "substantially related to achievement of those objectives" (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)). Some, including justices on both sides of the issue, have suggested that in practice the Court reviews classifications adverse to minorities more leniently, notwithstanding its stated doctrine which calls for symmetrical treatment. *See, e.g., Parents Involved*, 127 S. Ct. at 2817 (Breyer, J., dissenting) ("The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is 'fatal in fact' only to racial classifications that harmfully *exclude*; they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.") (emphasis in original); *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting) ("Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race . . . ."); *Id.* at 387–88 (Kennedy, J.) (criticizing the Court for not applying a unitary formula of strict scrutiny); *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting) (arguing strict scrutiny is fatal for classifications burdening minority groups but not those promoting integration); Joel K. Goldstein, *Beyond* Bakke: Grutter-Gratz *and the Promise of* Brown, 48 ST. LOUIS U. L.J. 899, 926 (2004) (arguing that "racial preferences favoring minorities do not deserve the same degree of suspicion as do those burdening them."); Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation; The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83, 110 (2006) (arguing that historically, the Equal Protection Clause "prohibits racial *subjugation*, not racial *classification*") (emphasis added); John Hart Ely most eloquently demonstrated the flaw in the reasoning behind a symmetrical approach, but to no

Mr. Marshall's argument followed from the famous *Carolene Products* Footnote Four which first suggested that more rigorous judicial scrutiny might be appropriate in reviewing statutes "directed at . . . racial minorities."[86] The Court there had also raised the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[87]

The Department of Justice recognized this important distinction in its amicus brief on behalf of those challenging segregated schools.

> [The United States needed to] prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.
>
> The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries.[88]

Chief Justice Roberts's former employer, Chief Justice William Rehnquist, also grasped the schoolchildren's claim in the controversial memo he wrote in 1952 as Justice Jackson's law clerk. "To the argument made by Thurgood, not John, Marshall that a *majority* may not deprive a *minority* of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."[89] Mr. Rehnquist misunderstood the Constitution—the Court in *Brown* soon made clear its role in vindicating

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apparent avail. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 170 (Harvard University Press) (1980) ("There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect. Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks.").

[86] United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 n.4 (1938).

[87] *Id.*

[88] Brief for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954), *reprinted in* 49 LANDMARK BRIEFS, at 121.

[89] Memorandum from William H. Rehnquist to Justice Robert Jackson, A Random Thought on the Segregation Cases (1952), *reprinted in* 117 CONG. REC. 45, 440–45, 441 (1971) (emphasis added).

minority rights—but unlike the Roberts plurality he correctly characterized Mr. Marshall's claim.

The civil rights attorneys believed that the race classifications supporting Jim Crow laws were constitutionally suspect because a white majority had imposed them on a black minority which was not fairly represented in the political process. That rationale did not apply when a white majority enacted measures which arguably benefited blacks.

Brown did not raise the issue of whether states could use race-conscious classifications to integrate schools, and the civil rights advocates did not address that question. With one pertinent exception,[90] the briefs and oral arguments focused entirely on the way in which the government then used racial classifications—to segregate and demean blacks. The one exception occurred during a confusing colloquy between Justice Frankfurter and Mr. Marshall. Mr. Marshall had been attacking the separate but equal formulation during the 1953 argument when the following exchange occurred:

> MR. JUSTICE FRANKFURTER: Your argument comes down to this: If in one of the states in which there is a large percentage of Negro voters, a preponderance, where we get a situation where x state has a preponderance of Negro voters who are actually going to the polls, and actually assert their preponderance and install a Negro governor, to the extent that more money is spent for Negro education, better housing, better schools, more highly paid teachers, where teachers are more attracted, better maps, better schoolbooks, better everything than the white children enjoy—and I know I am making a fantastic, if you will, assumption—
>
> MR. MARSHALL: Yes.
>
> MR. JUSTICE FRANKFURTER:—and yet there is segregation, you would come here and say that they cannot do that?
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> MR. MARSHALL: If it is done by the state, the state has been deprived of—
>
> MR. JUSTICE FRANKFURTER: That is your position; that is the legal—

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[90] Justice Jackson and Mr. Marshall also had a brief exchange regarding whether the Fourteenth Amendment protected Native Americans. *See* Oral Argument of Marshall, *supra* note 73, at 17, *reprinted in* 49 LANDMARK BRIEFS, at 324.

> MR. MARSHALL: I think, sir, that is our flat legal position, that if it involves class or caste legislation—[91]

Justice Frankfurter then interrupted to pose another question before Mr. Marshall could complete his thought.

Having spun out his hypothetical, which rested on a "fantastic ... assumption," in classic professorial fashion, Justice Frankfurter never allowed Mr. Marshall to answer in any clear way. Accordingly, the exchange adds little, if anything, to the question under discussion. Does it support an anticlassification rationale because it suggests that classification would be impermissible even if blacks were benefited? Does it support the antisubordination rationale because blacks were hypothesized to be the majority and because of Mr. Marshall's qualifier "if it involves class or caste legislation—"? Was Mr. Marshall saying that anytime a racial majority favored its own interests such action would be suspect? Or was Mr. Marshall simply saying that state-created *segregation* was unconstitutional, even if the black schools were ahead on objective factors?

Perhaps someone with the Biblical Joseph's special gifts[92] could interpret these uncompleted thoughts, but Mr. Marshall's meaning is inscrutable to me. Justice Frankfurter never let Mr. Marshall explain what he meant. All that is clear is that both Justice Frankfurter and Mr. Marshall agreed that the premise of Justice Frankfurter's hypothetical of a black majority being in a position to favor black schools was "fantastic" (by which they meant fantasy-like, not wonderful). That characterization confirmed the reality which needed no confirmation—the phenomenon of race classifications to benefit blacks was beyond everyone's imagination in 1953. In any event, the hypothetical did not imagine a white majority considering race to promote integration.

We do not know what Mr. Marshall or any of his colleagues would have told the Court in 1952 or 1953 if one of the justices had posed a hypothetical that imagined an elected school board using race in student assignments to achieve racially-diverse student bodies. It is possible they would have thought a strict anticlassification position had merit or was expedient, although such a position would have differed from the Court's approach in

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[91] Oral Argument of Thurgood Marshall on Behalf of Appellants at 29, Briggs v. Elliot, 347 U.S. 483 (1954) (No. 101) reprinted in 49A LANDMARK BRIEFS, at 477.

[92] *Genesis* 40:8–19;41. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (Framers' intent regarding executive power "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah.").

Korematsu,[93] and Mr. Nabrit had pointedly refused to adopt a blanket anticlassification position. It is possible they would have distinguished between classifications whites imposed adverse to blacks and classifications to remedy past discrimination or to integrate. It is possible they would have pointed out that such a hypothetical bore no resemblance to the case or to reality. In six days of argument, no one asked this hypothetical, an omission which is itself instructive. Such a hypothetical was irrelevant to the case and unknown to their experiences. In any event, the question not having been asked, we cannot know what the answer would have been or that all of the civil rights attorneys would have answered the same way. It is clear, however, once their words are returned to context, that the civil rights attorneys did not in 1952 or 1953 take the position Chief Justice Roberts attributed to them.

B. *Roberts's Other Fallacies*

Chief Justice Roberts's practice of inferring meaning from language fragments removed from their historical and linguistic context represented the most serious distortion of the position of the civil rights attorneys in *Brown*. His argument rested on two other fallacious premises which also deserve mention.

1. *The Advocacy Fallacy*

Chief Justice Roberts's argument suffers from a second fallacy, one related to legal advocacy. The presence of the alternative antisubordination argument undermined Chief Justice Roberts's attempt to associate Mr. Carter and his colleagues with modern-day anticlassificationists. Some form of anticlassification argument was "one of the bases for [the] attack"[94] the civil rights attorneys made in *Brown*. It was not the only basis of the attack. In *Brown*, Mr. Carter and his colleagues could advance both the anticlassification and antisubordination arguments because they both led to the same conclusion. Since they did not conflict, counsel did not have to choose between them in *Brown*, and, as capable advocates, they deployed them both. The use of both arguments when they coincided does not reveal how Mr. Carter or his colleagues would have argued when they diverged.

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[93] Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating racial classifications could be used if "pressing public necessity" but applying less rigorous standard).

[94] Transcript of Oral Argument of Carter, *supra* note 48, at 18, *reprinted in* 49 LANDMARK BRIEFS, at 295.

That complicates the task of someone who seeks to characterize himself as Mr. Carter's true heir in a case in which the rationales conflict as they do in *Parents Involved*. Someone with that ambition must advance some argument as to why, if forced to choose, Mr. Carter would have preferred the anticlassification argument over the antisubordination argument (or vice versa). The Chief Justice provided no reason to conclude that Mr. Carter would have resolved such a conflict by giving priority to the anticlassification rationale. It is clearly not sufficient simply to quote Mr. Carter's anticlassification language while ignoring the antisubordination points, as Chief Justice Roberts has done.

2. *The Perspective Fallacy*

Finally, the plurality's argument adopted a fallacious perspective in measuring the views of Mssrs. Marshall et al. on anticlassification versus antisubordination based on their work as advocates in *Brown* rather than, say, a quarter century later when they addressed the issue as judges or in extrajudicial comments. This premise is faulty for at least three reasons, any one of which is sufficient to undermine it.

a. *Lack of Focus*

First, Chief Justice Roberts characterized the position of the civil rights lawyers at a time when they did not consider the question whether race could be used to integrate schools. As previously pointed out, *Brown* did not force a choice between whether an anticlassification or antisubordination theory best captured the meaning of the Equal Protection Clause and, accordingly, counsel did not focus on that issue. It is not clear that the two positions were even recognized as separate theories in the early 1950s rather than simply as interrelated vices of Jim Crow practice.[95] The tension between the two approaches presented itself later when federal and state governments implemented affirmative action and race-conscious assignment and admission programs to remedy past societal discrimination or to promote racially-integrated or diverse workforces or student bodies. At that time, many who argued in *Brown* did consider that precise question and supported the use of racial preferences to remedy past societal discrimination or

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[95] *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1474–75 ("The understanding that anticlassification and antisubordination are competing principles. . .is not itself a ground of the decision or of the earliest debates it prompted.").

produce integrated work forces and campuses.[96] It is anomalous for Chief Justice Roberts to attribute to them an anticlassificationist position based on abstract language they used when they did not address the anticlassification versus antisubordination issue instead of characterizing them based on their resolution of the issue when it did arise later.

b. *Static History*

In addition to this lack of focus problem, the premise underlying Chief Justice Roberts's claim is susceptible to a second, though more controversial, critique based on its perspective. He assumed that the correct time to assess the views of Marshall et al. regarding equal protection was in the early 1950s, when *Brown* was litigated, rather than at later times when the norm was interpreted and implemented. Assuming for purposes of discussion that Chief Justice Roberts accurately captured the views of Mr. Marshall and his colleagues in 1952 and 1953, the views he described clearly did not reflect their understanding by the 1970s or later. Those who argued *Brown* thought that integration and equal opportunity would follow once "separate but

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[96] *See, e.g.*, Constance Baker Motley, Remarks at the Thurgood Marshall Commemorative Luncheon (Apr. 24, 1996), *in* 62 BROOK. L. REV. 529, 544 (1996) ("It is simply unjust to ask the black community to bear all of the sequelae of the transition from a segregated society to a nonsegregated society on the theory that the present day white majority has little connection to our historic segregated past and that the sins of their fathers should not be visited upon them today."); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 886 (1993) ("[I]n the 1960s and 1970s a viable African-American middle class emerged for the first time as a reality in this country, benefiting from . . . affirmative action policies. . . ."); Thurgood Marshall, Remarks at the Second Circuit Judicial Conference (Sept. 5, 1986), *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 202 (Mark V. Tushnet ed., Lawrence Hill Books) (2001) ("The decisions of our Court in [the Oct. 1985] Term suggest to me that there is still a basic agreement among a majority of the Justices that the commands of Title VII and the Equal Protection Clause should be implemented, where necessary, through broad-based relief including the imposition of affirmative duties to eradicate the effects of past discrimination."); Jeremy Lehrer, *The Path of the Just*, HUM. RTS., Fall 1997, at 18, 19 ("People are going to see that you're either going to have affirmative action for at least another generation . . . . [U]nless you have the affirmative action you're going to have a country that's increasingly divided and polarized[,]" said Jack Greenberg). On the day the *Parents Involved* decision was issued, both Carter and Greenberg gave interviews where each expressed disagreement with the majority's use of certain passages from the NAACP's briefs and oral arguments in *Brown*. *See* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

equal" was ruled unconstitutional.[97] History proved them wrong.[98] *Brown* did not produce the societal changes they sought or anticipated.[99] Recognition of this truth caused some to favor the use of race-conscious remedies to combat patterns which continued to impede the ability of African Americans to participate fully in American society.[100] Informed by the history that followed *Brown* which they could not have anticipated, the thoughts of the civil rights attorneys had developed beyond where they were in the early 1950s.

Chief Justice Roberts and his colleagues implicitly assumed that subsequent history was irrelevant in attributing views to the civil rights attorneys. Those in the Roberts plurality were interested simply in what they

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[97] *See, e.g.*, James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 152 (2007) ("The assumption of those who argued for and supported *Brown* was that prohibiting segregation would lead to integration."); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. L. U. L.J. 885, 885 (1993) ("With the 1954 declaration in *Brown v. Board of Education*, I believed the path was then clear for black children to receive an equal education. My confidence in the inevitability of this result now seems naive."); ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 135 (2005) ("After *Brown* was decided, Thurgood, like the rest of us, was certain that the civil rights fight had been won . . . .").

[98] *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 295 (Harvard University Press) (1985) ("The history of the campaign against racial injustice since 1954, when the Supreme Court decided *Brown v. Board of Education*, is a history in large part of failure. We have not succeeded in reforming the racial consciousness of our society by racially neutral means. We are therefore obliged to look upon the arguments for affirmative action with sympathy and an open mind."); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, 752–53 (Random House) (1975); GERALD, ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 50 tbl. 2.1 (The University of Chicago Press) (1991) (showing the slow pace of desegregation following *Brown*).

[99] *See, e.g.*, Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH L. REV. 237, 242–43 (1968) ("What is now crystal clear is that solution of this problem will involve state and federal efforts of the greatest magnitude. The elimination of formalized public discrimination will not suffice."); *id.* at 247 ("Few in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority.").

[100] *See* Harry T. Edwards, *The Journey from* Brown v. Board of Education *to* Grutter v. Bollinger: *From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 955 (2004) ("What history shows is that race-conscious remedies were invoked after *Brown* only when it became clear that color-blind actions would not effectively eradicate the patterns of racial bigotry in America.").

thought the civil rights attorneys thought in 1952 and 1953; they treated as irrelevant the lessons these attorneys learned from their observations and reflections during their life after *Brown*. Justice Kennedy declined to join portions of the Roberts opinion, including its discussion of *Brown*, in part because he recognized the relevance of intervening history. In rejecting as insufficient the "plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,'" Justice Kennedy observed that "[f]ifty years of experience since *Brown v. Board of Education* . . . should teach us that the problem before us defies so easy a solution."[101] If Justice Kennedy, not to mention Chief Justice Roberts and the rest of us, get to use what we have learned from our understanding of history since the early 1950s, it is not clear why the civil rights attorneys should not receive the same courtesy.

Of course, selection of the 1950s as the relevant time period was, in a sense, consistent with the tendency of the Roberts Four to seek constitutional meaning in original intent, here that behind the *Brown* decision, and reject any notion of a living Constitution, the norms of which adapt to historical change. Others have presented the objections to originalism[102] and now is not the occasion to repeat the reasons why it makes little sense to interpret the Constitution, particularly its open ended terms like equal protection, only by considering history at the origins while ignoring other modes of interpretation, including the insights which might be gleaned from history as it unfolds. *Brown* itself clearly embraced a living Constitution,[103] and it is ironic that Chief Justice Roberts claimed to rely on *Brown* while rejecting its underlying methodology.[104] Moreover, it seems strange for Chief Justice Roberts and his colleagues to compare their positions with those they claim Mssrs. Marshall et al. took more than a half century earlier rather than with those the civil rights lawyers took more recently, during times more

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[101] *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring).

[102] *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 28–44 (Harvard University Press) (2001); WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST CONSTITUTIONAL ORDER 476 (Johns Hopkins University Press) (2007) (originalism faces "insuperable" difficulties); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

[103] Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout . . . .").

[104] *Parents Involved*, 127 S. Ct.. at 2767–68.

comparable to those in which the Roberts Four acted. Such a comparison would place the Roberts Four and the civil rights lawyers poles apart.

c. *The Influence of Role*

Finally, assuming for purposes of discussion that Chief Justice Roberts accurately depicted the civil rights attorneys in *Brown* as advocating an anticlassification position, one could not fairly conclude they would have reached that same position in a role independent of the constraints an advocate's role imposes. Two years before the Court decided *Brown,* Justice Robert Jackson memorably remarked that one implication of the role differentiation, which our legal system imposes, is that a jurist cannot fairly be held to the arguments he or she advanced as an advocate. In *Youngstown Sheet & Tube Co. v. Sawyer*,[105] he not only rejected the arguments he had made as President Franklin D. Roosevelt's lawyer but explained the folly in suggesting that his earlier positions were relevant to his resolution.[106]

One need not lean entirely on Justice Jackson to support this proposition, for Chief Justice Roberts made the same point time and again during his confirmation hearings. Chief Justice Roberts repeatedly noted the difference in perspective between an advocate and a jurist,[107] referred to Justice

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[105] 343 U.S. 579 (1952).

[106] *Id.* at 647 (Jackson, J., concurring) ("While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question even if the advocate was himself.").

[107] *Confirmation Hearing on the Nomination of John G. Roberts to Be Chief Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary,* 109th Cong. 207 (2005) (statement of John G. Roberts) [hereinafter *Roberts Confirmation Hearing*] ("My view in preparing all the memoranda that people have been talking about was as a staff lawyer. I was promoting the views of the people for whom I worked. In some instances, those were consistent with personal views; in other instances, they may not be."); *id.* at 254–55 ("You know, it's a tradition of the American Bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients . . . . I do think there is an unfortunate tendency to attack lawyers because of the positions they press on behalf of clients and I think that's unfortunate."); *id.* at 307 ("[W]e talked yesterday about the established principle that lawyers do not subscribe as a personal matter to the views they present on behalf of clients."); *id.* at 308 ("I'm just saying that it is a basic principle in our system that lawyers represent clients, and you do not ascribe the position of the client to the lawyer."); *id.* at 389–90 ("It has always been my position that I do not sit in judgment other than once I've satisfied myself that the legal arguments are reasonable ones, within the mainstream, if you will, that I don't decide whether that's the way I would rule as a judge or whether I would rule the other

Jackson's example,[108] and volunteered that Justice Jackson's understanding of the distinction in perspective was "one reason many admire him, including myself."[109] Chief Justice Roberts asked the Senate not to impute to him the views he had advanced on behalf of clients in predicting how he would resolve issues on the bench.

To be sure, Marshall, Carter and their colleagues were civil rights attorneys committed to litigating against the Jim Crow laws as inconsistent with equal protection. As advocates in that enterprise, they could properly attack those practices with reasonable arguments regardless of whether each of those positions represented their preferred personal formulations of equal protection. Just as Chief Justice Roberts could fairly argue that every legal argument he had made could not fairly be assumed to reflect his personal convictions, so, too, those made on behalf of the school children in *Brown* cannot be assumed to represent the jurisprudence of the civil rights attorneys who made them. Even if Chief Justice Roberts fairly characterized the arguments the civil rights lawyers made, it is odd that he would associate them with the specific arguments they advanced on behalf of their clients in the early 1950s when he rightly insisted that the Senate could not fairly judge him in that manner.

As jurists, and in their extrajudicial writings, the civil rights advocates took the unambiguous position that the Equal Protection Clause permitted at least some racial classifications designed to integrate or diversify public institutions. One need only read Justice Thurgood Marshall's powerful opinion in *University of California Regents v. Bakke*[110] to see that he resolved the conflict in favor of the antisubordination position.

In *Bakke*, Justice Marshall argued that "the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."[111] Society had marked African Americans as inferiors in ways which had endured the abolition of slavery and Jim Crow laws. "The dream of America as the great melting pot has not been realized for the

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way . . . . Lawyers aren't judges when they're representing clients . . . . I think it's a basic fundamental principle of the legal system and the bar that you take clients who have reasonable arguments . . . . But the lawyers aren't the judges. The judges are."); *id.* at 393 ("My point is simply this, that in representing clients, in serving as a lawyer, it's not my job to decide whether that's a good idea or a bad idea. The job of the lawyer is to articulate the legal arguments on behalf of the client.").

[108] *Id.* at 280.

[109] *Id.* at 153.

[110] 438 U.S. 265, 324 (1978) (Marshall, J., concurring in part, dissenting in part).

[111] *Id.* at 400.

Negro; because of his skin color he never even made it into the pot."[112] He continued, "These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination."[113]

Justice Marshall did not share Chief Justice Roberts's prescription regarding the way to end discrimination; in fact, he reached a conclusion 180 degrees from it. "If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors."[114] Those steps included race-conscious action.[115] The other civil rights attorneys reached similar conclusions regarding race-conscious remedies and viewed them as consistent with *Brown*.[116]

C. *Mr. Marshall's Concluding Argument*

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[112] *Id.* at 400–01.

[113] *Id.* at 401.

[114] *Id.* at 401–02.

[115] *Id.*

[116] *See, e.g.*, CONSTANCE BAKER MOTLEY, EQUAL JUSTICE . . . UNDER LAW: AN AUTOBIOGRAPHY OF CONSTANCE BAKER MOTLEY 240 (Farrar, Straus and Giroux 1998) ("The Supreme Court's decision in *Brown* is not only a statement what the equal protection clause requires but, more broadly speaking, a statement of what justice requires. Justice requires that the American community repair the damage that decades of racial segregation have done to its black members."); Constance Baker Motley, Remarks at the Thurgood Marshall Commemorative Luncheon (Apr. 24, 1996), *in* 62 BROOK. L. REV. 529, 544 (1996) ("It is simply unjust to ask the black community to bear all of the sequelae of the transition from a segregated society to a nonsegregated society on the theory that the present day white majority has little connection to our historic segregated past and that the sins of their fathers should not be visited upon them today."); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 886 (1993) ("[I]n the 1960s and 1970s a viable African-American middle class emerged for the first time as a reality in this country, benefiting from . . . affirmative action policies . . . ."); Jeremy Lehrer, *The Path of the Just*, HUMAN RIGHTS, Fall 1997, at 18, 19 ("People are going to see that you're either going to have affirmative action for at least another generation . . . . [U]nless you have the affirmative action you're going to have a country that's increasingly divided and polarized," [quoting Jack Greenberg]). On the day the *Parents Involved* decision was issued, both Carter and Greenberg gave interviews where each expressed disagreement with the majority's use of certain passages from the NAACP's briefs and oral arguments in *Brown*. *See* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24.

The anticlassification jurisprudence of the Roberts Four bears no resemblance to that of the lawyers who successfully litigated *Brown*. Those in the Roberts plurality can position themselves as the heirs of Thurgood Marshall and his colleagues only by the most dubious reasoning. Chief Justice Roberts's argument depended on (a) avoiding the facts which shaped the claims Marshall et al. made; (b) presenting sentence fragments torn from a context which reshapes their meaning; (c) ignoring alternative arguments the civil rights lawyers made; (d) attributing to the civil rights lawyers positions they allegedly took as representatives in cases which did not turn on the issues presented in *Parents Involved* rather than acknowledging their quite different stances years later when they addressed similar issues as jurists and legal thinkers. If that qualifies as hearing history, it is hard to imagine the sound of fiction.

The attorneys for the black schoolchildren made the antisubordination point on a recurring basis, but never more eloquently than did Thurgood Marshall as he concluded his rebuttal argument on December 8, 1953 in *Briggs v. Elliott*, one of the companion cases decided under the umbrella of *Brown*.[117] Whether the Court decided the case based on the original intent of the Fourteenth Amendment or "the logical extension of the [Court's] doctrine,"[118] the result was the same. The Court's precedents equated inequality and segregation, Marshall argued. The statutes his clients attacked were indistinguishable from the Black Codes, which the Fourteenth Amendment was designed to nullify. Marshall concluded as follows:

> So whichever way it is done, the only way this Court can decide this case in opposition to our position is that there must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes; and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings. Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why, of all of the multitudinous groups of people in this country, you have to single out Negroes and give them this separate treatment.

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[117] Transcript of Oral Argument of Thurgood Marshall, Esq., on Behalf of Appellants at 21–22, Briggs v. Elliot 347 U.S. 483 (1954) (No. 101), and Davis v. County Sch. Bd. Of Prince Edward County, 347 U.S. 483 (1954) (No. 191), *reprinted in* 49A LANDMARK BRIEFS 522–23.

[118] *Id.* at 21, *reprinted in* 49A LANDMARK BRIEFS 522.

> It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man. The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as possible; and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.[119]

IV. MISREADING THE 1954 DECISION

Ultimately, the meaning of *Brown* does not turn on what Marshall, Carter and their colleagues argued but on what the Court decided. Here, too, Chief Justice Roberts took considerable license in advancing an interpretation which the opinion does not bear. He described *Brown* as holding that

> [S]egregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. ("The impact [of segregation] is greater when it has the sanction of law.").[120]

To be sure, he was correct in saying that in *Brown* it "was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954." But the Court did not find, as Chief Justice Roberts suggested, that "government classification and separation on grounds of race themselves denoted inferiority." Rather, the classification and separation of *black* children in 1954 did.[121] Nor was "the fact of legally separating children on the basis of race" the source of the constitutional violation.[122] Rather, *Brown* held that segregating black children from white children treated the black children as inferiors and accordingly denied them equal protection of the laws. *Brown* was not addressed simply to any practice of using race in

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[119] *Id.* at 21–22 *reprinted* in 49A LANDMARK BRIEFS 522–23.

[120] *Parents Involved*, 127 S. Ct. at 2767 (citations omitted).

[121] *Id.*

[122] *Id.*

student assignments, as the Chief Justice suggested,[123] but to a core feature of a Jim Crow regime which was designed to segregate African Americans.[124]

If, as Chief Justice Roberts suggested, "history will be heard,"[125] to understand *Brown* it is perhaps best to start by listening to Chief Justice Earl Warren, the author of the opinion and figure whose leadership produced the unanimous result. Four days after Thurgood Marshall concluded his 1953 argument in *Briggs*, Chief Justice Warren opened the Court's conference to consider the school segregation cases. His statement to his new colleagues was brief but it is unlikely that more poignant words have ever been spoken in those sessions.

> The more I read and hear and think, the more I come to conclude that the basis of the principle of segregation and separate but equal rests upon the basic premise that the Negro race is inferior. That is the only way to sustain *Plessy*—I don't see how it can be sustained on any other theory. If we are to sustain segregation, we must do it on that basis. If oral argument proved anything, the arguments of Negro counsel proved that they are not inferior.
>
> I don't see how we can continue in this day and age to set one group apart from the rest and say that they are not entitled to *exactly the same* treatment as all others. To do so is contrary to Thirteenth, Fourteenth, and Fifteenth Amendments. Those amendments were intended to make those who were once slaves equal with all others. That view will perhaps cause trouble, but personally I can't see how today we can justify segregation based solely on race and so forth.[126]

We do not know whether Mr. Marshall's conclusion convinced his future colleague or whether Chief Justice Warren simply saw the essential issue the precise way Mr. Marshall did. In any event, the Marshall closing and the Warren opening were sufficiently similar to suggest at least the coincident

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[123] *Parents Involved*, 127 S. Ct. at 2768 ("Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.").

[124] *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting) ("But segregation policies did not simply tell schoolchildren 'where they could and could not go to school based on the color of their skin'; they perpetuated a caste system rooted in the institutions of slavery and the 80 years of legalized subordination.") (citation omitted).

[125] *Parents Involved*, 127 S. Ct. at 2767 (citations omitted).

[126] Remarks of Chief Justice Earl Warren at the United States Supreme Court Conference (Dec. 12, 1953), *in* THE SUPREME COURT IN CONFERENCE 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS, 654 (Del Dickson ed., Oxford University Press 2001).

thought of two kindred spirits, if not also reflecting the cause and effect of convincing advocacy.

It is hard to read Chief Justice Warren's opinion in *Brown* as an endorsement of the anticlassification rationale. Although Chief Justice Warren was determined that the opinion in *Brown* would be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory,"[127] the antisubordination rationale echoed through the opinion as it did in his statement at conference.

The Court's opinion did not assert that the Constitution was color-blind or that it prohibited all racial classification. The failure to include such language is striking, especially if, as Chief Justice Roberts claimed, Marshall, Carter et al. trumpeted that rationale during six days of oral argument. The Court did not define the question for decision as whether racial classification always violated equal protection or even whether it did in school assignment. Rather, Chief Justice Warren wrote, the "question presented" was whether school segregation deprived "the children of the *minority group* of equal educational opportunities[.]"[128]

In so identifying the issue, the Court rejected the very sort of symmetrical approach to the Equal Protection Clause that Chief Justice Roberts advanced. The principal advocate for the school boards in *Brown*, John W. Davis, had specifically framed the issue in symmetrical fashion. He argued:

> The question with which Your Honors are confronted is: Is segregation in schools a denial of equality where the segregation runs against one race as well as against the other, and where, in the eye of the law, no difference between the educational facilities of the two classes can be discerned?[129]

Far from seeing the issue as Mr. Davis urged in 1953 or as Chief Justice Roberts's plurality opinion described more than a half century later, the Court considered the case as asking whether *segregation* subordinated the black children who were part of the minority group.

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[127] BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY 97 (New York University Press 1983) (quoting Chief Justice Warren).

[128] *Brown*, 347 U.S. 483, 493 (1954) (emphasis added).

[129] Transcript of Oral Reargument of John W. Davis, Esq., on Behalf of Appellees at 35, Briggs v. Elliott, 347 U.S. 483 (1954) (No. 101), and Davis v. County Sch. Bd. of Prince Edward County, 347 U.S. 483 (1954) (No. 191), *reprinted in* 49A LANDMARK BRIEFS, at 483.

The Court's answer to that question in *Brown* also suggested an antisubordination view of equal protection. The Court did not state that any racial classification was unconstitutional or that any racial classification in school assignment was defective.[130] On the contrary, the crucial sentence of the opinion said that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[131] The reference to them is unambiguous and no credible claim has ever construed it to include white children. Those whose hearts and minds were thought to be irreparably harmed were the children of the minority group. The Court underscored the obvious when it cited a lower court finding from the Kansas case that well stated the effect of this separation on the "educational opportunities" of the black schoolchildren.[132] The finding said, in part, that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children" and that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[133]

The opinion in *Brown* pivoted on the "feeling of inferiority" sentence. That language would have been superfluous had the Court decided *Brown* on an anticlassification theory. If the Equal Protection Clause proscribed any racial classification in student assignments it would not matter whether or not segregation had "a detrimental effect upon the colored children." The fact that the Court focused so much attention on the effect of segregation on a racial minority was an unmistakable signal regarding the rationale that supported the decision.

Chief Justice Roberts quoted one sentence from the District Court's finding[134] to support his assertion that *Brown* found a constitutional violation in "the fact of legally separating children on the basis of race," but omitted

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[130] *See, e.g.*, Siegel, *supra* note 95, at 1481 (noting that *Brown* fails to prohibit state classification based on race).

[131] *Brown*, 347 U.S. at 494. *See also* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9 (1976) (noting that the essence of *Brown* was observation that "segregation of black public school pupils" generates a feeling of inferiority).

[132] *Brown*, 347 U.S. at 494.

[133] *Id. See also* Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 251–52 (1991) (Marshall, J., Dissenting) (*Brown* rested on recognition that state sponsored segregation sent a message of inferiority to black children).

[134] "The impact [of segregation] is greater when it has the sanction of the law." *Parents Involved*, 127 S. Ct. at 2767 (quoting *Brown*, 347 U.S. at 494).

the rest of the quote which made clear that the problem with official segregation was that it usually denoted the inferiority of black children.[135] Indeed, of the four sentences in the District Court finding which *Brown* quoted (and of which Chief Justice Roberts quoted a half sentence), three specifically stated that separation hurt Negro children and the context lent that inescapable meaning to the other sentence, too.[136]

Moreover, the "feeling of inferiority" language in *Brown* only had meaning in 1954 when applied to black children. *Brown* involved African-American plaintiffs. That characteristic is a necessary part of its identity but one which Chief Justice Roberts systematically ignored.[137] No whites claimed that public school segregation denied their equal protection rights. As Justice Stevens put it, "The Chief Justice fails to note that it was only black schoolchildren who were so ordered [where to go to school based on race]; indeed, the history books do not tell stories of white children struggling to attend black schools."[138] Had white schoolchildren made such a claim, the Court surely would not have decided their cases on the basis that segregation sent a message to those white children that they were inferior.

Finally, the Court's treatment of *Plessy v. Ferguson*[139] underscored the fact that *Brown* rested on the antisubordination rationale. Although the Court rejected racially "separate but equal" public schools as a constitutional oxymoron, it did not explicitly overrule *Plessy* (although it soon became clear that *Plessy*'s demise was implicit). *Plessy* had, however, insisted that segregation did not subjugate blacks, since any conclusion that segregation marked blacks as inferior was simply an inference blacks drew.[140] *Brown*

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[135] The sentence quoted in the text continued: "[F]or the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." *Brown*, 347 U.S. at 494.

[136] The finding which *Brown* quoted reads as follows: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." 347 U.S. at 494.

[137] *Parents Involved*, 127 S. Ct.. at 2768 ("Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.").

[138] *Parents Involved*, 127 S. Ct.. at 2798 (Stevens, J., dissenting).

[139] 163 U.S. 537 (1896).

[140] *Plessy*, 163 U.S. at 551. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races

explicitly rejected *Plessy* to that extent.[141] *Plessy*'s language to that effect was, of course, uttered in a case dealing with segregated transportation facilities, not schools, and the Court might have ignored it on that ground. The Court's specific rejection of *Plessy*'s language to this effect made manifest the Court's view that Jim Crow laws did subjugate blacks and that the Equal Protection Clause was designed to remedy that denigration of racial minorities.[142]

Brown simply does not support the symmetrical reading Chief Justice Roberts advanced. I have previously suggested that a claim that "government classification and separation on grounds of race themselves denoted inferiority" of the white children was a historical non sequitur;[143] in 1954, no whites thought Jim Crow laws signified their inferiority. Such a claim also was a logical impossibility. "Inferiority" is a relative term which only has meaning with respect to some other group being treated as superior.[144] A racial classification and separation of black and white children could not signify the inferiority of both groups. *Brown* stated that segregation sent a message to blacks that they were inferiors.[145] It was implicit that Jim Crow was premised on white superiority.

The day it issued *Brown*, the Court itself characterized its holding much more narrowly than did Chief Justice Roberts more than a half century later. "We have held this day that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools," wrote Chief Justice Warren for a unanimous Court in *Bolling v. Sharpe*.[146] Two pages later it held that racial segregation in the public

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stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." *Id.*

[141] *Brown*, 347 U.S. at 494–95.

[142] The Court's rejection of this language from *Plessy* signaled that the Court in *Brown* meant its attack on segregation to extend beyond public schools.

[143] *See supra* Part IV, p. 37.

[144] *Cf.* Edmond v. United States, 520 U.S. 651, 662 (1997) (inferior officer is one who has superior).

[145] *Brown*, 347 U.S. at 494.

[146] 347 U.S. 497, 498 (1954).

schools of the nation's capital violated the Fifth Amendment.[147] Subsequent school cases also described *Brown* as forbidding segregation, not classification.[148] Judge J. Harvie Wilkinson, III wrote in 1995 that "[t]he premise of *Brown v. Board of Education* was simple: Racial integration, or at least the end of the de jure segregation, would overcome the invidious failure of separatism."[149] *Brown* prohibited racial classification to segregate blacks from whites; it did not say government could not classify by race to integrate. As Justice Ginsburg put it during oral argument, using race in student assignments in Seattle meant that there were "at last, white and black children together on the same school bench. That seems to be worlds apart from saying we'll separate them."[150]

A. *Contemporary Understandings of* Brown

Contemporary writers did not then understand *Brown* in the manner in which the Chief Justice characterized the decision in *Parents Involved.* Less than five years after the Court spoke in *Brown*, Herbert Wechsler delivered his famous Oliver Wendell Holmes Lecture, later published as "Toward Neutral Principles of Constitutional Law." [151] Professor Wechsler wrote that in *Brown*, "[t]he Court did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation, though subsequent per curiam decisions may, as I have said, now go that far."[152] Instead, the Court had held that separate but equal had no place in public education, since "segregated schools are 'inherently unequal,' with deleterious effects upon the colored children in implying their inferiority,

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[147] *Id.* at 500.

[148] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11 (1971) ("Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws."); *id.* at 15 ("Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution."); *id.* at 22 ("The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause.").

[149] J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 994 (1995).

[150] Transcript of Oral Argument at 50, *Parents Involved*, 127 S. Ct.. 2738 (2007) (No. 05-908).

[151] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959).

[152] *Id.*

effects which retard their educational and mental development."[153] Wechsler did not think the decision in *Brown* turned on evidence regarding the psychological impact on black children.

> Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved. For many who support the Court's decision this assuredly is the decisive ground.[154]

To be sure, Wechsler thought *Brown's* principle problematic, but what is pertinent here is not his assessment of its merits, but the fact that he found this antisubordination principle implicit in *Brown*.[155]

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[153] *Id.*

[154] *Id.* at 33. *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 56 (1962). "As Mr. Wechsler concedes, the *School Segregation Cases*, read in conjunction with certain brief orders that followed after them, have made clear that the principle in question is that racial segregation constitutes, *per se*, a denial of equality to the minority group against whom it is directed."

[155] Professor Wechsler suggested that the series of per curiam opinions, which extended *Brown* to other contexts may have established the anticlassification rule which *Brown* did not. (*See e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (outlawing segregated public parks); Gayle v. Browder, 352 U.S. 903 (1956) (outlawing segregated buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (outlawing separate golf courses). In referring to the principle that "the fourteenth amendment forbids all racial lines in legislation," Professor Wechsler may have referred simply to lines adverse to blacks, the only form of racial classification then used. Wechsler, *supra* note 151, at 32. His point is not persuasive even if intended to resemble the principle Chief Justice Roberts championed. An anticlassification rationale could have accounted for those results but there is no evidence that it did, and some evidence that it did not. *See* Siegel, *supra* note 95 at 1482 n.38 ("But anticlassification was not the only, or even the dominant, way of expressing the significance of the per curiam decisions. Many explained the decisions as concerned with practices that enforced the inferior status of blacks."). Those cases, which rested on conclusory orders which simply cited *Brown*, extended *Brown* to contexts beyond public education, but they did not articulate any new rationale. Each case addressed official discrimination against African-Americans. A more precise statement of their collective holding would be that they struck down official classifications which separated blacks from others. They did so presumably for the same reason the Court did so in *Brown*—the laws overruled were part of the Jim Crow regime which sent a message to blacks that they were inferior. The message may not have been so poignant when directed at adults or so important when related to activity other than education. *See* Cass Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV 1267, 1267 (1992) (characterizing *Brown* as a case principally about education). But no fact finding or imagination is needed to conclude that public racial segregation of

Wechsler's lecture generated principal responses from two other leading constitutional scholars of his day, one by Charles L. Black, Jr. and the other by Louis Pollak. They disagreed with Wechsler's critique of *Brown*, but these constitutional law scholars read the decision like Wechsler, not like the Roberts Four more than one-half century later. In *The Lawfulness of the Segregation Decisions*,[156] Professor Black repeatedly described the decision as outlawing segregation, as recognizing rights of African-Americans, and as predicated on an antisubordination theory of the Fourteenth Amendment.

> Simplicity is out of fashion, and the basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law.[157]

Time and again, Professor Black described the Equal Protection Clause as designed primarily to protect African-Americans and *Brown* as

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parks, golf courses, and transportation sent a message of the inferiority of blacks. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 215 (Harvard University Press) 2004) (Cases extending Brown consistent with antisubordination rationale since addressed to "dismantling of a legally enforced caste system, with its implication of racial subordination."). The Court's specific rejection of *Plessy's* language that Jim Crow laws did not mark blacks with a badge of inferiority signaled the relevance of the antisubjugation rationale in areas other than the public schools, since *Plessy* itself involved transportation, not education.

Finally, the argument that *Brown*'s progeny established an anticlassification principle encounters one other problem. The Court did not, following *Brown*, strike down all such classifications, even against blacks. It avoided ruling on state statutes outlawing interracial marriage. *See e.g.*, Naim v. Naim, 350 U.S. 891, 891 (1955) (per curiam). *See* Siegel, *supra* note 95, at 1483–84. When it finally did rule on that most controversial classification in 1967, a unanimous Court went out of its way to point out that the miscegenation laws were objectionable as vestiges of white supremacy. Loving v. Virginia, 388 U.S. 1, 11 (1967). The Court included four Justices who had decided *Brown* , including Chief Justice Warren and Justices Black, Douglas and Clark, and one, Justice Harlan, who joined the Court shortly thereafter. Indeed, in *Loving* the court twice stated that the Equal Protection Clause prohibited "invidious" racial classification, not all race classifications. *Id.* at 8.

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

[157] *Id.* at 421.

recognizing that fact.[158] "[T]he Court had the soundest reasons for judging that segregation violates the fourteenth amendment. These reasons make up the simple syllogism with which I began: The fourteenth amendment commands equality, and segregation as we know it is inequality."[159]

Professor Black concluded:

> These judgments, like all judgments, must rest on the rightness of their law and the truth of their fact. Their law is right if the equal protection clause in the fourteenth amendment is to be taken as stating, without arbitrary exceptions, a broad principle of practical equality for the Negro race, inconsistent with any device that in fact relegates the Negro race to a position of inferiority. Their facts are true if it is true that the segregation system is actually conceived and does actually function as a means of keeping the Negro in a status of inferiority. I dare say at this time that in the end the decisions will be accepted by the profession on just that basis.[160]

Black thought the "venial fault" of *Brown* was in "its not spelling out that segregation, for reasons of the kind I have brought forward . . . is perceptibly a means of ghettoizing the imputedly inferior race," an omission he attributed to the Court's "reluctance to go into the distasteful details of the southern caste system."[161]

Professor Pollak described *Brown* simply as "decreeing the invalidity of state-imposed segregation in public schools,"[162] and otherwise said little about the principle behind the Court's opinion. Instead, he focused his discussion on rewriting *Brown* to articulate clearly a constitutional principle to justify the decision. The alternative opinion he did offer understood, and resolved, legally mandated segregation of public schools as a practice which

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[158] *See, e.g., id.* at 423 ("But history puts it entirely out of doubt that the chief and all-dominating purpose was to ensure equal protection for the Negro"); *id.*("What the fourteenth amendment, in its historical setting, must be read to say is that the Negro is to enjoy equal protection of the laws, and that the fact of his being a Negro is not to be taken to be a good enough reason for denying him this equality, however 'reasonable' that might seem to some people. All possible arguments, however convincing, for discriminating against the Negro, were finally rejected by the fourteenth amendment."); *id.* at 429 ("The fourteenth amendment forbids inequality, forbids the disadvantaging of the Negro race by law.").

[159] *Id.* at 428.

[160] Black, *supra* note 156, at 429–30.

[161] *Id.* at 430 n.25.

[162] Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24 (1959).

offended the Equal Protection Clause because it subjugated blacks. The issue for decision was whether the Jim Crow laws rested on "a demonstrable state need" and whether they "work significant harm to the segregated Negro."[163] Courts should not favor with any normal presumption of validity legislation which rested on "prejudice against discrete and insular minorities [which] may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities."[164] Professor Pollak quoted at length from the great historian, C. Vann Woodward, to document the denigrating purpose and effect of Jim Crow laws.[165] "We see little room for doubt that it is the function of Jim Crow laws to make identification as a Negro a matter of stigma. Such governmental denigration is a form of injury the Constitution recognizes and will protect against."[166] Finally, Professor Pollak pointed out a historical fact which challenged the premise underlying the Chief Justice's symmetrical application of the anticlassification principle: the Civil War Amendments themselves rested on a decidedly nonneutral purpose, "the full emancipation of the Negro."[167] "[I]n any final assessment of these cases it cannot be too much stressed that the decisive constitutional principles here relevant are in a vital sense not neutral."[168]

Brown provides no basis to support a symmetrical anticlassification rationale. It is telling that the Roberts plurality identified no language in *Brown* to support that interpretation. In inferring such a principle, Chief Justice Roberts and his colleagues violated a cardinal tenet of judicial restraint: that constitutional rules should never be formulated in a manner

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[163] *Id.* at 26.

[164] *Id.* at 27.

[165] *Id.* at 27–28.

[166] *Id.* at 28. *See also id.* at 29 ("In support of what we deem to be the well-founded contention that governmentally-imposed segregation carries with it a stigma directed at the segregated group.").

[167] *Id.* at 31.

[168] Pollak, *supra* note 162, at 31. Other leading constitutional scholars of the day also did not define the case as standing for the symmetrical anticlassification principle that Chief Justice Roberts identified. *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 159 (1955) (It was "so very obvious" that government sponsored racial segregation humiliated, and accordingly injured, African-American citizens. That "cruelty" was sufficiently "obvious and evident" for the Court to recognize and "act on it."); Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 351 (1958) (describing the case as addressing the question of "segregation"). *See also* Siegel, *supra* note 95, at 1482 n.38.

broader than the facts at issue require.[169] Indeed, in other contexts, members of the Roberts Four have insisted on reading history narrowly in extending constitutional norms.[170]

Writing fifty years after the Court decided *Brown*, Judge Harry T. Edwards succinctly captured its animating principle: "The crucial precept underlying the decision in *Brown* is simple: the law cannot be used to separate the races to the detriment of the minority."[171]

That same year Charles Fried, former Solicitor General under President Ronald Reagan, echoed Judge Edwards' understanding of *Brown* and rejected the interpretation Chief Justice Roberts later offered.

Professor Fried wrote:

> This conception of the permanent, institutional subordination of blacks to whites is the theme in the single most important equal protection case, *Brown v. Board of Education*. For the Court in that case did not denounce all classification by race; nor even did it denounce the separation of the races as such. Rather it famously based its decision on what it took to be the implicit social message of inferiority in school segregation and its practical effect in maintaining that inferiority: not only did black children not learn as well because of that message, but, because they did not learn as well, their continued subordination was assured.[172]

Judge Edwards and Professor Fried often do not agree in their constitutional interpretations. They had no difficulty in appreciating the basis of *Brown* and in articulating it in a manner faithful to its language and context.

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[169] *See, e.g.*, Washington State Grange v. Washington State Republican Party, 128 S. Ct.. 1184, 1191 (2008); United States v. Raines, 362 U.S. 17, 21 (1960); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885). *See also* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 152 (2007) (Roberts ignores distinction between holdings and dicta).

[170] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (Scalia, J., plurality) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."). *See also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (substantive due process analysis requires "careful description" of asserted right); Reno v. Flores, 507 U.S. 292, 302 (1993).

[171] Harry T. Edwards, *The Journey from* Brown v. Board of Education *to* Grutter v. Bollinger*: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 945 (2004).

[172] CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 215 (2004).

B. *Roberts's Reliance on* Brown II

The clear absence of anticlassification language in *Brown* and the decision's antisubordination tone no doubt explain why Chief Justice Roberts leaned very gently on it in *Parents Involved.* Instead, Chief Justice Roberts drew greater support from *Brown II.* He cited two clauses from the Court's opinion in *Brown II* to support the color blind Constitution/anticlassification interpretation. Three times in three consecutive paragraphs Chief Justice Roberts cited *Brown II* for the proposition that "full compliance" with *Brown* required achieving a system of public school admission "*on a nonracial basis.*"[173] He also cited *Brown II* for the statement that at "stake is the personal interest of the plaintiffs in admission to public schools . . . *on a nondiscriminatory basis.*"[174]

Relying on *Brown II* is not nearly the same as relying on *Brown.* They were, of course, interrelated since *Brown II* was the remedial component of *Brown* decided by essentially the same Court[175] one year later. Yet *Brown II* is neither iconic nor celebrated[176] and, unlike *Brown,* its various anniversaries pass without recognition. Most everyone now appreciates *Brown*;[177] *Brown II* receives, and deserves, less accolades.

Yet once again, the quoted language from *Brown II* does not quite mean what the plurality claimed. To be sure, the Court said student assignment should be done on a "nonracial" or "nondiscriminatory" basis. But once the Court's statements are restored to their context they lose the intended impact. Presumably no citation is needed to support what everyone then knew and now knows: The Court made those statements to implement a decision in favor of black plaintiffs, and it issued those commands to government actors who had systematically discriminated against blacks so they would not subjugate black children in the future. The Court was instructing school boards not to use race to perpetuate the prevailing system of racial segregation because that system had the purpose and effect of denoting black children as inferiors.

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[173] *Parents Involved,* 127 S. Ct. at 2767–68 (citing *Brown II,* 349 U.S. at 300–01) (emphasis added by Chief Justice Roberts on two of three occasions) (emphasis provided by plurality two of three times).

[174] *Id.* at 2765 (citing *Brown II,* 349 U.S. at 300) (emphasis added).

[175] Justice Harlan had replaced Justice Jackson who had died.

[176] *See* Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83, 86, 138-43.

[177] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 385 (2000) (*Brown* part of constitutional canon).

Surely the Court in *Brown II* was not worried that the offending school boards would favor blacks in their future orders. That outcome was not even a remote possibility. One cannot infer from that language that the Court meant thereby to bar use of racial classifications to foster integration, a practice the Court subsequently sanctioned.[178] Chief Justice Roberts took license with the Court's language when he used orders prohibiting bigots from segregating blacks to erect a constitutional principle against using racial classifications to integrate schools. When the quoted language from *Brown II* is considered in context, the plurality's reliance on it becomes thoroughly unpersuasive.

C. Bolling v. Sharpe

In its quest to reinterpret *Brown* as outlawing essentially all racial classifications, the plurality ignored *Brown's* companion case, *Bolling v. Sharpe*,[179] which the Court decided simultaneously under the Fifth Amendment's Due Process Clause. The problem in *Bolling*, Chief Justice Warren wrote, was somewhat different[180] because it involved the Fifth Amendment's Due Process Clause rather than the Equal Protection Clause of the Fourteenth Amendment. The two were not "always interchangeable phrases" but both stemmed "from our American ideal of fairness" and accordingly were not mutually exclusive.[181] Discrimination could be "so unjustifiable as to be violative of due process," the Court stated.[182] Chief Justice Warren wrote not that all racial classifications were forbidden but that classification "based solely upon race" had to be "scrutinized with particular care."[183] Liberty could be restricted only for reasons sufficiently related to "a proper governmental objective."[184] Segregated public education did not meet that test and as such constituted an arbitrary deprivation of the liberty of Negro children in violation of Due Process.[185]

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[178] *See e.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[179] 347 U.S. 497 (1954).

[180] *Id.* at 498–499.

[181] *Id.* at 499.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 500.

[185] *Bolling*, 347 U.S. at 500.

Chief Justice Warren's formulation in *Bolling* implicitly suggested that some racial classifications might be sufficiently related to a "proper governmental objective" and accordingly survive strict scrutiny. It, too, implicitly rejected the "color blind constitution" reading in favor of a less absolute position. *Bolling* thus rejected for the Fifth Amendment the reading of the Equal Protection Clause the Roberts's plurality opinion gave *Brown*.

V. THE CONSEQUENCES OF CHIEF JUSTICE ROBERTS'S DISCUSSION

The "color blind constitution" principle which the Roberts plurality championed will impact public efforts to use race to address societal discrimination against minorities and to create racially diverse learning environments. The Roberts opinion leaves little room for school districts to use race in student assignment to achieve diversity and is plainly inconsistent in tone with the Court's opinion in *Grutter v. Bollinger* in which the Court found achieving diversity to be a compelling state interest and upheld a plan using race as one factor among many to do so.[186] Whereas *Grutter* seemed to suggest allowing narrowly tailored race conscious admissions programs to continue for at least twenty-five years from 2003, the Roberts opinion implies such programs should end now.[187] The jurisprudence of the Roberts Four is inconsistent with equal protection and will retard America's move to racial justice for reasons I have elsewhere argued.[188]

In *Parents Involved*, Chief Justice Roberts sought to enlist the enormous symbolic weight of *Brown* to support his judicial strategy. *Brown* is, of course, one of the most revered Supreme Court precedents.[189] Consistency with it will insulate any constitutional principle it supports from attack. The anticlassification interpretation of the Fourteenth Amendment would become more credible if it explained *Brown* and *Brown* supported it.

The costs of Justice Roberts's interpretation of *Brown* go beyond its effect on efforts to achieve racial justice in America, serious as that impact will be. It also sounds alarms regarding the role of the Supreme Court and the enterprise of constitutional interpretation.

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[186] 539 U.S. 306, 328 (2003).

[187] *Id.* at 343.

[188] *See, e.g.*, Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83 (2006); Joel K. Goldstein, *Beyond* Bakke: Grutter-Gratz *and the Promise of* Brown, 48 ST. LOUIS U. L.J. 899 (2004). *See also* john a. powell and Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 ST. LOUIS U. L. J. 1153 (2008).

[189] *See e.g.*, BALKIN, *supra* note 4, at 3; Snyder, *supra* note 177, at 385.

One such problem relates to the role of the Supreme Court and its justices as historian. The Supreme Court is an important interpreter of America's history.[190] This role as historian is not, of course, part of the Court's official job description. Rather, to paraphrase Professor Paul A. Freund's apt words, the Court is a historian only by the way.[191] It exists to decide cases and articulate legal principles, but in the course of its work justices and those who influence them have frequent occasion to rest conclusions about the present on claims about the past. Judges claim to use different modes of historical analysis—original intent, precedent, ongoing history—to discover the most valid constitutional interpretations. Justices make claims regarding the holdings of past decisions and regarding past events with the expectation that their readers will accept those claims as reliable. The Court's treatment of events in our past influences what many know about those events and how they regard them. Its status as one of three co-equal branches of government gives its historical discussions an official character. Its appearance as a judicial, rather than political, institution may lend those judgments a semblance of credibility which those of the other branches may not enjoy. Many will accept the Court's claims about *Brown* and the civil rights attorneys simply because the Court, or a bloc of justices, utters them.

The Court's conclusions about history probably do not deserve such deference. The Court, its members, and those who influence them have shortcomings as historians. Although lawyers and judges are not trained as historians, their lack of the skills of that trade is not the principal problem for purposes of this discussion. A lawyer's perspective on history is quite different from that of a historian. Lawyers use history for the instrumental purpose of advancing their client's cause, not to discover the lessons the past has to disclose. In the apt phrase of historian Edwin M. Yoder, Jr., lawyers succumb to "a well-known lawyerly tendency to rearrange historical evidence to fit a brief."[192] Judges ideally should, however, seek and discover the view of history most true to our past, but in practice the competing

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[190] *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 6 (1969) ("The Constitution itself is a product of the nation's past, and the Supreme Court, as the accepted interpreter of the Constitution, has become a public interpreter of American political history.").

[191] *Cf.* PAUL A. FREUND, THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES AND PERFORMANCE 142 (1961) ("Judges are educators only by the way").

[192] EDWIN M. YODER, JR., THE HISTORICAL PRESENT: USES AND ABUSES OF THE PAST 83 (1997).

adversarial presentations of history may sometimes conceal, rather than reveal, historical insight.

The lawyers were not the source of the problem with Justice Roberts's discussion in *Parents Involved*. The arguments about the civil rights attorneys originated with the Court, not with counsel, and the Court's misreading of *Brown*, a case the justices have read and reread on numerous occasions beginning in law school if not sooner, can surely not be attributed to the lawyers. In practice judges deploy constitutional arguments, including historical arguments, not simply to reach decisions but "to construct and reconstruct reasoning for their conclusions after having reached them."[193] When history is used to justify, rather than to discover, conclusions about constitutional meaning the temptations may be particularly great to mold the history to match the conclusions rather than to accommodate conclusion to history. The Court would seem most likely to generate a poor historical analysis when result dictates reasoning rather than the other way around.

That appears to be what happened in *Parents Involved*. The discussion of *Brown* certainly qualifies as bad history. The plurality's discussion of *Brown* distorted a critical moment of our past. It attributed to those who argued *Brown* purposes which it is not at all clear they had and it interpreted the decision in *Brown* as resting on a rationale which *Brown*'s language does not support.[194] The Roberts historical narrative presented the litigation against Jim Crow segregated schools as if a primary focus and result was to vindicate an anticlassification principle capable of operating symmetrically to benefit blacks and whites. Such a portrayal obscures the extent to which *Brown* involved racial classifications against a black minority whom segregation branded as inferiors.

It is always difficult to prove that a desired outcome inspired the stated reasoning but some suggestive circumstantial evidence exists here. Chief Justice Roberts's assessment that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[195] suggested a strong disposition, on moral and pragmatic grounds, to end all race conscious

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[193] MILLER, *supra* note 190, at 10.

[194] *Parents Involved*, 127 S. Ct. at 2798 (Stevens, J., dissenting) ("In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions."); *id.* at 2836 (Breyer, J. dissenting). ("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.")

[195] *Parents Involved*, 127 S. Ct. at 2768.

decision-making and one which was independent of the historical arguments. It would not be surprising if that preference influenced the analysis of the historical record.

Our history can only help us understand the present and shape the future if presented in a manner which is faithful to the past. Distorted history provides false clues which are likely to misdirect us. The distorted history in *Parents Involved* is particularly alarming for two quite different reasons. It deals with race, the most vexing problem in our history, and with *Brown*, one of the Court's most significant decisions. It is hard to imagine an area where America has greater reason to understand and come to grips with its past. Moreover, the distortion of history becomes more serious when it is used to create or support constitutional law. The Roberts plurality no doubt has that ambition for its version of *Brown*. If successful, this new version of *Brown* would become law which *stare decisis* would perpetuate forward.[196]

The plurality's distortion of the advocates' arguments and of *Brown* raise somewhat different problems. In one sense, the distortion of *Brown* itself is the more serious because it has precedential value. Over time, the meaning of a prior decision resides not in what that decision said but in how the Court subsequently interprets it. Future opinions can cite the Chief Justice's interpretation of *Brown* as an authoritative statement which frequent repetition will reinforce. On the other hand, *Brown* itself is among the most accessible Court opinions. Law students read it, and others certainly can, and all can subject the Chief Justice's interpretation to a skeptical analysis.

The distortion of the advocates' arguments has less weight in shaping future outcomes but is also less susceptible to review and correction. Few will review the briefs and oral arguments from that case to examine the merits of the Chief Justice's claims.

Of course, other jurists can respond to and correct the distortions. Justice Brandeis appreciated his colleagues' criticisms of his drafts because it demonstrated they were doing their work conscientiously.[197] In practice, the other chambers may serve as a less reliable countervailing force than one might expect. Justices cannot respond to every argument an opinion advances. They often ignore the claims in solitary concurrences, like that Justice Thomas wrote, and if Chief Justice Roberts added his language at a late stage in the opinion-writing cycle the *Brown* paragraphs may have escaped close review by other chambers.

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[196] *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 123; Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL'Y. 809, 889 (1997).

[197] FREUND, *supra* note 191, at 138.

The plurality's opportunistic history runs the risk of building a jurisprudence of race on shaky foundations. The discovery that justices have, and try to advance, different visions of constitutional concepts should not shock. Indeed, *Brown* in many respects represented a recognition that constitutional adjudication[198] involves making judgments about alternative interpretations of contested concepts. Nor is it troubling that justices embrace different approaches to constitutional interpretation and accordingly assign greater weight to some sorts of constitutional arguments as opposed to others.

Judicial decisionmaking, especially at the Supreme Court, rests on the premise that the process of constitutional interpretation impacts the quality of the doctrine which emerges. If the Court rests doctrine on history and the history is deficient the doctrine is not likely to be any better. Moreover, recourse to bad history may allow the Court to camouflage the real reasons animating doctrine and accordingly avoid a debate on them.

The Chief Justice's formulation about the way to end discrimination may or may not be correct. It reflects moral and pragmatic judgments which lend themselves to discussion. Such an exchange might reveal more common ground in the debate over race conscious remedies than is often apparent and might lead to some consensus positions. Many people, on both sides of the debate, would at least agree that past discrimination against African-Americans has left an enduring mark, that racially diverse educational institutions have virtue, that race conscious decisionmaking has helped open opportunities to minorities and that it also has some costs. Moreover, all justices on the Court have appeared to accept race conscious remedies in some situations and all have agreed that race conscious programs merit some elevated level of scrutiny. Of course, all would not subscribe to each proposition with the same enthusiasm. Many of these and other pertinent claims are subject to empirical study so that the costs and benefits of race conscious decision-making can be assessed. Regardless of whether or not consensus emerged, would the Court's jurisprudence not be better served by a discussion of the merits of that position, as well as an examination of other constitutional arguments, rather than trying to rest such a conclusion on a reinterpretation of *Brown* which lacks historical resonance?

Far from representing a model of strict or fair construction, the plurality's discussion of *Brown* is a rather loose recreation. Rather than reinterpreting *Brown* to support the plurality's anticlassificationist

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[198] *See, e.g.*, William Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L. J. 795, 800 (2004).

predisposition, Chief Justice Roberts would do better to align the Court with the principles truly implicit in the discussions of Warren, Marshall and Carter or to explain why those principles are not compelling under contemporary circumstances.