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## BROWN AS SENIOR CITIZEN

Randall Kennedy\*

On May 17, 2019, *Brown v. Board of Education* attained that notable landmark in American life—the age of sixty-five. One of the Supreme Court’s most esteemed decisions became a senior citizen. *Brown* is a ruling that people tend to think they know even if they have not actually read it. This contributes to a fate that often bedevils celebrities. Observers project their yearnings upon *Brown*, neglecting its particularities. They sanctify *Brown*, make it an icon, and invoke its constitutional authority to impose preferred policies. Liberals have done this, and so, too, have conservatives.

This essay contains five Parts. Part I defines what I mean by *Brown*. Part II recalls its painful birth and traumatic childhood. Then, Part III rejects prominent claims said to be justified by *Brown*. Next, Part IV rebuts frequently heard charges of “betrayal,” noting that the Supreme Court, throughout *Brown*’s adulthood, has never retreated from the invalidation of segregation in public schooling. Finally, Part V asserts that we should acknowledge *Brown*’s limits and, renouncing ancestor worship, look to ourselves to fashion fresh ideas that suitably address the new challenges we face.

### I

When I refer to *Brown v. Board of Education*, I refer to three rulings of the Supreme Court in 1954 and 1955, all of which were authored by Chief Justice Earl Warren.<sup>1</sup> These rulings constitute the historical *Brown*—not an allegory, not a metaphor, not an emblem, but

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**Author:** \*Randall LeRoy Kennedy is the Michael R. Klein Professor of Law at Harvard Law School, where he specializes in contracts, freedom of expression, and race relations law. His books include *For Discrimination: Race, Affirmative Action, and the Law*; *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*; and *Race, Crime, and the Law*. His forthcoming book is *Say It Loud! On Race, Law, History and Culture*.

1 See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

rather a cluster of discrete, although related, opinions that announced decisions in three cases. The first case is a collection of disputes that arose in certain states. *Brown v. Board of Education* arose from a dispute in the State of Kansas; the other disputes occurred in Delaware, Virginia, and South Carolina. At issue was the legitimacy of state constitutional and statutory law that authorized or required officials to separate students on a racial basis for primary and secondary schooling. The South Carolina Constitution, for instance, declared: “Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school for children of the other race.”<sup>2</sup> The companion to the *Brown* cases, *Bolling v. Sharpe*, arose from the District of Columbia, where a policy superintended by the federal government separated students on a racial basis.<sup>3</sup>

In the cases from the states, plaintiffs challenged segregation under the Fourteenth Amendment to the Federal Constitution, which declares that no *state* shall deny to any person within its jurisdiction the equal protection of the laws. In the District of Columbia case, the plaintiff challenged segregation pursuant to the Fifth Amendment, which declares that no person shall be deprived of liberty without due process of law.

Officials defended segregation by saying it was a long-established tradition that diminished social frictions and protected “racial integrity.” They denied that segregation was an invidious discrimination. They insisted that separate but equal facilities satisfied federal constitutional requirements because insofar as segregation was implemented such that racially separated services and facilities were equal no one had a basis for justified complaint.

In the state cases, on May 17, 1954, the Supreme Court ruled that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>4</sup> The Court held that “the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws.”<sup>5</sup> In the companion case, the Court ruled that, with respect to the District of Columbia, “segregation in public education is not reasonably related to any proper governmental objective, and thus [imposes] . . . a burden that constitutes an arbitrary deprivation of . . . liberty in violation of the Due Process Clause.”<sup>6</sup>

The Court addressed the issue of remedy, in a third decision, a little more than a year later. On May 31, 1955, the Court remanded all of the cases to the trial courts from which they had arisen and determined that local officials should continue to exercise primary authority over schooling; additionally, the trial courts should appraise the good faith of

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2 STATES’ LAWS ON RACE AND COLOR 406 (Pauli Murray ed., Univ. of Ga. Press 1997) (1951).

3 *Bolling*, 347 U.S. 497.

4 *Brown*, 347 U.S. at 495.

5 *Id.*

6 *Bolling*, 347 U.S. at 500.

these officials in implementing admission to public schooling on a nondiscriminatory basis. The Court also decreed that, although the new dispensation could not be permitted to yield to popular disagreement, a variety of obstacles could justify permitting local officials additional time to carry out the ruling in an effective manner. *Brown*, the Court concluded, required officials “to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”<sup>7</sup>

## II

Most Supreme Court rulings are rendered after one round of oral arguments. *Brown* needed three. To elicit the unanimous holdings that followed required a feat of diplomacy, inasmuch as views diverged markedly on a bench filled with strong-willed personalities.<sup>8</sup> Essential to the success of that diplomacy was securing the votes of at least five justices. Crucial to securing those votes was the writing of an opinion that would be acceptable to racial conservatives and proponents of “judicial restraint” while at the same time satisfying the aim of racial liberals to invalidate racial segregation in primary and secondary public schooling.

Given the reverence with which some commentators discuss *Brown*,<sup>9</sup> one might expect it to contain a searing denunciation of racist deprivation or a thrilling call for a new birth of racial equality. If eloquence is your expectation, however, Warren’s opinion will bring disappointment. *Brown* is strikingly wan, studiously restrained.<sup>10</sup> It says next to nothing about segregation’s origins, purpose, ideology, or implementation. A reader of *Brown* alone, with no knowledge of American race relations, might well be mystified by the depth

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7 *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

8 For the behind-the-scenes diplomacy, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 292–320 (2004); Mark Tushnet, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1 (1979).

9 For an illustration of *Brown*-worshipping piety, see OWEN FISS, PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION 1–3 (2017). In his first three pages, Fiss mentions *Brown* eleven times, referring to it as “an extraordinary moment in the life of the law, transforming the law into an instrument for realizing the highest ideals of the nation.”

10 J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954–1978, at 29 (1979) (“A schoolboy of the twenty-first century reading back and expecting to find a Declaration of Independence or Gettysburg Address will likely be deflated.”). Wilkinson, a shrewd observer, understood that the dullness of the opinion was purposeful. “If the price of unanimity was a lack of language to anthologize, then that price, sensed Warren, would have to be paid.” *Id.* at 31. On the other hand, the great civil rights advocate Jack Greenberg maintained that *Brown* “proved to be the Declaration of Independence of its day.” Jack Greenberg, *The Supreme Court, Civil Rights, and Civil Dissonance*, 77 YALE L.J. 1520, 1521 (1968).

of the feelings surrounding the case. The opinion offers little explanation of what the fighting is about.

In his opinion, Warren says that “to separate [Blacks] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>11</sup> He embraces the finding of a lower court that “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”<sup>12</sup> In his strongest negative aside, he says that “segregation in public schooling is not reasonably related to any proper governmental objective.”<sup>13</sup> But Warren omits explaining why segregation generated a feeling of inferiority, or was usually interpreted as denoting the inferiority of the “negro group,”<sup>14</sup> or was devoid of any proper governmental purpose.

In 1896, in *Plessy v. Ferguson*,<sup>15</sup> the Supreme Court upheld the constitutionality of racial segregation in intrastate rail transportation, a policy of racial separation that metastasized into every crevice of Southern society. Dissenting in that case, Justice John Marshall Harlan wrote, “What can more certainly arouse race hate . . . than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?”<sup>16</sup> Appropriately mocking segregation’s “thin disguise” of delusive symmetry—the cunning lie of separate but equal—Harlan remarked that “everyone knows that [segregation] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by . . . white persons.”<sup>17</sup> Harlan pointed out that segregation was something done by whites to Blacks, that segregation was a deliberate negation of racial equality, that segregation was a proclamation of white superiority, that segregation was meant to protect whites from the supposedly contaminating influence of colored people. Harlan’s blunt exposure of segregation’s ugliness is absent from Warren’s narrative, and Harlan’s dissent is never even cited in *Brown*.

Warren’s diffidence was neither negligent nor inadvertent. It was part of his diplomacy. Warren wrote privately that he sought to craft an opinion that was “short, readable by the lay public, non-rhetorical, and, above all, non-accusatory.”<sup>18</sup> He did just that. Warren’s

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11 *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

12 *Id.*

13 *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

14 *Brown*, 347 U.S. at 494.

15 163 U.S. 537 (1896).

16 *Id.* at 560.

17 *Id.* at 557.

18 See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 699 (Knopf 2004).

*Brown* opinion managed to invalidate segregation without castigating the officials who designed and imposed Jim Crow oppression. It depicted stigma without stigmatizers, injustice without perpetrators. It struck down school segregation policies in twenty-one states and the District of Columbia without setting forth clearly the basis for this momentous action. Judicial opinions are typically lauded for clarification as well as resolution. *Brown* is a testament to delphic ambiguity.

Perhaps the Chief Justice was right to engage in obfuscation. Perhaps he was prudent to avoid candor. Perhaps he was sensible in eschewing immediate compliance and permitting instead the gradualism of “all deliberate speed.” Perhaps he was wise to be evasive for the purpose of securing unanimity behind the Court’s ruling.<sup>19</sup>

We should, however, be aware of the realities attending *Brown*’s birth. As with other positive developments in the American law of race relations, *Brown* was conceived in compromise. The Emancipation Proclamation left unaffected the legal status of around 800,000 slaves.<sup>20</sup> The Fourteenth Amendment permitted the states to continue racial exclusion at the ballot box, imposing only a penalty for doing so.<sup>21</sup> The Fifteenth Amendment was among the narrowest of the voting rights provisions considered during the First Reconstruction and was promulgated despite the foreseeability of easy evasion.<sup>22</sup> Perceiving a need to compromise, Warren omitted from *Brown* central aspects of the segregation story, most notably white supremacists’ rationale for racially separating children pursuant to the coercive force of state power. *Largely absent from the most honored race relations decision in American constitutional law is a candid reckoning with racism.*

Despite Warren’s effort to soften the blow that the Court delivered to the white supremacist “Southern way of life,” *Brown* triggered an extraordinary negative reaction. Echoing Confederate ancestors, lawmakers in several segregationist states promulgated resolutions of interposition that proclaimed the authority of states to disregard the United States Supreme Court’s ruling. Nineteen senators and eighty-two members of the House of Representatives endorsed the *Declaration of Constitutional Principles*, better known as the *Southern Manifesto*, which denounced *Brown* as “a clear abuse of power” and voiced an intention to resist and reverse it.<sup>23</sup> Mississippi’s governor, Hugh L. White, called *Brown*

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19 The unanimity of *Brown* is often portrayed as a key feature of its attractiveness. See, e.g., WILKINSON, *supra* note 10, at 30 (“It was precisely the unusualness of unanimity on so divisive an issue that made *Brown* so effective.”). Justin Driver bracingly challenges this conventional view, suggesting that “the veneration of *Brown*’s unanimity appears to rest on a severely exaggerated understanding of the Supreme Court’s ability to stifle opponents by speaking with one voice.” JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 253 (2018).

20 ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 28 (2019).

21 *Id.* at 87.

22 *Id.* at 107–09.

23 See WALDO E. MARTIN JR., *BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS* 220 (1998).

“the most unfortunate thing that ever happened,” and he said that his state was “not going to pay any attention to the Supreme Court.”<sup>24</sup> Repudiating the Court’s gradualism, Georgia’s governor, Marvin Griffin, declared that “no matter how much the Supreme Court seeks to sugarcoat its bitter pill of tyranny, the people of Georgia and the South will not swallow it.”<sup>25</sup>

Over the next several years, states moved from rhetoric to action. Louisiana enacted school segregation statutes anew that denied credits to any student who attended desegregated instruction, decertified any teacher who delivered instruction in a desegregated class, fired any principal who permitted desegregated schooling, and threatened prosecution of any agent of the federal government who attempted to implement *Brown*. Several jurisdictions rescinded laws requiring mandatory school attendance. Others enacted laws empowering officials to close schools that were ordered to desegregate. In a county in Virginia, officials did away with public schooling altogether for five years in order to avoid any desegregation (and would have continued the shutdown even longer if not for judicial intervention).<sup>26</sup> In Little Rock, Arkansas, Governor Orval Faubus called out the state’s National Guard to prevent the court-ordered desegregation of a high school, and he subsequently closed all of the city’s high schools for a year rather than see any of them desegregated. Voicing a sentiment consistent with the governor’s conduct, a white teenager bluntly announced why she would prefer no schooling to schooling governed by *Brown*. The teen said that she would “rather be stupid than go to school with a nigger.”<sup>27</sup>

### III

Seldom, if ever, has a Supreme Court ruling met with as much sustained, outspoken, defiant, and intermittently violent resistance as the backlash against *Brown v. Board of Education*. Yet, as a matter of law, the Supreme Court’s invalidation of Jim Crow segregation in schooling has never been rescinded. To the contrary, the Court supported the champions of the civil rights movement with rulings that enabled them to spread anti-segregationism beyond schooling to recreation, housing, employment, transportation, seating in courtrooms, prisons, matrimony, and just about every other conceivable facet of social life.<sup>28</sup> Jim Crow was routed. Today, nothing like the segregation provision of the

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24 See REED SARRATT, *THE ORDEAL OF DESEGREGATION: THE FIRST DECADE* 1, 5 (1966) (quoting Mississippi Governor Hugh L. White).

25 See YASUHIRO KATAGIRI, *BLACK FREEDOM, WHITE RESISTANCE, AND RED MENACE: CIVIL RIGHTS AND ANTICOMMUNISM IN THE JIM CROW SOUTH* 98 (2014) (quoting Georgia Governor Marvin Griffin).

26 See *Griffin v. Prince Edward Cnty*, 377 U.S. 218 (1964).

27 See KAREN ANDERSON, *LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL* 195 (2010).

28 See Greenberg, *supra* note 10.

South Carolina Constitution exists in the United States as an effective law-giving force. This is not to say that racial injustice in all its manifold incarnations has been overcome. In many domains, whiteness continues to elicit privilege, while coloredness continues to attract deprivation. But the type of racial oppression that *Brown* specifically targeted has been vanquished.

After Heman Sweatt, an African American, applied for admission to the University of Texas School of Law in 1947, state officials, confidently reliant upon the validity of segregation, openly rejected him on a racial basis, admitting that “he possessed every essential qualification for admission, except that of race.”<sup>29</sup> Fourteen years later, when James Meredith, another African American, applied for admission to the University of Mississippi, a profound change had occurred that prevented racist officials from confidently relying upon the validity of segregation. That change was *Brown*. It had moved the needle of legitimacy. Now the segregationists could no longer be honest. *Brown* forced them abjectly to lie. The State now claimed that it no longer maintained a policy of segregation at the university, an obviously untrue assertion at which a U.S. Court of Appeals scoffed. Deprived of the legal high ground they had long enjoyed, the segregationists resorted to violence, fraud, and corruption of the judicial process.<sup>30</sup> But eventually, albeit after frustrating delay, Meredith did enroll at Ole Miss, a step forward that could not have been achieved without *Brown*. Meredith’s advance has now been replicated on innumerable occasions. Now, nowhere in the United States can an official say without fear of legal repercussion that he or she is using governmental authority to separate pupils on a racial basis to create or maintain racially homogeneous “white” schools. Officials said that loudly and assuredly prior to May 17, 1954. No more.

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29 Sweatt v. Painter, 210 S.W. 2d 442, 443 (Tex. Civ. App. 1948), *rev’d* 339 U.S. 629 (1950). The Texas Constitution, echoing the South Carolina Constitution, provided that “separate schools shall be provided for the white and colored . . . and impartial provision shall be made for both.” TEX. CONST. art. VII, § 7. The U.S. Supreme Court ordered that Sweatt be admitted to the University of Texas, but only because the state failed to offer to colored applicants a law school that was equal to that offered to whites. The Court made it practically impossible for the state to create racially segregated law schools that could be deemed “equal” under the Court’s analysis. Still, as a formal matter, the Supreme Court did not extinguish the legal vitality of segregation in *Sweatt v. Painter*.

30 U.S. District Court Judge Sidney Mize, forsaking his obligation to be truthful, sought to ratify the deceitful claim of state educational officials who swore that they rejected Meredith’s application for nonracial reasons. Judge Mize “found” that the University of Mississippi no longer engaged in racial segregation and that its rejection of Meredith’s application had nothing to do with race. *See Meredith v. Fair*, 202 F. Supp. 224 (S.D. Miss. 1962). Reversing Judge Mize, in a sardonic opinion penned by Judge John Minor Wisdom, the Fifth Circuit Court of Appeals noted that “from the moment the defendants discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense,” the court observed, “designed to discourage and to defeat by evasive tactics which would have been a credit to Quintus Fabius Maximus.” *Meredith v. Fair*, 305 F.2d 343, 344 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962). All too little attention has been paid to the corruption of the legal process that occurred when segregationist judges lied repeatedly in order to avoid the conclusions demanded by *Brown v. Board of Education*.

For a decade after *Brown*, segregationist defiance succeeded impressively. By 1964 only a little bit more than one percent of Black children in Dixie attended schools with whites.<sup>31</sup> Then, by dint of private litigation initiated by brave plaintiffs who refused to back down even in the face of frightening intimidation, by dint of federal legislation, and by dint of nudging by the Johnson and Nixon administrations, the situation on the ground was transformed. The dam broke and desegregation flowed, even in the Deep South. Black children crossed the race line to enter schools, even though segregationists had vowed, “Never!”

Reflective of that profound change in American life and law was the trajectory of *Brown*'s reputation. Segregationists who vilified *Brown* at its birth and during its early years received a degree of succor from others who distanced themselves from the Court's ruling or spoke of *Brown* skeptically, sometimes even with disdain, because of objections to Warren's ruling, including to its theoretical thinness and allusions to ill-supported social science. Over time, however, *Brown*'s prestige grew and solidified to the place where its justifiability ascended to the rank of an unquestionable assumption. Its acclaim grew as millions were transfixed and transformed by the morally resplendent oratory of Martin Luther King Jr.; the disciplined militancy of the Student Nonviolent Coordinating Committee, the heroic persistence of the National Association for the Advancement of Colored People; the exposure of injustice that led to the Civil Rights Bills of 1957, 1960, 1964, 1965, and 1968; and the shocking sacrifice of brave activists such as Medgar Evers, Andrew Goodman, Michael Schwerner, James Chaney, Jimmie Lee Jackson, Viola Liuzzo, James Reeb, and Vernon Dahmer. As the civil rights movement won influence and admiration, so too did *Brown*.

By the late 1960s, former declared enemies of *Brown* were abandoning open opposition. In 1952, a law clerk to Supreme Court Justice Robert Jackson wrote a memo entitled “A Random Thought on the Segregation Cases,” in which he posited that *Plessy v. Ferguson* ought to be reaffirmed. Nineteen years later, that clerk, William Hubbs Rehnquist, came before the U.S. Senate for confirmation as President Richard Nixon's nominee as an associate justice of the Supreme Court. Rehnquist insisted that, in that memo, he had articulated not his own thinking but that of his boss. Fifteen years after that, when he was nominated to become chief justice, Rehnquist again distanced himself from the memo. Both times, he realized that his chances for confirmation would be seriously diminished were he to admit what is almost certainly true: as a young attorney he saw no constitutional infirmity in racial segregation, and as a mature attorney he had continued to doubt *Brown*'s justifiability. So, he pinned the substance of the memo upon his deceased boss and engaged in a belated confirmation reassessment: “I wish to state

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31 GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (2d ed. 2008).



unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.”<sup>32</sup>

By offering ratification from the right wing of the legal establishment, Rehnquist and other conservatives grudgingly completed *Brown*’s canonization. Since the late 1960s, few ambitious jurists have been willing to publicly dispute the rightness of *Brown*. It is, as Professors Jack Balkin and Sanford Levinson observe, “normatively canonical. . . . [O]ne establishes oneself as a properly acculturated lawyer by affirming *Brown*’s correctness.”<sup>33</sup>

#### IV

*Brown*’s beatification has prompted advocates of all sorts to enlist it in support of their causes. They want to associate its aura with their aims. Racial liberals did this in the 1970s and 1980s, when they successfully invoked *Brown* as a justification for requiring authorities not simply to desist from segregating schools but also to take affirmative steps to ensure that schools be racially mixed. Although *Brown* had initially declared that “thou shalt not segregate,” reformers came to interpret it as declaring “thou shalt integrate.” The original *Brown* prohibited racial segregation in schooling as a matter of governmental policy. *Brown*, as later recast, required authorities to create racially heterogeneous schools, even if doing so required burdensome busing.<sup>34</sup> In retrospect, this recasting is remarkable given the modesty of the original *Brown* decisions. Warren’s rulings in 1954 and 1955 offer an implausible predicate for the sweepingly affirmative actions taken in its name subsequently.

Political and judicial reversals undercut the ability of racial liberals to implement some of their plans.<sup>35</sup> But ideas that animated those plans have persisted. They manifest

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32 Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 445 (2000) (quoting Rehnquist).

33 J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 997 (1999); see also Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185, 185 (1994) (describing *Brown* as “politically sacrosanct”); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 675 (1992) (opining that genuflection to *Brown* is the “admission ticket for entry into mainstream constitutional dialogue”). It should be noted, however, that some jurists nominated for judgeships by President Trump declined to state their belief that *Brown* specifically was rightly decided. They justified their nonresponse on the ground that sharing their personal view of *Brown* would put pressure on them to share their personal view on other cases, most notably *Roe v. Wade* (410 U.S. 113 [1973]). See Laura Meckler & Robert Barnes, *Trump Judicial Nominees Decline to Endorse Brown v. Board Under Senate Questioning*, WASH. POST, May 16, 2019.

34 See, e.g., *Keyes v. Sch. Distr. No. 1 Denver*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

35 See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977).

themselves in efforts to revise the meaning of certain highly emotive terms, most notably “segregation.” Many racial liberals now erase the distinction between the “segregation” of the pre-*Brown* era, when the law expressly required racially homogeneous institutions, and the “segregation” of today, when that term is often used to refer to institutions that are said to be “racially imbalanced”—having populations that do not mirror the racial demographics of the surrounding community.<sup>36</sup> Although for some this usage is merely imitative habit, for others this usage is part of a strategy to discredit those institutions by tarring them with a label associated with the state-sanctioned racial stratification that was openly and unapologetically practiced prior to *Brown*.

If schools are bad or unjustly organized, they should be exposed and made better or fairer. “Segregation” with its accompanying connotations, however, is a misleading term to use in seeking to understand and remedy some of the problems we currently face, including circumstances under which, in the absence of current state-sanctioned efforts to separate students on racial grounds, students of color nonetheless suffer strikingly poorer educational outcomes in comparison with white peers. “Segregation,” properly understood, means racial separation in schools that has been deliberately engineered by public authorities. Typically, though, this is not what is at play as dissension erupts among whites, Blacks, Latinos, Native Americans, people of Asian ancestry, and still others over optimal or permissible ways to organize public schooling. Rather, at play is a mosaic of contending forces battling over charter schools, Afrocentric schools, race-conscious integrationism, selection schemes based on standardized testing, and other contested initiatives. These conflicts are marked in unprecedented ways by cross-cutting fissures of class, culture, and ideology, as well as race—a situation much more complicated than that which *Brown* addressed.

Overlooking complication will lead us awry. But that is the fate to which we consign ourselves when we apply terminology that suitably illuminated the problems of an earlier time but that is unsuitable to the illumination of looming difficulties today. The problem of the school from which Blacks are racially excluded categorically, notwithstanding grades or test scores or anything else, should be viewed differently from the problem of the selective school in which the Black population is disproportionately small because relatively few Blacks have applied and a large number of those who have applied are

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36 See *Spangler v. Pasadena*, 311 F. Supp. 501 (C.D. Cal. 1970), for an early example of judicial revision of “segregation” that expressly collapsed the distinction between the racial separation of students directly caused by purposeful governmental policy and a condition of racial separateness stemming from a variety of causes. According to the district judge in *Spangler*, “[r]acial segregation and racial imbalance are two names for the same phenomenon, racial separation.” He then notes that he uses the two terms “interchangeably.” *Id.* at 506 n.4. The Supreme Court ultimately disapproved of much of the district court’s ruling in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

outperformed by peers of different races.<sup>37</sup> Although the former school should be labeled “segregated,” the latter school ought not. By hypothesis, the rules pursuant to which the latter school is organized are racially unbiased in design and implementation. The racial demographics of the school do not stem from efforts by officials to deter, exclude, or in any way diminish the presence of students of color on account of race. Rather, the racial demographics of the student body almost certainly reflect the obstructive power of debilitating disadvantages left by vestiges of racial injustice, including historically victimized parents who, relative to others, have fewer resources to impart to their children. These and other difficult-to-remedy problems will be obscured by portraying the school as “segregated,” when, in fact, its problems lie elsewhere.

Commentators who wield loosened definitions of “segregation” invoke the specter of the “New Jim Crow.” The outstanding articulation of this concept is Michelle Alexander’s influential critique of the administration of criminal justice.<sup>38</sup> But invocations of the New Jim Crow have now reached to other domains as well, indeed to apply to American society in general. The central theme of the New Jim Crow is that the racial hierarchy that gave rise to old-style segregation remains intact. Social reforms (e.g., Jackie Robinson breaking the color bar in baseball and Vanessa Williams breaking the color bar at the Miss America pageant), judicial reforms (e.g., *Smith v. Allwright*<sup>39</sup> and *Shelley v. Kraemer*<sup>40</sup>), and legislative reforms (e.g., the Civil Rights Act and the Voting Rights Act) have etched significant changes into the fabric of American life. Oprah is a media sensation. A few Blacks are CEOs of major corporations. Colin Powell was the most admired military officer since World War II. Every presidential cabinet since 1964 has featured at least one African American. Barack Obama was elected and reelected president of the United States. An African American woman, Kamala Harris, has been elected vice president of the United States, while an African American man, Raphael Warnock, has been elected to serve as a U.S. senator from Georgia. But despite these indicia of change, analysts who propound the idea of the New Jim Crow insist that America remains a pigmentocracy. They assert that racial hierarchy manifests itself in educational regimes in which, systematically and

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37 See generally JOSHUA GOODMAN & MELANIE RUCINSKI, INCREASING RACIAL DIVERSITY IN BOSTON’S EXAM SCHOOLS (Oct. 2018); Jelani Cobb, *Back to School Reform*, NEW YORKER, Sept. 8, 2019, <https://www.newyorker.com/magazine/2019/09/16/back-to-school-reform>; Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.’s Most Selective High School, Out of 895 Spots*, N.Y. TIMES, Mar. 18, 2019, <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html>; Susan Dynarski, *Evidence on New York City and Boston Exam Schools*, BROOKINGS (July 19, 2018), <https://www.brookings.edu/research/evidence-on-new-york-city-and-boston-exam-schools/>.

38 See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

39 321 U.S. 649 (1944).

40 334 U.S. 1 (1948).

predictably, whites fare far better than people of color. They argue that these circumstances are the result of decisions in which officials have chosen, with varying degrees of self-awareness, to privilege policies advantageous to whites over policies that would be advantageous to non-whites. An example, they say, is the Supreme Court's choice to condemn as unconstitutional *de jure* segregation while putting "de facto segregation" beyond the reach of constitutional regulation.

The New Jim Crow analogy taps into the memory of a notorious, older regime of racial injustice. Those who deploy it are determined to make vivid the current situation in which Blacks continue to be relegated to the bottom tiers of American society as measured by all manner of indicia of well-being—from longevity and wealth to access to employment, housing, health care, and education. Purveyors of the New Jim Crow analogy, however, use it for more than exegesis; they also use the analogy for purposes of political mobilization. They implore audiences to resist assurances of mission accomplished and to reject claims that we have overcome. It was sure to happen, as it has, that a law professor was going to assert that "the new Jim Crow is the old Jim Crow."<sup>41</sup>

There is much that is laudable about the aims and tactics of those sounding alarms about the supposed New Jim Crow. The analogy has assisted in triggering indignation that has fueled new activism challenging formidable problems. Purveyors of the New Jim Crow analogy, however, tend to erase crucial distinctions, insisting upon a continuous, unchanging narrative of white supremacist ascendancy. Although proponents of the New Jim Crow analogy decry triumphalism, their central rhetorical trope derives its power from the fact that, overwhelmingly, Americans condemn the (old) Jim Crow system. The widely perceived unacceptability of *that* system prompts and undergirds the effort to associate it with contemporary policies and conditions also deemed to be unacceptable. This strategy, however, holds dangers of its own. One is relying too much on the intellectual and political labors of precursors—echoing overmuch imagery that is now overused. If nothing much has changed between the segregation regime and what exists today, it would seem that no harm will ensue from continuing to use the same old vocabulary of protest. If much has changed, however, deploying obsolescent terminology is bound to mislead.

A far more troubling example of anachronism is supplied by the Supreme Court, particularly Chief Justice John Roberts. In 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>42</sup> in a set of cases arising from Kentucky and Washington, the Court invalidated policies undertaken voluntarily by local school boards that used race as one of several possible factors in determining placements for students in primary and

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41 Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 *YALE L.J.* 1002 (2019).

42 551 U.S. 701 (2007).

secondary schools. The school boards' purpose was to sustain as much racial heterogeneity as possible.

At the end of his plurality opinion for the Court in *Parents Involved*, the Chief Justice wrapped himself in *Brown*. Because *Brown* required admission to public schools on a non-discriminatory basis, Roberts reasoned, it should be impermissible for school boards on their own, absent judicial compulsion, to take race into account in making student assignments, even if maintaining racial integration was the aim. "The way to stop discrimination on the basis of race," Roberts concluded, "is to stop discriminating on the basis of race."<sup>43</sup>

Chief Justice Roberts's equation of racial discrimination at issue in *Brown* and the racial discrimination at issue in *Parents Involved* is obtuse. It is an awful example of myopic formalism. The segregation challenged in *Brown* was a regime that oppressed Blacks. It categorically disadvantaged them with a policy signaling that in the estimation of officials African Americans were an inferior group that should be publicly labeled as such. The policy challenged in *Parents Involved* can hardly be said to have oppressed whites. The upshot of predominantly white school boards, those policies contained nothing that could plausibly be seen as signaling a belief that whites are racial inferiors. *Brown* featured officials separating the races in order to quarantine all Blacks. *Parents Involved* featured policies that adversely affected some whites—not all, but some—for the purpose of securing racially mixed schooling. Roberts says that drawing racial distinctions to create segregation and to create integration are both similarly violative of the Constitution's directive to government to offer to all persons equal treatment before the law. This position is ridiculous and ought to be rejected. It purports to erase the difference between the policies in question in *Brown* and those in *Parents Involved*. That polarity is the difference between a sign that says "People of Color Are Welcome!" and a sign that says "People of Color Are NOT Welcome!"<sup>44</sup> Both signs draw racial distinctions. But the first is a benign, positive racial discrimination, while the second is a malign, negative racial discrimination. *Brown* addressed the latter, which was all too prevalent in the United States of 1954. The former—positive discrimination aimed at fostering integration or rectifying past injustices or enhancing diversity—hardly had a presence in American life back then. *Brown* simply did not speak to the permissibility or wisdom of such policies. When Chief Justice Roberts justifies his views on the matter by reference to *Brown*, he is engaging in bamboozlement.

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43 *Id.* at 748.

44 Justice John Paul Stevens made the point nicely: "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." To ignore the gulf that should be seen as separating positive from negative racial distinctions, he rightly complains, is to "disregard the difference between a 'No Trespassing' sign and a welcome mat." *Adarand v. Peña*, 515 U.S. 200, 243–47 (1995) (Stevens, J. dissenting).

## V

We would do well now to appreciate the historical *Brown* and continue to deploy it to invalidate any governmental action undertaken for the purpose of separating people on a racial basis to signify and accomplish racial hierarchy. We should also acknowledge *Brown's* boundaries and retool ourselves to confront a very different racial landscape than that confronting Americans in 1954. The creators of *Brown*—the brave plaintiffs, their justly celebrated lawyers, and the justices who allowed themselves to break from tradition—all warrant congratulations and gratitude. *Brown* is a vehicle that carried essential freight. But it should not be looked to longingly as a vehicle that can carry *all* of the burdens of racial justice. To adequately address the crises we confront now requires more than habitual incantations of *Brown* and allusions to “segregation” and the “New Jim Crow.” It requires forging *new* law, *new* ideas, and a *new* vocabulary pertinent to current demands.