The Price of Fame: *Brown* as Celebrity

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Parents Involved in Community Schools v. Seattle School Dist. No. 1[1] revived *Brown v. Board of Education*.[2] During the previous ten to fifteen years, Rehnquist and Roberts Court Justices rarely mentioned the judicial decisions declaring segregated public schools unconstitutional. *Brown I*, *Brown II*,[3] or *Bolling v. Sharpe*[4] were almost never cited for any significant legal proposition after George Bush took office in 2001. This neglect was abruptly abandoned in 2007. The *Parents Involved* opinions individually and as a group set or came close to setting numerous records for citing *Brown*. These records include total number of citations in all opinions (58), most opinions that cited *Brown* at least once (5),[5] and most citations to *Brown* in a dissenting opinion (Breyer—24).[6] Justice Lewis Powell's opinion in *Keyes v. Sch. Dist. No. 1*[7] retains the lead for most citations to *Brown* (27),[8] but Justice David Breyer's dissent in *Parents Involved* (24)[9] is now in silver medal position while Justice Clarence Thomas occupies the second spot for

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[1] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2008).

[2] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). These two decisions are conventionally lumped together as *Brown*. This paper will follow that convention, unless specific reason exists to refer to *Brown I*, the specific decision declaring school segregation unconstitutional handed down in 1954 or *Brown II*, the specific decision on implementing *Brown I* handed down in 1955.

[3] For the distinction between *Brown I* and *Brown II*, see *supra* note 2.

[4] Bolling v. Sharpe, 347 U.S. 497 (1954).

[5] Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974) is tied with *Parents Involved* for this honor.

[6] *Parents Involved*, 127 S. Ct. at 2800–37 (Breyer, J., dissenting).

[7] 413 U.S. 189 (1973).

[8] *Id.* at 217–53 (Powell, J., concurring and dissenting). Powell's opinion in *Keyes* was classified as a concurrence because he agreed with the disposition of the case. *See id.* at 217. If Powell's opinion is classified as a dissent (or in a separate category of opinions that concur and dissent), then Justice Thomas is the new record holder for most citations to *Brown* in a concurring opinion. *See infra* note 10 and accompanying text.

[9] *See supra* note 6 and accompanying text.

most citations to Brown in a concurrence (22).[10] With the exception of *Keyes* (51), the total number of citations in *Parents Involved* to the *Brown* cases and *Bolling* almost doubles the number of citations in any other judicial decision.[11]

This dramatic change in citation masks the more fundamental irrelevance of *Brown* for Rehnquist and Roberts Court Justices. From 1954 until 1986 most parties to debates over racial equality thought that *Brown*—or at least a broad reading of *Brown*—supported the constitutional vision of the civil rights movement. While the Warren Court reigned, proponents of civil rights cheered the judicial decisions which held that racial segregation was inherently unconstitutional.[12] Opponents of the civil rights movement insisted that *Brown* was wrongly decided.[13] While the Burger Court reigned, civil rights advocates and their judicial supporters insisted that *Brown* required courts to remedy all vestiges of racial inequality rooted in past segregation.[14] Opponents of the civil rights movement maintained that *Brown*'s remedial reach was far more limited.[15] In sharp contrast to previous opponents of the civil rights movement, Rehnquist Court conservatives either ignored *Brown* or appropriated *Brown* in ways that blunt the critical edge of that decision. More often than not, Justices after 1986 refrained from mentioning *Brown* at all or cited *Brown* solely for propositions everyone agreed on.[16] In *Parents Involved*, all parties cited *Brown* extensively as providing precedential support for their contrasting positions.[17] Opponents of integrating schools eagerly endorsed *Brown* as the lineal legal descendants of Thurgood Marshall. Presently invoked to support every popular position on racial equality, the 1954 school segregation cases no longer stand for any contested proposition or are identified in any distinctive way with the civil rights movement. *Brown*, like Paris Hilton, is now famous largely for being famous.

The present celebrity status of *Brown* is partly rooted in judicial practices during the time that decision was unanimously acknowledged as providing crucial precedential support for the interpretation of equal protection

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[10] *Parents Involved*, 127 S. Ct. at 2768–88 (Thomas, J., concurring).

[11] Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) occupies third place with 33 citations.

[12] *See infra* notes 71–88 and accompanying text.

[13] *See infra* notes 45–49 and accompanying text.

[14] *See infra* notes 148–157 and accompanying text.

[15] *See infra* notes 158–167 and accompanying text.

[16] *See infra* notes 301–311 and accompanying text.

[17] *See infra* notes 342–349 and accompanying text.

championed by the civil rights movement. With the exception of Justice William Douglas,[18] the members of the Warren Court who decided *Brown* and *Bolling* were initially reluctant to cite those cases or announce the broader principles justifying their decision to declare unconstitutional school segregation. Rather than consistently invoke *Brown* when elaborating a broad principle of constitutional equality, liberal justices tended to limit legally significant citations to fairly narrow propositions about racial equality.[19] Legal scholarship repeatedly teased out powerful jurisprudential themes from the 1954 opinions,[20] but neither Warren Court nor early Burger Court majorities explicitly took a stand on whether *Brown* committed Americans to an anti-classification or an anti-subordination conception of the Equal Protection Clause.[21] This failure to specify the principles that best justified *Brown* enabled the generation of conservative Justices on the Rehnquist and Roberts Courts to wield language in the *Brown* opinions and briefs as weapons against the constitutional vision which inspires the contemporary civil rights movement.[22] Contemporary liberals committed to abolishing racial caste in the United States have the spirit of *Brown* on their side,[23] but the precedential history is unfortunately far more ambiguous.

This Article examines the history of *Brown I*, *Brown II*, and *Bolling* in the Supreme Court of the United States. Part I briefly discusses the primitive methods used to assess citations, points to important limits on citation analysis, and presents citation counts for the Warren, Burger, Rehnquist, and Roberts Courts. Parts II–V detail with respect to each of these courts how often *Brown I*, *Brown II*, *and Bolling* were cited, which Justices did the citations, the various principles and outcomes different Justices thought *Brown* could be used to support, and the nature of judicial disagreement over the meaning of the segregation cases. Part VI explores the nature of a constitutional universe in which *Brown* is either never cited or cited promiscuously on every side of a major constitutional dispute.

Enduring precedents, the analysis suggests, go through three stages. In the first stage, they fight for survival. This describes *Brown* during the first

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[18] *See infra* notes 95–96 and accompanying text.

[19] *See infra* notes 84–88 and accompanying text.

[20] *See* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2002) (setting out various alternative rationales for the *Brown* decision).

[21] *See infra* notes 71–88 and accompanying text.

[22] *See infra* notes 313–317, 342–344 and accompanying text.

[23] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

decade after that decision was handed down. No Supreme Court Justice asserted, "*Brown* should be overruled," but many citations to *Brown* came in the context of political efforts to reverse or marginalize that decision.[24] In the second stage, precedents fight for extension. This describes *Brown* in the later Warren and Burger years. Civil rights activists insisted that *Brown* be read broadly.[25] Nixon Justices maintained that *Brown* authorized only a narrow range of practices.[26] In the third stage, precedents become celebrities. This describes *Brown* at present. Americans agree that *Brown* is a landmark decision, agree that decision should be broadly interpreted, but insist that the 1954 ruling provides precedential support for their particular and divergent constitutional visions.[27] As Sections IV and V will detail, Justices whose partisan supporters identity with political movements that previously either opposed *Brown* or broad readings of *Brown* presently cite *Brown* as enthusiastically when elaborating their distinctive racial understandings as do Justices whose partisan supporters identify with the contemporary civil rights movement. *Brown* is a decision no one questions only because no issue of constitutional importance depends on whether *Brown* was correctly decided or on whether the principles underlying *Brown* should be construed broadly.

Celebrity precedents are not entirely meaningless. The present celebrity status of *Brown* renders impossible political or legal efforts to return to the status quo before, say, 1966. This may seem small consolation from the perspective of civil rights activists in 2008, but appears a greater boon given the status of civil rights activism in 1940.[28] The crucial point is that *Brown* has no remaining capacity to inspire continued progress on American race relationships. Just as Americans are likely to need an entirely new political era to make greater racial progress, so the next successful generation of civil rights advocates will likely march under a different banner.[29]

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[24] *See infra* notes 45–49 and accompanying text.

[25] *See infra* notes 148–157 and accompanying text.

[26] *See infra* notes 158–167 and accompanying text.

[27] *See infra* notes 342–349 and accompanying text.

[28] For a good comparison of the status of racial equality in 1940 to racial equality at present, see PHILIP A. KLINKNER WITH ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 136–316 (1999).

[29] That banner may be the election of President Barack Obama. One might note in this respect that Obama did not make any references to *Brown* during the presidential debates and rarely if ever did so on the campaign trail.

I. THE CITATION COUNT

Citation counting has not yet attained the precision of ice dance judging. Consider the clauses, "*Brown* holds," "*Brown I* and *II* hold," and "*Brown I* and *Brown II* hold." Which of these examples contains one citation to *Brown* and which contains two is unclear. No matter what choice the researcher makes, no significant difference exists between the phrases for purposes of determining the influence of *Brown* on the legal opinion. Making an accurate citation count is also problematic when opinions provide quotations from another opinion that cites *Brown* or a scholarly article that cites *Brown* (or has *Brown* in the title). Sometimes, the author may be relying on *Brown* to make a point. Other times the point of the reference may be unclear. Stylistic differences often explain the number of times *Brown* or *Bolling* is mentioned in a paragraph devoted to discussing those decisions. The difference between a paragraph that mentions *Brown* five times and one that mentions *Brown* six times is probably trivial for present purposes. In short, many judgment calls must be made when doing the citation count and no good reason exists for thinking small variations in citations have any meaning at all.

A. *The Methods*

This article adopted the following practices for counting citations to *Brown I*, *Brown II*, and *Bolling*. References to *Brown* in the singular counted as one citation. References to "*Brown I* and *II*" (or "*Brown I* and *Brown II*") counted as two citations. If an author made a statement about *Brown* and then used a quote from *Brown* to support the claim, that counted as only one citation. If another quotation from *Brown* occurred later in the paragraph, an extra citation was counted if in my judgment the quotation made a slightly different point. Citations to articles with *Brown* in the title did not count. Quotes from other opinions and works that included a citation to *Brown* did count. These standards differentiate opinions that cite *Brown* ten times from opinions in which only one citation is made. Much smaller differences are almost certainly meaningless.

No exact standards determine when certain citations to *Brown* have legal significance or are better thought of as celebrity citations that support uncontroversial constitutional claims. Consider the assertion, "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[30] This was a controversial assertion in 1954. Today the citation is a

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[30] Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

banality. No one claims otherwise. No crucial constitutional issue turns on whether racial classifications are constitutionally suspect.[31] The precise moment when general agreement developed that racial classifications are constitutionally suspect is not clear. The best I can do is explain my judgments in the text and let the readers adjust the data to fit their intuitions.

B. *The Scorecards*

Table 1 – Warren Court Citations

Year	Cases	Opinions	Citations
1954	5	5	6
1955	1	1	2
1956	3	3	5
1957	1	1	1
1958	2	3	17
1959	4	5	7
1960	5	5	5
1961	4	4	5
1962	1	1	1
1963	8	11	26
1964	10	14	34
1965	10	12	16
1966	3	5	7
1967	2	2	3

[31] *See infra* Parts IV–V.

Year	Cases	Opinions	Citations
1968	7	8	35
1969	6	9	20

Table 2 – Burger Court Citations

Year	Cases	Opinions	Citations
1969	1	1	6
1970	3	5	9
1971	15	21	73
1972	5	6	18
1973	14	21	77
1974	12	16	41
1975	4	4	4
1976	10	11	15
1977	9	10	19
1978	3	5	21
1979	11	16	68
1980	8	9	14
1981	8	9	9
1982	9	9	9
1983	3	3	5
1984	3	5	9
1985	6	7	7
1986	2	3	4

Table 3 – Rehnquist Court Citations

Year	Cases	Opinions	Citations

Year	Cases	Opinions	Citations
1986	3	5	8
1987	4	4	7
1988	4	5	7
1989	3	5	9
1990	4	7	15
1991	2	3	20
1992	6	13	61
1993	1	1	1
1994	3	4	7
1995	4	9	36
1996	3	3	3
1997	1	1	3
1998	1	1	1
1999	1	1	1
2000	1	1	1
2001	1	1	1
2002	1	1	1
2003	4	6	7
2004	1	1	2
2005	2	3	3

Table 4 – Roberts Court Citations

Year	Cases	Opinions	Citations

Year	Cases	Opinions	Citations
2005	0	0	0
2006	0	0	0
2007	1	5	67
2008	1	1	1

Table 5 – Warren Court Justice Citations

Justices		Opinions			Citations		
First Name	*Last Name*	*Brown*	*Bolling*	*Total*	*Brown*	*Bolling*	*Total*
Earl	Warren	9	3	12	23	6	29
Hugo	Black	10	2	12	32	3	35
Stanley	Reed	0	0	0	0	0	0
Felix	Frankfurter	2	0	2	3	0	3
William	Douglas	14	2	16	20	2	22
Robert	Jackson	0	0	0	0	0	0
Harold	Burton	0	0	0	0	0	0
Tom	Clark	2	0	2	7	0	7
Sherman	Minton	0	0	0	0	0	0
John	Harlan	10	2	12	12	4	16
William	Brennan	4	2	6	29	2	31
Charles	Whittaker	1	0	1	1	0	1
Potter	Stewart	4	0	4	4	0	4
Byron	White	1	1	2	1	2	3
Arthur	Goldberg	4	2	6	16	5	21
Abe	Fortas	0	0	0	0	0	0
Thurgood	Marshall	0	0	0	0	0	0

Table 6 – Burger Court Justice Citations

Justices		Opinions			Citations		
First Name	*Last Name*	*Brown*	*Bolling*	*Total*	*Brown*	*Bolling*	*Total*
Hugo	Black	5	0	5	15	0	15
William	Douglas	6	9	15	9	10	19
John	Harlan	1	0	1	1	0	0
William	Brennan	16	9	25	36	16	52
Potter	Stewart	11	6	17	22	11	33
Byron	White	8	3	11	56	4	60
Thurgood	Marshall	14	9	23	29	9	38
Warren	Burger	10	2	12	54	2	56
Harry	Blackmun	6	4	10	8	5	13
Lewis	Powell	15	1	16	53	2	55
William	Rehnquist	9	3	12	47	4	51
John Paul	Stevens	6	5	11	6	5	11
Sandra Day	O'Connor	1	0	1	1	0	1

Table 7 – Rehnquist Court Justice Citations

Justices		Opinions			Citations		
First Name	*Last Name*	*Brown*	*Bolling*	*Total*	*Brown*	*Bolling*	*Total*
William	Brennan	4	0	4	5	0	5
Byron	White	5	1	6	13	1	14
Thurgood	Marshall	5	0	5	27	1	28
Harry	Blackmun	6	0	6	7	0	7
Lewis	Powell	1	1	2	3	1	4
William	Rehnquist	3	1	4	15	1	16
John Paul	Stevens	9	1	10	11	1	12
Sandra Day	O'Connor	10	1	11	20	13	33
Antonin	Scalia	6	0	6	21	0	21
Anthony	Kennedy	6	1	7	24	2	26
David	Souter	4	1	5	20	5	25
Clarence	Thomas	6	0	6	15	0	15
Ruth	Ginsburg	5	0	5	7	0	7
Stephen	Breyer	1	1	2	1	1	2

Table 8 – Roberts Court Justice Citations

Justices		Opinions			Citations		
First Name	*Last Name*	*Brown*	*Bolling*	*Total*	*Brown*	*Bolling*	*Total*
John Paul	Stevens	1	0	1	9	0	9
Sandra Day	O'Connor	0	0	0	0	0	0
Antonin	Scalia	0	0	0	0	0	0
Anthony	Kennedy	2	0	2	4	0	4
David	Souter	0	0	0	0	0	0
Clarence	Thomas	1	0	1	22	0	22
Ruth	Ginsburg	0	0	0	0	0	0
Stephen	Breyer	1	0	1	24	0	24
John	Roberts	1	0	1	9	0	9
Samuel	Alito	0	0	0	0	0	0

Table 9 – Summary of Justice Citations: Warren to Roberts Courts

Justices		Opinions			Citations		
First Name	*Last Name*	*Brown*	*Bolling*	*Total*	*Brown*	*Bolling*	*Total*
Earl	Warren	9	3	12	23	6	29
Hugo	Black	15	2	17	47	3	50
Stanley	Reed	0	0	0	0	0	0
Felix	Frankfurter	2	0	2	3	0	3
William	Douglas	20	11	31	29	12	41
Robert	Jackson	0	0	0	0	0	0
Harold	Burton	0	0	0	0	0	0
Tom	Clark	2	0	2	7	0	7
Sherman	Minton	0	0	0	0	0	0
John	Harlan	11	2	13	13	4	16
William	Brennan	24	11	35	70	18	88
Charles	Whittaker	1	0	1	1	0	1
Potter	Stewart	15	6	21	26	11	37
Byron	White	14	5	19	70	7	77
Arthur	Goldberg	4	2	6	16	5	21
Abe	Fortas	0	0	0	0	0	0
Thurgood	Marshall	19	9	28	56	10	66
Warren	Burger	10	2	12	54	2	56
Harry	Blackmun	12	4	16	15	5	20
Lewis	Powell	16	2	18	56	3	59

Justices		Opinions			Citations		
First Name	*Last Name*	*Brown*	*Bolling*	*Total*	*Brown*	*Bolling*	*Total*
William	Rehnquist	12	4	16	62	5	67
John Paul	Stevens	16	6	22	26	6	32
Sandra Day	O'Connor	11	1	12	21	13	34
Antonin	Scalia	6	0	6	21	0	21
Anthony	Kennedy	8	1	9	28	2	30
David	Souter	4	1	5	20	5	25
Clarence	Thomas	7	0	7	37	0	37
Ruth	Ginsburg	5	0	5	7	0	7
Stephen	Breyer	2	1	3	25	1	26
John	Roberts	1	0	1	9	0	9
Samuel	Alito	0	0	0	0	0	0

Table 10 – Multiple *Brown* or *Bolling* Citations

Year	#Opinions w/ 5 or more citations	#Opinions w/ 10 or more citations	#Opinions w/ 20 or more citations
1954	0	0	0
1955	0	0	0
1956	0	0	0
1957	0	0	0
1958	1	1	0
1959	0	0	0
1960	0	0	0
1961	0	0	0
1962	0	0	0
1963	2	0	0
1964	2	0	0
1965	0	0	0
1966	0	0	0
1967	0	0	0
1968	2	1	0
1969	2	0	0
1970	0	0	0
1971	2	2	2
1972	2	0	0
1973	4	2	1
1974	3	0	0

Year	#Opinions w/ 5 or more citations	#Opinions w/ 10 or more citations	#Opinions w/ 20 or more citations
1975	0	0	0
1976	0	0	0
1977	1	0	0
1978	1	1	0
1979	4	3	1
1980	0	0	0
1981	0	0	0
1982	0	0	0
1983	0	0	0
1984	1	0	0
1985	0	0	0
1986	0	0	0
1987	0	0	0
1988	0	0	0
1989	1	0	0
1990	1	0	0
1991	1	1	0
1992	5	2	0
1993	0	0	0
1994	0	0	0
1995	3	1	0
1996	0	0	0
1997	0	0	0
1998	0	0	0
1999	0	0	0
2000	0	0	0
2001	0	0	0
2002	0	0	0
2003	0	0	0
2004	0	0	0
2005	0	0	0
2006	0	0	0
2007	4	2	2

I. THE WARREN COURT

Warren Court Justices in 1963 substantially increased citations to *Brown* and *Bolling*. That year, eleven opinions in eight cases cited the 1954 school

segregation cases twenty-seven times, with all but one of those citations being to *Brown*. During the previous nine years, *Brown* or *Bolling* had been cited on average by three opinions in slightly less than three cases each year. The average number of total citations was only slightly greater than five each year, a number that reduces to less than four when *Cooper v. Aaron* is removed from the analysis. While substantial fluctuations occurred, all these figures increased after 1963. From 1964 until Chief Justice Earl Warren left the Court, *Brown* or *Bolling* were cited an average number of 17.5 times by 8.5 opinions in slightly less than seven cases annually. The Justices in this time period also began mentioning *Bolling* more often and citing *Brown* more frequently in individual opinions. Six opinions written between 1963 and 1969 cited *Brown* more than five times. *Cooper* was the only instance in which *Brown* was cited this frequently before 1963.

This sharp division after 1963 is consistent with two well-known features of American constitutional politics. Liberal judicial policymaking increased significantly during the early 1960s.[32] Professor Lucas Scot Powe of the University of Texas contends that history's Warren Court is largely the Court from 1962 to 1969.[33] Some debate exists over the precise year in which the Supreme Court shifted into high-activist mode.[34] Given the nature of this data, no one should take the citation differences between those two years that seriously. The more important point is the general trend in citations is consistent with the scholarly conclusion that *Brown* became a landmark case around 1963. That year, civil rights protests dramatically turned northern opinion in favor of desegregation.[35] President John Kennedy's decision to submit a major civil rights bill[36] and the passage of the Civil Rights Act of 1964[37] all indicated a national commitment to realizing the promise of *Brown* and *Bolling*. The increased citation to those decisions reflected the national mood.

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[32] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 298 (2002).

[33] *Id.*

[34] *Compare id.* (1962 term is crucial) *with* Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts*, 73 JUDICATURE 104 (1989) (1960 and 1961 terms were crucial).

[35] *See* Michael J. Klarman, Brown, *Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 147 (1994).

[36] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245 (1964) ("[O]n June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill."). The case went on to quote part of Kennedy's message. *Id.* (citing H.R. DOC. NO. 88-124, at 14 (1963)).

[37] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

A. *Brown* Before 1963

The relatively few citations to *Brown* before 1963 seem to be a consequence of that decision's contested status during the early Warren years. As is well known, the Justices in *Brown II* left to the lower federal courts the implementation of *Brown I*.[38] Their refusal to intervene, other than in *Cooper*,[39] unsurprisingly lowered the number of occasions for citing *Brown* or *Bolling*. Indeed, the Justices tended to avoid saying much about race cases at all from 1954 to 1962. In some instances, state laws mandating racial segregation were often summarily declared unconstitutional, often without even a citation to *Brown*.[40] In other instances, the Justices simply refrained from deciding racial issues.[41] Most famously, the Justices in 1956 decided they would not determine whether state miscegenation laws were constitutional.[42] "One bombshell at a time is enough," one member of the Warren Court declared.[43] This decision not to decide foreclosed an occasion for citing *Brown*. *Brown* made an appearance a decade later when the Supreme Court declared restrictions on interracial marriage unconstitutional.[44]

Liberals on the Supreme Court when race was not on the table had little tactical reason for citing *Brown* or *Bolling* before 1963. Judicial liberalism was under sharp attack during the 1950s as a coalition of anti-communists

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[38] *Brown II*, 349 U.S. at 299 ("Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.").

[39] Cooper v. Aaron, 358 U.S. 985 (1958).

[40] *See* Turner v. City of Memphis, 369 U.S. 350, 353 (1962); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959); New Orleans City Park Dev. Ass'n v. Detiege, 358 U.S. 54 (1958); Gayle v. Browder, 352 U.S. 903, 903 (1956) (citing *Brown* in a one sentence opinion affirming a lower court ruling striking down segregation on municipal buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 971 (1954) (remanding decision on segregation in public parks for consideration in light of *Brown*). For later instances of this summary practice, see *Lee v. Washington*, 390 U.S. 333 (1968), *Schiro v. Bynum*, 375 U.S. 395 (1964), and *Johnson v. Virginia*, 373 U.S. 61, 62 (1963).

[41] *See infra* notes 42, 111 and accompanying text.

[42] *See, e.g.*, L.A. Powe, Jr., *The Supreme Court, Social Change and Legal Scholarship*, 44 STAN. L. REV. 1615, 1621 n.50 (1992) (citing Naim v. Naim, 350 U.S. 891 (1955) (per curiam), *motion denied*, Naim v. Naim, 350 U.S. 985 (1956)).

[43] *Id. See also* Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority:* Williams v. Georgia *Revisited*, 103 YALE L. J. 1423, 1473 n.291 (1994).

[44] Loving v. Virginia, 388 U.S. 1, 9 (1967) (citing *Brown*, 347 U.S. at 489).

and segregationists sought to curtail federal jurisdiction and otherwise restrict judicial power.[45] In this environment, a citation to *Brown* in, say, a school prayer case, would not add support to the controversial judicial decision by attempting to ground an apparently new constitutional right in a well established constitutional precedent. Instead, citations to *Brown* in opinions restricting school prayer might better cement potential alliances between evangelicals unhappy with the Warren Court's establishment clause jurisprudence and racists unhappy with that tribunal's equal protection jurisprudence.

Many citations to *Brown* or *Bolling* reflected the contested nature of those decisions. Most obvious were the numerous citations to *Brown* in *Cooper v. Aaron*.[46] Chief Justice Warren's unanimous opinion began by declaring that the case "involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*."[47] After giving a history of both *Brown* and desegregation in Little Rock, Warren concluded that no right of state defiance existed.[48] His strong assertion of judicial supremacy contended, "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."[49] Other citations to *Brown* in this time period referred to various facets of massive resistance. These citations were not for legal propositions, but highlighted that decisions made on grounds other than equal protection often provided important protections for the civil rights movement. *Scull v. Virginia ex rel. Comm. on Law Reform & Racial Activities*, when holding that the publisher had a First Amendment right to not answer certain legislative questions, noted that the legislative investigation which spawned the litigation focused on the activities of citizens who supported the *Brown* decision.[50] Both opinions in *Harrison v. NAACP*, a case which concerned restrictions on civil rights litigation, pointed out that Virginia had passed many statutes "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown*."[51]

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[45] POWE, *supra* note 32, at 127–34.

[46] *E.g. Cooper*, 358 U.S. at 4–6.

[47] *Id.* at 4.

[48] *Id.* at 24.

[49] *Id.* at 18.

[50] Scull v. Virginia *ex rel.* Comm. on Law Reform and Racial Activities, 359 U.S. 344, 346 (1959).

[51] Harrison v. NAACP, 360 U.S. 167, 175 (1959); *id.* at 182 (Douglas, J., dissenting) (both citing NAACP v. Patty, 159 F. Supp. 503, 511 (E.D. Va. 1958)).

Some citations to *Brown* before 1963 on legal points hardly excited even the most committed southern racist. The per curiam memo in *United States v. Thomas* cited *Bolling* for the proposition that certain petitions "may be filed in typewritten form."[52] Justice Douglas cited *Brown* for the unexciting proposition that "[o]ne historic feature of equity is the molding of decrees to fit the requirements of particular cases."[53] Such generalized support for creative equitable decision making would frequently recur over the next forty years.[54] Justice Felix Frankfurter in 1959 became the first member of the Supreme Court who cited *Brown* as legal authority for a conservative result.[55] The Justices in 1954 declared unconstitutional segregation practices previously thought constitutional. Frankfurter, ever alert to promote judicial restraint, concluded that such precedents might limit judicial solicitude for governmental practices previously thought to be unconstitutional. "[W]hat free people have found consistent with their enjoyment of freedom for centuries," he declared when holding that health inspectors do not always need warrants, "does not freeze due process within the confines of historical facts or discredited attitudes."[56] Brown was noted in the supporting footnote.[57] This citation in *Frank v. Maryland* was the only occasion in which Frankfurter cited *Brown* as legal authority for any position.[58]

Both *Brown* and *Bolling* were occasionally cited for contestable substantive points before 1963. The judicial majority in *Pennsylvania v. Board of Directors of City Trusts of Philadelphia* in 1957 cited *Brown* as supporting the holding that state agencies could not ban persons of color from being admitted to college.[59] Several decisions in the early 1960s began citing *Brown* as forbidding race discrimination in general, although the emphasis tended to be on education.[60] Justice Hugo Black, dissenting in

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[52] United States v. Thomas, 361 U.S. 950, 951 (1960) (per curiam) (citing *Bolling*, 344 U.S. at 3).

[53] USWA v. United States, 361 U.S. 39, 71 (1959) (Douglas, J., dissenting) (citing *Brown*, 349 U.S. at 300).

[54] *See infra* notes 252–54, 294 and accompanying text.

[55] Frank v. Maryland, 359 U.S. 360, 371 & n.15 (1959).

[56] *Id.*

[57] *Id.* at 371 n.15.

[58] *Id.*

[59] Pennsylvania v. Bd. of Dirs. of City Trusts of Philadelphia, 353 U.S. 230, 231 (1957) (per curium).

[60] *See, e.g.*, Turner v. City of Memphis, 369 U.S. 350, 353 (1962); Garner v. Louisiana, 368 U.S. 157, 178 (1961) (Douglas, J., concurring); Wolfe v. North Carolina,

Cohen v. Hurley, cited *Brown* as rejecting the theoretical proposition that "constitutional rights are to be determined by long-standing practices."[61] Unlike the Frankfurter opinion in *Frank v. Maryland*, Black's invocation of *Brown* rejecting "long-standing practices" in favor of judicial protection for the fundamental freedoms he thought textually guaranteed by the Bill of Rights.

Justice John Harlan was the first Justice who cited *Brown* or *Bolling* for a contested constitutional principle outside of the context of race.[62] His dissent in *Poe v. Ullman*, which concluded that married couples had a constitutional right to use birth control, twice cited *Bolling* for the proposition that "due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions."[63] Due process, Harlan continued on the authority of *Bolling*, "includes a freedom from all substantial arbitrary impositions and purposeless restraints," and also "recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."[64]

B. *The 1963 Turn*

The cases decided in 1963 marked a sharp break in both the number and nature of citations to *Brown* and *Bolling*. The first citation that year again reflected opposition to school desegregation without making a legal point.[65] Justice William Brennan in *NAACP v. Button* cited *Brown* when observing that "litigation assisted by the NAACP has been bitterly fought."[66] Justice Douglas's concurring opinion more specifically detailed how Virginia bar regulations were designed to prevent the implementation of *Brown*.[67] Nevertheless, in three cases decided in 1963, and in seven other cases

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364 U.S. 177, 182 (1960); Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring).

[61] Cohen v. Hurley, 366 U.S. 117, 142 n.23 (1961) (Black, J., dissenting).

[62] Poe v. Ullman, 367 U.S. 497, 541–42 (1961) (Harlan, J., dissenting).

[63] *Id.* at 542.

[64] *Id.* at 543.

[65] NAACP v. Button, 371 U.S. 415, 435 n.16 (1963) (citing a companion case to *Brown*, Davis v. Sch. Bd. of Prince Edward County, 347 U.S. 483 (1954)).

[66] *Id.*

[67] *Id.* at 445–46 (1963) (Douglas, J., concurring). Justice Harlan also cited *Brown* when insisting that *Button* had nothing to do with race, but was a case about "state regulatory power over the legal profession." *Id.* at 448 (Harlan, J., dissenting).

decided from 1964 to 1969, *Brown* was cited as legal authority for claims that desegregation remedies proposed by local officials were inadequate or that delay was no longer tolerable.[68] Other Supreme Court decisions during this period cited *Brown* as providing constitutional foundations for attacks on other manifestations of racism in American society.[69] *Bolling* became the canonical citation for claims that the Fifth Amendment prohibited invidious discrimination and protected rights not explicitly mentioned in the Constitution.[70]

"*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers. . . ,"[71] Justice Arthur Goldberg asserted when demanding that Memphis immediately desegregate public parks. With those words, the Supreme Court announced that *Brown* had come of age. The Justices were now insisting more aggressively that racist public policies be abandoned. Two decisions later that year put teeth into Goldberg's warning in *Watson v. City of Memphis* that "it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs . . . which eight years ago might have been deemed sufficient."[72] Justice Tom Clark's unanimous opinion striking down policies that permitted students to transfer to schools where most students were of their race asserted, "eight years after this decree was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply . . . plans for desegregation has been significantly altered.[73] "[T]ransfer provisions" that promoted racial separation or identity, *Goss v. Board of Education* held, "cannot be deemed to be reasonably designed to meet legitimate local problems, and therefore do not meet the requirements of *Brown*."[74] Three months later, Black declared that the Board of Education in Mobile County, Alabama, had similarly run out of time.[75] "It is difficult to conceive of any administrative problems which could justify the Board in failing in 1963 to make a start towards ending the racial discrimination in the public schools," Black stated when

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[68] *See infra* notes 71–82 and accompanying text.

[69] *See infra* notes 82–97 and accompanying text.

[70] *See infra* notes 98–103 and accompanying text.

[71] Watson v. City of Memphis, 373 U.S. 526, 530 (1963).

[72] *Id.*

[73] Goss v. Bd. of Educ., 373 U.S. 683, 689 (1963).

[74] *Id*.

[75] *See* Bd. of Sch. Comm'rs v. Davis, 84 S. Ct. 10, 10 (1963).

refusing to stay a Fifth Circuit decision ordering desegregation.[76] Delay was particularly unwarranted, given that the state conduct was "forbidden by the Equal Protection Clause of the Fourteenth Amendment, as authoritatively determined by this Court in *Brown* nine years ago."[77]

Supreme Court opinions in desegregation cases for the rest of the decade followed the pattern set out in 1963. Lest readers miss the date in the header, one unanimous opinion noted how many years had passed since 1954. "This case is one of the school segregation cases which we dealt with nearly a decade ago in *Brown v. Board of Education*," the Justices stated in 1964.[78] Four years later, Brennan's majority opinion in *Green v. County School Board* asserted, "[i]t was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished . . . ."[79] The Justices then, citing *Brown* again, declared that further delay was intolerable. "There has been entirely too much deliberation and not enough speed," Black asserted in the second *Griffin v. County School Board* case, "in enforcing the constitutional rights which we held in *Brown* . . . had been denied."[80] Repeating their earlier assertion in *Goss*, the Justices insisted that a new racial era had begun. *Green* declared, "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered."[81] In this new regime, *Brown* was understood to require the "transition to a unitary, nonracial system of public education. . . ."[82] "The constitutional rights of Negro school children articulated in *Brown I*," the unanimous Court in *Green* decreed, required school districts "to take whatever steps might be necessary to convert to a

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[76] *Id.* at 12.

[77] *Id.*

[78] Griffin v. County Sch. Bd., 375 U.S. 391, 391 (1964). *See also* Bradley v. Sch. Bd., 382 U.S. 103, 105 (1965) ("[M]ore than a decade has passed since we directed desegregation of public school facilities . . . . Delays in desegregating school systems are no longer tolerable." (citing *Brown II*, 349 U.S. at 294)); Griffin v. County Sch. Bd., 377 U.S. 218, 221 (1964) ("[T]en years ago, we held that the Virginia segregation laws did deny equal protection." (citing *Brown I*, 347 U.S. 483)).

[79] Green v. County Sch. Bd., 391 U.S. 430, 435 (1968). *See also* United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 226 (1969) ("[F]ifteen years ago . . . , we decided that segregation of the races in the public schools is unconstitutional." (citing *Brown*, 347 U.S. 483)).

[80] *Griffin*, 377 U.S. at 229. *See Bradley*, 382 U.S. at 105 ("Delays in desegregating school systems are no longer tolerable" (citing Goss v. Bd. of Educ., 373 U.S. 683, 689 (1963))).

[81] *Green*, 391 U.S. at 438 (alteration in original) (quoting *Goss*, 373 U.S. at 689).

[82] *Id.* at 436.

unitary system in which racial discrimination would be eliminated root and branch."[83]

Brown, after 1963, more clearly became a case that outlawed all forms of race discrimination. Justice Douglas cited *Brown* and *Bolling* when holding that "any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[84] Justice Byron White in *McLaughlin v. Florida* first cited *Brown* when observing "racial classifications have been held invalid in a variety of contexts,"[85] and then cited *Bolling* for the proposition that "racial classifications" are "constitutionally suspect."[86] *Brown*, Harlan agreed, stood for the proposition that "any statute requiring unjustified discriminatory treatment is unconstitutional."[87] By 1966, Justice Potter Stewart could refer to "a consistent line of decisions" beginning with *Brown* that established "the right[] under the Equal Protection Clause" to be free from state discrimination.[88]

Several opinions cited *Brown* as providing doctrinal support for expanded notions of what constituted unconstitutional discrimination. *Brown* provided the precedential foundations for civil rights protestors claiming a right to be served by segregated restaurants.[89] Justice Goldberg, in *Bell v. Maryland*, rejected assertions that "the Constitution permits American citizens to be denied access to places of public accommodation solely because of their race or color."[90] He declared that such a holding would "not do justice . . . to the Court's decision in *Brown v. Board of Education*."[91] "The denial of the constitutional right of Negroes to access to places of public accommodation," Goldberg continued, "would perpetuate a caste system in the United States."[92] Justice Douglas's concurring opinion insisted

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[83] *Id.* at 437–38.

[84] Colorado Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc., 372 U.S. 714, 721 (1963). *See* Johnson v. Virginia, 373 U.S. 61, 62 (1963) ("[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities." (citing *Brown*, 347 U.S. 483)).

[85] McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

[86] *Id.*

[87] Reitman v. Mulkey, 387 U.S. 369, 392 (1967) (Harlan, J., dissenting).

[88] United States v. Guest, 383 U.S. 745, 754 (1966).

[89] *See* Bell v. Maryland, 378 U.S. 226, 227–230, 287 (1964).

[90] *Id.* at 287 (Goldberg, J., concurring).

[91] *Id.* at 287–88.

[92] *Id.* at 288.

that "the discrimination in these sit-in cases is a relic of slavery."[93] Justice Douglas then cited *Brown* as an instance when the Justices declared relics of slavery unconstitutional.[94] Justice Douglas repeated this claim that *Brown* was part of a broader attack on the "badges of slavery" when criticizing private housing discrimination in *Jones v. Alfred H. Mayer Co.*[95] Justice Goldberg's 1965 attack on prosecutorial uses of preemptory challenges to remove persons of color from criminal juries invoked *Brown* for the proposition that "[s]tates may not discriminate on the basis of race."[96]

Warren Court Justices made several efforts to expand the meaning of *Brown* beyond the context of racial discrimination or equal protection. Most notably, after Frankfurter's retirement *Brown* became the canonical citation for a living Constitution whose aspirations for justice and equality might constitutionally undermine long-standing practices.[97] "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change," Douglas declared when citing *Brown* as legal authority for declaring state poll taxes unconstitutional.[98] When declaring laws discriminating against illegitimate children unconstitutional, Douglas pointed to *Brown* as demonstrating that the Justices had "not hesitated to strike down an invidious classification even though it had history and tradition on its side."[99] Chief Justice Warren similarly cited *Brown* for the proposition that "this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted."[100]

Bolling, during the later Warren years, more frequently transcended race. That decision was cited for the legal propositions that the Due Process Clause forbade unjustified discrimination, that "liberty" in the Due Process Clause should be broadly construed, and that some due process rights were not specifically enumerated in the Bill of Rights. When striking down limits on travel abroad by naturalized citizens, Douglas quoted *Bolling* as establishing that "the Fifth Amendment . . . forbid[s] discrimination that is 'so unjustifiable as to be violative of due process.'"[101] Preference for one

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[93] *Id.* at 248 (Douglas, J., concurring).

[94] *Id.* at 248 n.4.

[95] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

[96] Swain v. Alabama, 380 U.S. 202, 231 (1965) (Goldberg, J., dissenting).

[97] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966).

[98] *Id.* at 669–70.

[99] Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[100] Estes v. Texas, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring).

[101] Schneider v. Rusk, 377 U.S. 163, 168 (1964). *See also* Shapiro v. Thompson, 394 U.S. 618, 642 (1969).

religion over another was another "invidious discrimination" inconsistent with *Bolling*.[102] Justice Goldberg's majority in *Aptheker v. Secretary of State* insisted that federal laws prohibiting communists from obtaining passports violated *Bolling*'s injunction that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[103] Justice Goldberg, in *Griswold v. Connecticut*, repeatedly cited *Bolling* for the proposition that "[t]his Court . . . has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name."[104] Two weeks before using *Bolling* to provide legal foundation for the right to use birth control, Goldberg signed Brennan's concurring opinion in *Lamont v. Postmaster General*, an opinion which cited *Bolling* as providing legal foundations for the right to receive certain publications.[105] *Bolling*, Brennan wrote, recognized that "the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful."[106]

Warren Court Justices nevertheless were generally quite restrained when mentioning *Brown* and *Bolling*. In no instance did the Justices make broad appeals to *Brown* outside the context of race discrimination or even race discrimination in public schools. Most controversial instances of Warren Court liberalism, cases ranging from school prayer[107] and free speech[108] to the criminal process,[109] contain no reference to the race segregation opinions. Chief Justice Warren, in the reapportionment cases, did make reference to *Brown* when declaring, "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."[110] Still, no Warren Court opinion outside of education offered a grand theory of the general principles underlying *Brown* and then derived particular civil rights or civil liberties from that principle. The major Warren

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[102] United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring).

[103] Aptheker v. Sec'y of State, 378 U.S. 500, 506 n.5 (1964).

[104] Griswold v. Connecticut, 381 U.S. 479, 486–87 n.1 (1965) (Goldberg, J., concurring). *See also id.* at 492.

[105] Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[106] *Id.*

[107] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

[108] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[109] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[110] Reynolds v. Sims, 377 U.S. 533, 566 (1964).

Court opinions on criminal processes handed down from 1963 to 1969 studiously avoided making any reference to race, even though they seem to have been partly motivated by racist police and prosecutorial practices.[111] Justice Thurgood Marshall never cited *Bolling* or *Brown* during his short tenure on the Warren Court.

Two disputes over *Brown* broke out while the Warren Court reigned. Both involved Black resisting broader readings of that case. In *Bell v. Maryland*, Black objected to using *Brown* to justify constitutional attacks on private segregation.[112] "[T]here was no possible intimation in *Brown*," he wrote, "that this Court would construe the Fourteenth Amendment as requiring restaurant owners to serve all races."[113] Justice Black vigorously objected to citing *Brown* as supporting living constitutionalism. In his view, "the holding in *Brown* was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color."[114]

The first citations to *Brown* for the color-blind constitution took place in 1964. Objecting to the creation of a black majority district in New York, Goldberg cited *Brown* for the proposition that the "Constitution . . . proscribes state-sanctioned racial segregation in legislative districting as well as in voting and in public schools . . . ."[115] Justice Douglas joined that dissent and wrote a separate opinion, which Goldberg joined, declaring, "I had assumed that since *Brown v. Board of Education*, no State may segregate people by race *in the public areas*."[116]

Significantly, the Justices on the Warren Court who regarded *Brown* as establishing a color-blind Constitution were the Justices most likely to cite *Brown* and *Bolling*, and the Justices most likely to cite those rulings as requiring wide ranging protections against race discrimination. Justice Douglas cited *Brown* in fourteen opinions during his time on the Warren Court, more than any other Justice who sat on that tribunal.[117] Justice Goldberg's four citations may seem small, but that accounts for eighty percent of the citations to *Brown* or *Bolling* by Warren Court Justices

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[111] *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 718–753 (1992).

[112] Bell v. Maryland, 378 U.S. 226, 342–43 (1964) (Black, J., dissenting).

[113] *Id.* at 342 n.42.

[114] Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 677 n.7 (1966) (Black, J., dissenting). *See also id.* at 682 n.3 (Harlan, J., dissenting).

[115] Wright v. Rockefeller, 376 U.S. 52, 68 (1964) (Goldberg, J., dissenting).

[116] *Id.* at 62 (Douglas, J., dissenting) (citation omitted) (emphasis in original).

[117] *See supra* Table 5.

appointed during the 1960s.[118] Justices Douglas and Goldberg had the most expansive notion of the rights *Brown* guaranteed. Both insisted that *Brown* provided protection against private as well as public discrimination.[119] Justice Douglas repeatedly stressed that *Brown* was a legal sword against all relics of slavery.[120] The next generation of color-blind constitutionalists would not be nearly so eager to find racial discrimination against persons of color.

III. THE BURGER COURT

The Burger years initially witnessed a sharp increase in citations to the 1954 and 1955 school segregation cases, followed by, after 1979, a return to late Warren Court numbers. From 1970 until 1979, Justices on the Burger Court annually cited *Brown* or *Bolling* an average of 45.5 times in 11.5 opinions issued in 8.6 cases. The major jump was in the total number of citations. While the number of opinions citing *Brown* during the 1970s jumped by slightly over a third, and the number of cases in which *Brown* or *Bolling* were cited jumped by slightly less than a quarter, the total number of citations to *Brown* increased almost three fold. This sharp increase is largely explained by a dramatic increase in the number of opinions that frequently cited or quoted *Brown* or *Bolling*. Only seven Warren Court opinions cited the 1954 cases five times or more. Eighteen early Burger Court opinions included that many cites, seven cited those cases ten times or more, and four opinions made at least twenty references to *Brown* or *Bolling*. After 1979, the average number of Burger Court opinions (7) and cases (6.3) citing *Brown* or *Bolling* decreased to slightly below late Warren Court levels. The total number of citations (8.8) decreased to near early Warren Court levels.

The remarkable number of citations to *Bolling* from 1971 to 1980 is the other interesting story of the Burger years. *Bolling*, in that ten-year period, was cited a total of sixty times by forty-nine opinions issued in forty-one cases. No ten year period comes close to these numbers. In only three other years, 1964, 1965, and 1969, did more than two opinions cite *Bolling*. With the exception of the period between 1970 and 1979, the total citations to *Bolling* was mentioned five or more only in 1965, 1969, and 1995. Citations to *Bolling* account for the entire increase between the 1960s and 1970s in opinions citing the 1954 and 1955 segregation cases.

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[118] *See supra* Table 5.

[119] *See supra* notes 88–93 and accompanying text.

[120] *See supra* notes 91–92 and accompanying text.

The busing controversies explain much of the difference between the citation patterns of the Warren and Burger Courts. With two exceptions, *Palmer v. Thompson*[121] and *Regents of University of California v. Bakke*,[122] every opinion which cites *Bolling* or *Brown* at least five times was issued in a public school case involving primary or secondary schools. As important, 1972 marked the end of judicial unanimity on school desegregation.[123] This judicial dissensus had two impacts on citation patterns. Not surprisingly, the ratio of opinions to cases citing the original segregation decisions increased as justices began to write more dissents and concurrences in race cases. That ratio during the Warren years was approximately 6:5. During the first ten years of the Burger era, the ratio became 4:3. The ratio between opinions and cases citing *Brown* decreased to 10:9 from 1980 to 1985 when busing cases were no longer on the judicial docket. Controversy over the meaning of *Brown* and *Bolling* also increased the number of citations. Warren Court Justices could limit citations to *Brown* because few substantial judicial disputes existed over the meaning of that case, and none in the context of school desegregation. By contrast, Burger Court Justices had to justify their interpretation of the 1954 and 1955 cases in light of other opinions rendering a very different judgment as to what constitutional commitments were made by the *Brown* and *Bolling* decisions.

A. *Desegregating and Integrating Schools*

The initial Burger Court opinions on school desegregation resembled late Warren Court opinions on that subject. Once again, *Brown* served as a calendar reference. "It has been 15 years since we declared in *Brown I* that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause," Black declared on circuit in *Alexander v. Holmes County Board of Education*.[124] Two years later, Marshall did the arithmetic and spoke of the "devastating, often irreparable, injury to those children who experience segregation and isolation [that] was noted 17 years

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[121] Palmer v. Thompson, 403 U.S. 217 (1971).

[122] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[123] The judicial decisions on school desegregation from *Brown* to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), were unanimous. *Wright v. Council of Emporia*, 407 U.S. 451 (1972), was the first decision on school desegregation in which some Justices dissented. *See infra* notes 129–139 and accompanying text.

[124] Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218, 1222 (Black, Circuit Justice 1969).

ago in *Brown*."[125] Opinion writers then cited *Brown* when demanding immediate desegregation and integration of former Jim Crow school districts. After noting that "'[a]ll deliberate speed' has turned out to be only a soft euphemism for delay,"[126] Black, in 1969, declared, "there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute."[127] Chief Justice Warren Burger, in 1971, agreed that "*Brown I*" required school districts "to eliminate dual systems and establish unitary systems at once."[128]

Wright v. Council of Emporia[129] began a new era in school desegregation litigation and citation patterns The issue in that case was whether Emporia, Georgia, in 1969, could secede from the county public school system. Doing so would remove most white students from the county schools.[130] Justice Stewart's majority opinion for the five Warren Court holdovers was a near carbon copy of previous unanimous opinions, complete with the obligatory calendar reference[131] and citation to *Brown* as mandating "a school system in which all vestiges of enforced racial segregation have been eliminated."[132] The four Justices appointed by Richard Nixon, in their first term together on the bench, disagreed with the majority's assessment of the 1954 segregation cases.[133] Chief Justice Burger's dissent declared that the finding of a constitutional violation in *Wright* "far exceeds the contemplation of *Brown*."[134] Emporia's action may have influenced the racial balance in both city schools and the remaining schools in the county system, but that was not a problem of constitutional dimension.[135] "*Brown I*," Burger wrote, was about "the legal policy of separating children in

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[125] Jefferson Parish Sch. Bd. v. Dandridge, 404 U.S. 1219, 1220 (Marshall, Circuit Justice 1971). Burger, in an apparent effort to confuse readers, pointed out that "[o]ver the 16 years since *Brown II*, many difficulties were encountered." *Swann*, 402 U.S. at 13.

[126] *Alexander*, 396 U.S. at 1219.

[127] *Id.* at 1222.

[128] *Swann*, 402 U.S. at 6.

[129] 407 U.S. 451 (1972).

[130] *Id.* at 452–53.

[131] *See id.* at 459. Stewart did break from tradition by counting the years from *Brown* to Emporia's decision to secede from the county school system, rather than the years from *Brown* to the Supreme Court's decision. *Id.* at 465–66.

[132] *Id.* at 463.

[133] *Id.* at 471 (Burger, C.J., dissenting). Burger was joined by Justices Blackmun, Powell, and Rehnquist. *Id.*

[134] *Id.* at 471.

[135] *Wright*, 407 U.S. at 474 (Burger, C.J., dissenting).

schools solely according to their race."[136] In the case before the Court, "no child is accorded different treatment on the basis of race."[137] Chief Justice Burger then suggested that *Brown*, properly interpreted, required far more deference to Emporia's decision than given by the Supreme Court majority and lower federal courts.[138] This new *Brown* championed by conservative Justices was as concerned with allocating authority over desegregation as promoting racial equality. "It has been implicit in all of our decisions from *Brown II* to *Swann*," Burger in this vein stated, "that if local authorities devise a plan that will effectively eliminate segregation in the schools, a district court must accept such a plan unless there are strong reasons why a different plan is to be preferred."[139]

Judicial decisions in school desegregation cases during the rest of the 1970s when citing the original two *Brown* cases played minor variations on the themes announced in *Wright*.[140] The more liberal Justices cited *Brown* for the proposition that race discrimination in public school systems had to be remedied immediately and effectively.[141] The more conservative Justices, while proclaiming their allegiance to the central holdings of both *Brown* cases, denied either that a *Brown* violation had occurred or that *Brown* mandated the remedy demanded by the litigants.[142] Justice William Rehnquist, in particular, cited *Brown* only when seeking to limit the holding of that case.[143] Most conservative citations to *Brown* accused civil rights advocates of reading that decision too broadly. On occasion, conservative Justices also declared that proposed remedies for race discrimination were inconsistent with the principles decreed in 1954 and 1955. The civil rights movement was the party urging courts to abandon the principles of *Brown*, such assertions claimed, not school board members who had formerly championed Jim Crow.[144]

These disputes over *Brown* influenced the continued practice of measuring time by counting the years between the original judicial decisions that separate was inherently unequal and the case before the Court. Judicial

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[136] *Id.* at 476.

[137] *Id.*

[138] *Id.* at 477–78.

[139] *Id.* at 477.

[140] *Bolling* was hardly ever cited in the context of school desegregation litigation.

[141] *See infra* notes 148–157 and accompanying text.

[142] *See infra* notes 158–162 and accompanying text.

[143] *See infra* notes 163–167 and accompanying text.

[144] *See infra* notes 247–253 and accompanying text.

liberals saw the increasing number of years between violation and remedy as supporting immediate action by local and judicial officials. "The unwavering decisions of this Court over the past 20 years," White declared in 1974, "support the assumption of the Court of Appeals that the District Court's remedial power does not cease at the school district line."[145] Judicial conservatives, by comparison, began to see the time between *Brown* and later Supreme Court decisions as justifying an end to judicial supervision of public schools.[146] "[A] quarter of a century after *Brown*," Powell asserted in 1979, "the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country."[147]

Liberal Justices' judicial citations to *Brown* insisted that late Warren and early Burger Court decisions on school desegregation were straightforward applications of those initial rulings striking down racially segregated schools. Justice Brennan, in *Keyes v. School District No. 1*, declared that *Green* correctly held that "School boards . . . operating state-compelled dual systems were . . . clearly charged [by *Brown II*] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[148] "*Brown* and *Green* imposed an affirmative duty to desegregate," White stated in 1979.[149]

Brown provided the constitutional foundation for four central planks of desegregation. First, *Brown* during the 1970s was understood to compel immediate transition to public schools free from all traces of race discrimination in the past.[150] Marshall insisted, "*Brown II* promised [children of color] a school system in which all vestiges of enforced racial segregation

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[145] *Milliken I*, 418 U.S. at 772 (1974) (White, J., dissenting). *See also* Keyes v. School Dist. No. 1, 413 U.S. 189, 200 n.11 (1973) (noting the "interpretation of *Brown* expressed 18 years ago"); Buchanan v. Evans, 439 U.S. 1360, 1365 (Brennan, Circuit Justice 1978) ("the 'devastating, often irreparable, injury to those children who experience segregation and isolation was noted [24] years ago in *Brown*'") (alteration in original) (citation omitted).

[146] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480 (1979) (Powell, J., dissenting).

[147] *Id.*

[148] *Keyes*, 413 U.S. at 200 n.11 (quoting Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968) (alteration in original).

[149] *Columbus*, 443 U.S. at 459.

[150] *See Columbus*, 443 U.S. at 459; *Buchanan*, 439 U.S. at 1365–66 (Brennan, Circuit Justice 1978).

have been eliminated."[151] Second, *Brown* entailed effective remedies for past discrimination. White declared, "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."[152] "The very evil that *Brown I* aimed at will not be cured," Marshall asserted in *Milliken v. Bradley*, by "a Detroit-only plan [that] simply has no hope of achieving actual desegregation."[153] Third, government officials were obligated to remedy whatever *Brown* violations were taking place when that ruling was first made. White, in *Columbus*, declared, "since the decision in *Brown v. Board of Education*, the Columbus Board has been under a continuous constitutional obligation to disestablish its dual school system. . . ."[154] After noting that "many of the [Denver] Board's actions in the core city area antedated our decision in *Brown*," Brennan "reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent."[155] Fourth, all state actors were responsible for *Brown* violations, not merely the persons in the school or schools themselves that may have engaged in race discrimination. Justice Marshall observed, "[i]t is the State, after all, which bears the responsibility under *Brown* of affording a nondiscriminatory system of education."[156] From this premise, he concluded that busing could take place across school district lines, even when one of the districts had no official history of de jure segregation. Marshall wrote, "the State should no[t] be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children."[157]

Nixon's judicial appointees, most notably Powell and Rehnquist, vigorously denied that *Brown* supported busing and other desegregation plans devised during the 1970s. The more conservative Justices insisted that late Warren and early Burger Court decisions dramatically and sometimes

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[151] *Milliken I*, 418 U.S. at 798 (1974) (Marshall, J., dissenting) (quoting *Wright*, 407 U.S. at 463).

[152] Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (citing *Columbus*, 443 U.S. at 458–59).

[153] *Milliken I*, 418 U.S. at 802 (1974) (Marshall, J., dissenting). *See also id.* at 766–67 (White, J., dissenting).

[154] *Columbus*, 443 U.S. at 458 (citation omitted). *See also id.* at 462–63; *Dayton*, 443 U.S. at 534.

[155] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210 (1973).

[156] *Milliken I*, 418 U.S. at 808 (Marshall, J., dissenting).

[157] *Id. See also id.* at 772 (White, J., dissenting) ("The malady addressed in *Brown II* was the statewide policy of requiring or permitting school segregation on the basis of race . . . .").

unduly expanded the legitimate scope of *Brown*. In their view, "the doctrine of *Brown I*, as amplified by *Brown II*, . . . did not retain its original meaning."[158] *Green*, Rehnquist declared in *Keyes*, "represented a marked extension of the principles of *Brown*."[159] Conservative opinions tended to cite *Brown* when distinguishing that decision from the case before the Court. "To approve the remedy order by the [lower federal] court," Burger declared when reversing a decision ordering that school children be bused from Detroit to the suburbs, "would impose on the outlying districts . . . a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II*."[160] Justice Powell in *Estes v. Metropolitan Branches of Dallas NAACP* went further, questioning whether civil rights petitioners were championing policies that in practice were likely to achieve the egalitarian vision underlying the original decisions declaring segregation unconstitutional.[161] "The promise of *Brown v. Board of Education*," he declared while criticizing calls for "substantial additional busing," "cannot be fulfilled by continued imposition of self-defeating remedies."[162]

Justice Rehnquist during his tenure on the Burger Court vigorously insisted that the circumstances in every school segregation case before the Court did not resemble the circumstances in *Brown*.[163] "There are significant differences between the proof which would support a claim such as that alleged by plaintiffs in this case," his dissent in *Keyes* contended, "and the total segregation required by statute which existed in *Brown*."[164] His dissent in *Columbus* declared that it was "sophistry to suggest that a school board in Columbus in 1954 could have read *Brown I* and gleaned from it a

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[158] *Keyes*, 413 U.S. at 220 (Powell, J., concurring in part and dissenting in part). *See id.*, at 251 ("We have strayed, quite far as I view it, from the rationale of *Brown I* and *II*. . . .").

[159] *Id.* at 257 (Rehnquist, J., dissenting).

[160] *Milliken I*, 418 U.S. at 745. *See also id.* at 757 (Stewart, J., concurring) ("In reversing the decision of the Court of Appeals this Court is in no way turning its back on the proscription of state-imposed segregation first voiced in *Brown v. Board of Education*. . . .") (citation omitted).

[161] 444 U.S. 437, 438–39 (1980) (Powell, J., dissenting).

[162] *Id.*

[163] *See, e.g.*, *Keyes*, 413 U.S. at 254–55 (Rehnquist, J., dissenting); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435 (1976) (noting that "this case does not involve . . . a plan embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether such discrete individual modifications had achieved the 'unitary system' required by *Brown*") (citation omitted).

[164] *Keyes*, 413 U.S. at 255 (Rehnquist, J., dissenting).

constitutional duty 'to diffuse black students throughout the . . . system'"[165] Complaining that "school desegregation cases are often long and seemingly intractable," Rehnquist's dissent in another case wearily repeated Burger's assertion in *Swann* that "[a]t some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*."[166] In no case decided during his fifteen years on the Burger Court did Rehnquist cite *Brown* as supporting the plaintiff's constitutional right to a desegregated education or any other right against race discrimination.[167]

During the late 1970s, the more moderate conservatives on the Burger Court began citing *Brown* for the principle that locally approved remedies for desegregation had particular constitutional significance. Justice Stewart quoted from *Brown II* when speaking of "the crucial role of the federal district courts in school desegregation litigation."[168] While Stewart in this instance used *Brown* to restrict court ordered integration, other centrist justices invoked the same principle when supporting the civil rights plaintiff. Burger sustained desegregation remedies in the second *Milliken* case, largely because they had been recommended by the local district court.[169] Citing *Brown II*, he declared, "[t]his Court has from the beginning looked to the District Courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties."[170] Justice Powell quoted *Brown* in that case when claiming that a state could not ordinarily challenge a local school board's remedies for desegregation. "[T]he State's limited challenge" to the District Court order was "particularly lacking in force," he stated, because the order "largely embodies the original recommendation of the Detroit School Board" and "local school boards 'have the primary responsibility'" for determining how *Brown* violations are remedied.[171]

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[165] *Columbus*, 443 U.S. at 500 (Rehnquist, J., dissenting) (alteration in original).

[166] Bd. of Educ. v. Davis, 454 U.S. 904, 905 (1981) (Rehnquist, J., dissenting) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971).

[167] *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 377 (1976). For a discussion of *Rizzo*, see *infra* notes 214–15 and accompanying text.

[168] *Columbus*, 443 U.S. at 469 (Stewart, J., concurring in part and dissenting in part).

[169] Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 287 (1977).

[170] *Id.* at 287 n.18.

[171] *Milliken II*, 433 U.S. at 296 (Powell, J., concurring) (quoting *Brown II*, 349 U.S. at 299).

B. *The Struggle for Extension*

Liberal and conservative disputes over the meaning of *Brown* in other race cases and in contexts other than race followed the pattern exhibited by the school desegregation cases. Liberal Justices read *Brown* broadly as prohibited various racial and non-racial wrongs.[172] Conservative Justices claimed that the circumstances before the Court could be distinguished from the facts in *Brown*, or that the proponents of civil rights were unduly extending the principles underlying the 1954 decision to declare school segregation unconstitutional.[173] Affirmative action aside, general agreement existed that *Brown* and *Bolling*, broadly construed, favored the civil rights movement. The Justices divided over just how broadly to read those cases.

1. *Consensus*

By the beginning of the 1970s, broad agreement existed that *Brown* stood for the proposition that all official race discrimination was unconstitutional. Justice Black cited *Brown* for the proposition that "the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race."[174] "Few principles of law are more firmly stitched into our constitutional fabric." Harlan declared on the authority of *Brown*, "than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation."[175] Chief Justice Burger in 1983 invoked *Brown* as establishing "a firm national policy to prohibit racial segregation and discrimination in public education."[176] This broad constitutional antipathy to race discrimination fostered a judicial consensus that *Brown* forbade various state practices. State assistance to private schools that discriminated against persons of color consistently failed the *Brown* test. "Under *Brown v. Board of Education*," Burger's opinion in *Norwood v. Harrison* declared, "[s]uch private bias is not barred by the Constitution, . . . but neither can it call on the

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[172] *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 266–67 (1971) (White, J., dissenting).

[173] *See, e.g.*, *id.*, at 220.

[174] Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (opinion of Black, J.).

[175] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150–52 (1970).

[176] Bob Jones University *v. U.S.*, 461 U.S. 574, 593 (1983).

Constitution for material aid from the State."[177] *Brown* was also wielded in defense of legislation aimed at eradicating Jim Crow policies. The portion of Black's opinion in *Oregon v. Mitchell* which unanimously sustained a Congressional ban on literacy tests throughout the United States pointed to the history of *Brown* as justifying that remedial measure. Given "[t]he children who were denied an equivalent education by the 'separate but equal' rule of *Plessy v. Ferguson* . . . overruled in *Brown v. Board of Education*," he stated, "[t]here is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement."[178]

During the Burger years, a broad consensus developed on the minimum content of *Bolling*. The Justices repeatedly cited that case as demonstrating that the Due Process Clause of the Fifth Amendment had an equal protection component. "(W)hile the Fifth Amendment contains no equal protection clause," Brennan stated when citing *Bolling* in 1969, "it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"[179] Justice Rehnquist used the same language in *Rostker v. Goldberg* when pointing to the equal protection component of due process.[180] Justice

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[177] Norwood v. Harrison, 413 U.S. 455, 469 (1973). *See* Gilmore v. City of Montgomery, 417 U.S. 556, 571 (1974).

[178] Oregon v. Mitchell, 400 U.S. 112, 133 (1970) (Black, J., announcing the judgments of the court and expressing his view of the cases).

[179] Shapiro v. Thompson, 394 U.S. 618, 642 (1969). *See* Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (citing *Bolling* as forbdding "unjustifiable" discrimination); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (same); Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974) (same); Dep't of Agric. v. Moreno, 413 U.S. 528, 533 n.5 (1973) (same); Frontiero v. Richardson, 411 U.S. 677, 680 n. 5 (1973) (Brennan, J., announcing the judgment of the court, joined by Douglas, White & Marshall, JJ.) (same); United States v. Kras, 409 U.S. 434, 458 (1973) (Douglas, J, dissenting).

[180] 453 U.S. 57, 62 n.3 (1981). *See* Schweiker v. Hogan, 457 U.S. 569, 583 (1982) (citing *Bolling* as the foundation for the "equal protection component of the Fifth Amendment"); Califano v. Boles, 443 U.S. 282, 304 (1979) (Marshall. J., dissenting) (citing *Bolling* as the foundation for the "equal protection requirements of the Fifth Amendment"); Califano v. Jobst, 434 U.S. 47, 49 (1977) (citing *Bolling* as the foundation for "the equality principle applicable to the Federal Government by virtue of the Fifth Amendment"); Dep't of Agric. v. Moreno, 413 U.S. 528, 540 (1973) (Douglas, J., concurring) (citing *Bolling* for "the conception of equal protection that is implicit in the Due Process Clause of the Fifth Amendment"); Brown v. Gen. Servs. Admin., 425 U.S. 820, 825 (1976) (citing *Bolling* for the proposition that federal employment discrimination is unconstitutional); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (citing *Bolling* when referring to "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment"); Marshall v. United States, 414 U.S. 417,

Brennan cited *Bolling* when declaring, "racial segregation has been found independently offensive to the Equal Protection and Fifth Amendment Due Process Clauses."[181] Justice Douglas agreed that "*Bolling v. Sharpe*, . . . held that federal discrimination . . . may be so arbitrary as to be violative of due process as the term is used in the Fifth Amendment."[182] A consensus also developed that "invidious discrimination" was inconsistent with *Bolling*. Justice White cited *Bolling* when claiming that "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."[183] Justice Stewart spoke of "classifications . . . so irrational as to violate the Due Process Clause of the Fifth Amendment."[184] Justice Rehnquist offered a variation on this theme when, in *Weinberger v. Salfi*, he cited *Bolling* for the proposition that any classification that did not violate the Equal Protection Clause of the Fourteenth Amendment did not violate the Due Process Clause of the Fifth Amendment.[185]

Burger Court Justices did not fully clarify whether equal protection standards under the Due Process Clause of the Fifth Amendment were identical to the standards under the Equal Protection Clause of the Fourteenth

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422 (1974) (citing *Bolling* when referring to "the concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment").

[181] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585 (1980) (Brennan, J., concurring).

[182] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 361 n.4 (1973). See Wayte v. United States, 470 U.S. 598, 608 n.9 (1985) (citing *Bolling* for the proposition that "[a]lthough the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component"); Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 876 (1984) (Marshall, J., dissenting) (citing *Bolling* for the proposition that "[t]he Federal Government has a duty under the Due Process Clause of the Fifth Amendment to guarantee to all its citizens the equal protection of the laws"); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 75 n.1 (1977) (citing *Bolling* for the proposition that "Fifth Amendment equal protection claims are cognizable under the Amendment's Due Process Clause").

[183] Washington v. Davis, 426 U.S. 229, 239 (1976). *See* Morton v. Mancari, 417 U.S. 535, 552 (1974) (citing *Bolling* as forbidding "invidious" discrimination); Picard v. Connor, 404 U.S. 270, 279 (1971) (Douglas, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 81 (1971) (same); *Id.* at 84 (Douglas, J., dissenting) (same); Gillette v. United States, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting) (same).

[184] Hurtado v. United States, 410 U.S. 578, 590 (1973). See Gillette v. United States, 401 U.S. 437, 452 (1971) (citing *Bolling* for the proposition "arbitrary and capricious" classifications that "work[] an invidious discrimination in contravention of the 'equal protection' principles encompassed by the Fifth Amendment" are unconstitutional).

[185] 422 U.S. 749, 770 (1975).

Amendment. Some opinions indicated that courts should apply the same standards when adjudicating claims of federal and state discrimination. Justice White cited *Bolling* for the proposition that "the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."[186] Citing *Bolling*, Stevens in *Hampton v. Mow Sun Wong* stated that "the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."[187] Other opinions indicated that precise equal protection standards under the Fifth Amendment were not yet settled. The Rehnquist dissent in *Hampton* asserted that the Justices had not yet "decide[d] whether similar restrictions by the Federal Government would violate equal protection principles."[188]

2. *Parallel Play*

Most citations to *Brown* outside the school desegregation and affirmative action context seemed almost tangential to the core principles underlying the judicial principles being tossed about. Liberal justices cited *Brown* as supporting various points being made by various civil rights movements, but they did not make the meaning of *Brown* the focal point of their analysis. The result was a series of citations that resemble judicial parallel play. A liberal justice in one case would briefly cite *Brown* as supporting the claim, say, that discrimination against illegitimate children was unconstitutional.

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[186] Vance v. Bradley, 440 U.S. 93, 94 n.1 (1979). For other opinions that seem to be citing *Bolling* for the proposition that federal and state officials are held to the same equal protection standards, see Davis v. United States., 411 U.S. 233, 247 n.4 (1973) (Marshall, J., dissenting) (citing *Bolling* for the proposition that "the Due Process and Grand Jury Clauses of the Fifth Amendment make unconstitutional the same discrimination in the federal system") Richardson, 404 U.S. at 84 (citing *Bolling* for "the Federal Government's obligation under the Fifth Amendment's Due Process Clause to guarantee to all citizens equal protection of the laws"); Cruz v. Hauck, 404 U.S. 59, 62 n.10 (1971) (Douglas, J., concurring) (citing *Bolling* for the proposition that "the concept of equal protection of the laws is incorporated into the Due Process Clause of the Fifth Amendment"); McGautha v. California, 402 U.S. 183, 253 n. 2 (1971) (Brennan, J., dissenting) (citing *Bolling* for the proposition that "the requirement of evenhanded treatment imposed upon the States and their agents by the Equal Protection Clause . . . has been applied to the Federal Government as well through the Fifth Amendment's Due Process Clause").

[187] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

[188] *Id.* at 119 (Rehnquist, J., dissenting). *See Lehnhausen*, 410 U.S. at 361 (citing *Bolling* when noting "[w]e had not yet held that the Fifth Amendment in its use of due process carries a mandate of equal protection"); Shapiro v. Thompson, 394 U.S. 618, 658 n.3 (1969) (Harlan, J., dissenting) (citing *Bolling* when noting that "due process" and "equal protection" may not be "always interchangeable").

That specific citation to the school segregations cases would not be rebutted in any contrary opinion which insisted that the discrimination before the justices should be sustained. A conservative justice in a different opinion would then assert that *Brown* should be limited largely to discrimination against persons of color. Again, that citation would not be prominent enough to draw a liberal response specifically engaging the debate over the meaning of *Brown*.

The more liberal Justices on the Burger Court began to push the frontiers of *Brown* more aggressively as that decision became more broadly accepted by the legal community and general public. *Brown* by the 1970s began to stand for more a more general antidiscrimination principle. Justice Douglas on circuit declared, "*Brown v. Board of Education* was not written for Blacks alone." "The theme of our school desegregation cases," he continued when striking down discrimination against Asian-American children, "extends to all racial minorities treated invidiously by a State or any of its agencies."[189] Several Burger Court Justices applied these principles to discrimination based on legitimacy. Justice Powell cited *Brown* when determining that "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth."[190] *Bolling* was the citation of choice when Burger struck down a state law preventing illegitimate children from obtaining any benefit from their father's insurance policies.[191] *Brown* entailed that all forms of discrimination were subject to equal protection standards, Brennan more generally declared in a dissent issued in another illegitimacy case.[192]

For unexplained reasons, Supreme Court decisions urging strict or at least heightened scrutiny for gender classifications, classifications based on citizenship or other potentially invidious discriminations made reference to *Bolling*, but not *Brown*. Marshall and Brennan insisted that the principles underlying the school segregregation cases required the Justices to strictly scrutinize all gender classifications. Citing *Bolling* in a footnote, Brennan declared, "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore

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[189] Guey Heung Lee v. Johnson, 404 U.S. 1215, 1216–17 (Douglas, Circuit Justice 1971).

[190] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972).

[191] Jimenez v. Weinberger, 417 U.S. 628, 637 (1974). *See also* Califano v. Boles, 443 U.S. 282, 304 (1979) (Marshall, J., dissenting).

[192] Labine v. Vincent, 401 U.S. 532, 550–51 (1971) (Brennan, J., dissenting). *See also* Mathews v. Lucas, 427 U.S. 495, 504 (1976) (disagreeing with a lower federal court decision that had cited *Bolling* as supporting stricter scrutiny for discrimination based on status at birth).

be subjected to close judicial scrutiny."[193] Justice Brennan in *Kahn v. Shevin* asserted:

> [A] legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status as widows or widowers, like classifications based upon race, alienage, and national origin, must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control, and also because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.[194]

The Justices did reject invitations in these cases to scrutinize gender classifications as strictly as race classifications. Nevertheless, *Bolling* was cited when gender classifications were declared unconstitutionally arbitrary.[195] *Bolling* was also the precedent justices turned to when striking down restrictions on non-citizens. *Bolling*, not *Brown*, was among "the Court's decisions" the judicial majority in 1971 declared that "established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[196] "[T]he statutory restriction on the ability of aliens to engage in the otherwise lawful private practice of civil engineering," Justice Harry Blackmun's majority opinion in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero* stated, "is so egregious that it falls within the rule of *Bolling v. Sharpe*."[197] Justice Stevens in *Califano v. Jobst* noted that a lower federal court had cited *Bolling* when striking down discrimination against those who marry disabled persons.[198] *Bolling* was the citation of choice when Douglas urged his brethren to strike down residency requirements and restrictions

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[193] Frontiero v. Richardson, 411 U.S. 677, 682 & n.7 (1973) (citing *Bolling* in a footnote to "race").

[194] Kahn v. Shevin, 416 U.S. 351, 357 & n.1 (1974) (Brennan, J., dissenting) (citing *Bolling* in a footnote to "race").

[195] Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975).

[196] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[197] Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero 426 U.S. 572, 601 (1976). *But see In re* Griffiths, 413 U.S. 717, 722 n.8 (1973) (citing *Brown* for the proposition that "[d]iscrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose" in an opinion declaring that aliens had a right to become lawyers).

[198] Califano v. Jobst, 434 U.S. 47, 49 (1977).

based on wealth. Douglas in *Memorial Hospital v. Maricopa County* insisted that a "durational residency requirement" for certain local medical services "would involve weighty equal protection considerations by which the Federal Government" under "*Bolling v. Sharpe* . . ., as well as the States, are bound."[199] After quoting at length the passage in *Bolling* which asserted that "discrimination may be so unjustifiable as to be violative of due process," Douglas's dissent to the judicial decision sustaining the imposition of fees for bankruptcy declared, "[t]he inviduous discrimination in the present case is a denial of due process because it denies equal protection within our decisions make particularly 'invidious' discrimination based on wealth."[200]

Bolling during the early 1970s also became the citation of choice for justices who supported substantive due process, the position that the Due Process Clause protected liberty as well as procedural rights. Sometimes, *Bolling* was used to support claims that government could not capriciously restrict individual freedoms. White cited *Bolling* when speaking of a constitutional "freedom from all substantially arbitrary impositions and purposeless restraints."[201] Dissenting opinions defending a policeman's right to wear long hair and challenging unlimited discretion to put prisoners in administrative segregation quoted *Bolling*'s assertion that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue."[202] Other opinions relied on *Bolling* when championing a more robust understanding of constitutional liberty under the Due Process Clause. "In a Constitution for a free people," Stewart wrote when citing *Bolling*, "there can be no doubt that the meaning of 'liberty' must be broad indeed."[203] The next year, Stewart's concurring opinion in *Roe* relied on *Bolling* for the proposition that "the Due Process Clause . . . covers more

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[199] Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 273 (1974).

[200] United States v. Kras, 409 U.S. 434, 458 (1973) (Douglas, J., dissenting). See Hurtado v. United States, 410 U.S. 578, 600 (1973) (Douglas, J., dissenting) (quoting *Bolling* when asserted that discrimination against "indigents" in the case before the court was "so unjustifiable as to be violative of due process").

[201] Moore v. City of East Cleveland, 431 U.S. 494, 542–43 (1977) (White, J., dissenting). *See* Shapiro v. Thompson, 394 U.S. 618, 652 (1969) (Warren, C.J., dissenting).

[202] Kelley v. Johnson, 425 U.S. 238, 250 (1976) (Marshall, J., dissenting); Hewitt v. Helms, 459 U.S. 460, 485 n.9 (1983) (Stevens, J., dissenting).

[203] *See Moore*, 431 U.S. at 543 (White, J., dissenting) (quoting the same passage from *Bolling*); Paul v. Davis, 424 U.S. 693, 722–73 (1976) (Brennan, J., dissenting) (using the same quote from *Bolling* to support a right to "the enjoyment of one's good name and reputation").

than those freedoms explicitly named in the Bill of Rights."[204] Justice Powell put *Brown* to similar use. His opinion in *Weber v. Aetna Casualty & Surety Co.* cited that decision for the proposition that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny."[205]

The Justices on the Burger Court who most identified with the civil rights movement began to make more clear than previously that *Brown* was more rooted in antisubordination than anticlassification principles. In particular, liberal judicial opinions during the 1970s frequently identified stigmatic harm as central to claimed *Brown* violations. Justice Marshall condemned the judicial majority which sustained a Memphis ordinance blocking egress from predominant African-American to predominant white neighborhoods. "[I]t defies the lessons of history and law to assert that if the harm is only symbolic, then the federal courts cannot recognize it." *Brown* provided the relevant history and law. After quoting Warren's assertion that "[t]o separate them from others . . . 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," Marshall continued, "[t]he message the city is sending to Negro residents north of Hein Park is clear, and I am at a loss to understand why the majority feels so free to ignore it."[206] For judicial liberals, the lack of stigmatic harm helped explain why *Brown* was consistent with affirmative action. Justice Brennan's opinion in *Regents of University of California v. Bakke* declared:

> [T]here is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown* I would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color.[207]

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[204] Roe v. Wade, 410 U.S. 113, 158 (1973) (Stewart, J., concurring).

[205] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972). *See Moore*, 431 U.S. at 543 (White, J., dissenting) (observing that, under *Bolling*, "certain interests require particularly careful scrutiny").

[206] *City of Memphis v. Greene*, 451 U.S. 100, 153 (1981).

[207] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 375 (1978) (Brennan, J., concurring and dissenting).

The decision to close a public park after court ordered desegregation, Brennan wrote, "conveys an unambiguous message of community involvement in racial discrimination."[208] Stigmatic harm transcended Jim Crow. The more liberal justices on the Warren Court cited *Brown* when finding unconstitutional stigmatic harm in cases involving discrimination against other racial minorities,[209] gender discrimination,[210] and discrimination against poor children.[211] "[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community," Brennan stated with support from *Brown*, "can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."[212]

Brown during the Burger years continued to provide precedential support for living constitutionalism. Justice Brennan invoked the school segregation cases when explaining why legislative chaplains were inconsistent with the Establishment Clause, even though Congress during the eighteenth century had not thought such sponsorship of official prayer unconstitutional. Citing *Brown* for support, he declared, "the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee."[213] Justice Marshall highlighted the centrality of *Brown* for living constitutionalism at greater length in an opinion urging the Court to give greater judicial solicitude to mentally disabled citizens. He asserted in *City of Cleburne v. Cleburne Living Center*:

> Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare *Plessy v. Ferguson* . . . with *Brown v. Board of Education* . . . . Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental

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[208] Evans v. Abney, 396 U.S. 435, 453–54 (1970) (Brennan, J., dissenting).

[209] Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring).

[210] Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

[211] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71–72 (1973) (Marshall, J., dissenting).

[212] *Heckler*, 465 U.S. at 739–40 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

[213] Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting).

> principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause.[214]

Other judicial liberals agreed that time did not sanctity constitutional wrongs. Justice John Paul Stevens noted that "the age of the de jure segregation at issue in *Brown v. Board of Education* . . . provided no legitimate support for those rules."[215] Constitutional requirements remained constant, in this view, only in the absence of social change. Justice Stewart would justify a "substantial departure from precedent" only under the conditions he thought present in *Brown*, "in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment."[216]

The more conservative Justices on the Burger Court made occasional attempts outside of the school desegregation context to further limit the precedent impact of the original decisions declaring Jim Crow education unconstitutional. Justice Rehnquist played a particularly active role in efforts to narrow *Brown*. As noted in the previous section,[217] his opinions in school cases tended to cite *Brown* only when complaining that liberal justices were unduly expanding that precedent. His majority opinion in *Rizzo v. Goode* had a similar structure. The issue in that case was whether persons of color could sue the Mayor of Philadelphia and the police commissioner for discrimination committed by police offices. Justice Rehnquist, for the majority, insisted such a lawsuit was a misreading of *Brown*. The officials sued in *Brown*, he wrote, "were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights." The officials in *Rizzo*, by comparison, "had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights." The best that could be said was that they had "in their employ a small number of individuals, which later on their own deprived black[s]. . . of their constitutional rights."[218] In short, Rehnquist's *Brown* was limited to government officials who discriminated,

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[214] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

[215] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 367 (1985) (Stevens, J., dissenting). *See* United States v. Ross, 456 U.S. 798, 836 n.7 (1982) (Marshall, J., dissenting) (citing *Brown* as demonstrating the legal understandings during the Jim Crow era did not have constitutional significance).

[216] Mitchell v. W. T. Grant Co., 416 U.S. 600, 634–35 (1974) (Stewart, J., dissenting).

[217] *See supra* notes 163–167 and accompanying text.

[218] *Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

not government officials who hired and supervised other government officials who discriminated.

Many conservative assertions limiting *Brown*'s import, remarkably, came in the context of treating race as a suspect class. When more liberal justices cited *Brown* or, more often, *Bolling* as holding that race was a suspect classification, they typically did so to strike down the classification at issue.[219] Every opinion issued by a conservative justice on the Burger Court citing *Brown* as holding that race was a suspect classification either denied that the classification before the Court was suspect or, as will be noted later,[220] insisted that affirmative action programs were unconstitutional. Conservative justices from 1969 to 1985 distinguished *Brown* or *Bolling* when rejecting strict judicial solicitude for discrimination against the poor,[221] non-citizens,[222] gender,[223] and illegitimate children.[224] Justice Stewart's concurring opinion in *Michael M. v. Superior Court of Sonoma County* was typical. Justice Stewart first cited *Brown* as holding that "detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated."[225] He then pointed to a distinction between the racial classification struck down in *Brown* and the classification before the Court. "By contrast," Stewart continued, "while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes."[226]

Conservatives and liberal justices were particularly prone to engage in parallel constitutional play when they interpreted the passages in *Brown* about the importance of education. Burger Court Justices frequently quoted

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[219] See *Norwood v. Harrison*, 413 U.S. 455, 469 (1973); *Hunter v. Erickson*, 393 U.S. 385, 492 (1969); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973); *City of Mobile v. Bolden*, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting); *Shapiro v. Thompson*, 394 U.S. 618, 658 n.3 (1969) (Harlan, J., dissenting).

[220] *See infra* notes 248–249 and accompanying text.

[221] Harris v. McRae, 448 U.S. 297, 322 (1980); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61 (1973) (Stewart, J., concurring); Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting).

[222] Toll v. Moreno, 458 U.S. 1, 39–40 (1982) (Rehnquist, J., dissenting).

[223] Michael M. v. Superior Court, 450 U.S. 464, 478 (1981) (Stewart, J., concurring); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

[224] Parham v. Hughes, 441 U.S. 347, 351 (1979) (opinion of Stewart, J.).

[225] *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring).

[226] *Id.*

Brown's observations about the role of public schooling when making substantive, often controversial, constitutional points. Rarely, however, did Justices who disputed the constitutional matter challenge the underlying interpretation of *Brown*. Justices Marshall and Brennan on several occasions insisted that the principles announced in *Brown* required government to alleviate educational inequalities in contexts removed from racial discrimination. In a majority opinion that immediately before quoting *Brown* on the importance of education spoke of the "inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual" inherent in "status-based denial of basic education," Brennan found that states could not bar the children of illegal aliens from public schools.[227] Liberals less successfully invoked *Brown* when condemning disparities in local school funding. "As this Court held in *Brown v. Board of Education*," Marshall's dissent in *San Antonio Independent School Dist. v. Rodriguez* futilely claimed, "the opportunity of education, 'where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'"[228] Justice Douglas was unable to convince other justices that *Brown* mandated communities to equalize school facilities when de facto segregation existed.[229] Both majority and dissent citations to *Brown* in *New Jersey v. T.L.O.* had substantive constitutional content. At issue were the standards for searches in schools. Justice Blackmun found reason in *Brown* for limiting constitutional requirements. Quoting Warren's assertion that "[e]ducation 'is perhaps the most important function' of government, he insisted that "government has a heightened obligation to safeguard students whom it compels to attend school."[230] Justice Stevens believed the school segregation cases taught a different constitutional lesson. Insisting that the search in *T.L.O.* was unconstitutional, he cited *Brown* for the proposition that "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."[231] Justice White quoted *Brown* on education when explaining why students were entitled to some

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[227] Plyler v. Doe, 457 U.S. 202, 222 (1982).

[228] *San Antonio*, 411 U.S. at 116 (Marshal, J., dissenting) (quoting *Brown I*, 347 U.S. at 493).

[229] Spencer v. Kugler, 404 U.S. 1027, 1031 (1972) (Douglas, J., dissenting); *see* Gomperts v. Chase, 404 U.S. 1237, 1239-40 (1971) (opinion of Douglas, J.)

[230] New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (Blackmun, J., concurring) (quoting *Brown I*, 347 U.S. at 493).

[231] *Id.* at 373 (Stevens, J., concurring in part and dissenting in part).

procedural safeguards before being suspended from schools.[232] Justice Brennan employed the same logic and citation when explaining why teachers were public figures in libel cases.[233] Justice Powell in 1979 insisted that *Brown* provided grounds for prohibiting non-citizens from teaching in public schools.[234] "But the legislature," he stated in *Ambach v. Norwick*,

> [H]aving in mind the importance of education to state and local governments, see *Brown v. Board of Education*, may determine eligibility for the key position in discharging that function on the assumption that generally persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens.[235]

Anticipating future practice, some citations seemed merely a cliché or homily with little direct bearing on controversial constitutional issues. Justice Blackmun blandly quoted *Brown*'s assertion that schools may "awake[n] the child to cultural values" in an opinion declaring that a local board of education could not remove certain books from the school library.[236] Justice Powell's opinion in *San Antonio* endorsed *Brown*'s assertions about the importance of education, even as he insisted such commentary had no legal bearing on whether disparities in school funding were constitutional.[237]

3. *Fighting over* Brown

The judicial liberals and conservatives challenged rival interpretations of *Brown* in only three instances. The first two were particular cases, *Palmer v.*

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[232] Goss v. Lopez, 419 U.S. 565, 576 (1975) ("But 'education is perhaps the most important function of state and local governments' . . . ." (quoting *Brown I* 347 U.S. at 493).

[233] Lorain Journal Co. v. Milkovich, 474 U.S. 953, 958–59 (1985) (Brennan, J., dissenting).

[234] Ambach v. Norwick, 441 U.S. 68, 81 n.14 (1979).

[235] *Id.* (citation omitted); *see also* Ball v. James, 451 U.S. 355, 372 n.1 (1981) (Powell, J., concurring) (citing *Brown* on "the unique importance of education among the functions of modern local government" as a reason why local school board elections must be open to all voters).

[236] Bd. of Educ. v. Pico, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring).

[237] *San Antonio*, 411 U.S. at 29–30. *See also* Wisconsin v. Yoder, 406 U.S. 205, 238 (1972) (White, J., concurring) (citing *Brown* for the proposition that education is "a principal instrument in awakening the child to cultural values" in an opinion holding that the First Amendment entitled Amish children to an exemption from mandatory schooling laws).

Thompson[238] and *Allen v. Wright*.[239] These disputes followed the normal pattern on the Burger Court. Liberals insisted *Brown* supported a finding of race discrimination. Conservatives claimed the civil rights movement was reading that precedent too broadly. Affirmative action provided the other occasion for disputes over the meaning of the 1954 and 1955 school segregation cases. The structure of the debate between the Justices over the colorblind Constitution differed from standard Burger Court practice. Conservative and liberal justices fought over who was the proper heir to the principles originally championed by the civil rights movement as each side accused the other of betraying the legacy of *Brown*.

The Justices in *Palmer v. Thompson* debated whether *Brown* compelled a decision striking down Jackson, Mississippi's decision to close all public pools after a court ordered that the city cater to persons of all races. In an opinion which continues by a wide margin to hold the record for most citations to *Brown* outside the context of education, White declared:

> Closing the pools without a colorable nondiscriminatory reason was every bit as much an official endorsement of the notion that Negroes are not equal to whites as was the use of state National Guard troops in 1957 to bar the entry of nine Negro students into Little Rock's Central High School, a public facility that was ordered desegregated in the wake of *Brown*. Both types of state actions reflect implementation of the same official conclusion: Negroes cannot be permitted to associate with whites. But that notion had begun to break down as this Court struggled with the "separate but equal" doctrine and I had thought it was emphatically laid to rest in *Brown*. . . .[240]

Justice Black disagreed. Citing *Brown*, he maintained that no race discrimination occurred when public facilities were abandoned completely.[241] This is "not a case," he stated, "where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities."[242]

In *Allen v. Wright*, the Justices disputed whether *Brown* provided Article III grounds for permitting persons of color to challenge federal policies that

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[238] 403 U.S. 217 (1971).

[239] 468 U.S. 737 (1984).

[240] *Palmer*, 403 U.S. at 266–67 (White, J., dissenting). *See id.* at 272 (Marshall, J., dissenting) ("[S]ince *Brown* . . . public schools and public recreational facilities such as swimming pools have received identical Fourteenth Amendment protection.") (citations omitted).

[241] *Id.* at 220.

[242] *Id.*

provide some support for racially exclusive private schools. Justice Sandra Day O'Connor's majority opinion asserted that "children's diminished ability to receive an education in a racially integrated school . . . is . . . not only judicially cognizable but, as shown by cases from *Brown* to *Bob Jones University v. United States*, one of the most serious injuries recognized in our legal system."[243] *Brown* was nevertheless distinguished because O'Connor contended that "the federal judiciary may not redress [policies that undermine integration] unless standing requirements are met."[244] Justice Brennan insisted that *Brown*, standing alone, established the foundation for standing when the federal government was providing aid to private schools that discriminated on racial grounds. His dissent declared, "discriminatory practices by private schools, which 'exer[t] a pervasive influence on the entire educational process,' have been more readily recognized to constitute injury redressable in the federal courts."[245] Responding to the majority claims that persons lacked standing who sought "a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties," Stevens pointed out that "*Bolling* . . . made it clear that the courts have authority to restructure both school attendance patterns and curriculum when necessary to eliminate the effects of a dual school system."[246]

Opponents of affirmative action made different use of *Brown* than opponents of busing or civil rights litigation. Their *Brown* was a weapon against what they saw as violations of the anticlassification constitutional principle enshrined in 1868 or 1954. Justice Douglas during his last years continued insisting that *Brown* compelled race neutral policies. "[T]he point at the heart of all our school desegregation cases, from *Brown v. Board of Education*," his dissent in *DeFunis v. Odegaard* declared, was that the "Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[247] Justice Powell, when Douglas retired, assumed the mantle of the Court's leading colorblind champion. His opinion in *Bakke* cited *Brown* as holding that "[p]referring members of any one group for no reason other

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[243] *Allen*, 468 U.S. at 756 (citations omitted).

[244] *Id.* at 757.

[245] *Id.* at 772–73 (Brennan, J., dissenting) (citations omitted). *See id.* at 783 (Stevens, J., dissenting) (citing *Brown* as demonstrating that a child's "diminished ability to receive an education in a racially integrated school—is, beyond any doubt . . . judicially cognizable . . . .").

[246] *Id.*, at 792 n.10 (Stevens, J., dissenting).

[247] 416 U.S. 312, 342–43 (1974) (Douglas, J., dissenting).

than race or ethnic origin is discrimination for its own sake."[248] "At least since the decision in *Brown v. Board of Education*," Powell declared two years later, "the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant."[249] Justice Powell's colorblind onstitution, however, merely required that all race classifications be scrutinized strictly.[250] Indeed, he believed that the affirmative action program in *Fullilove* passed constitutional muster[251] and famously suggested in *Bakke* that well-designed diversity programs were consistent with equal protection.[252] Justice Stewart was the other member of the Burger Court who in the late 1970s wrote opinions aggressively condemning race classifications that benefited persons of color. Citing *Brown*, his dissent in *Fullilove* declared, "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court."[253]

Proponents of affirmative action insisted that government officials who self-consciously sought to increase African-American representation in elite institutions were fulfilling the mandate of *Brown*. Noting previous opinions holding that color-blind school assignments would "render illusory the promise of *Brown*," Brennan's opinion in *Bakke* insisted that such precedents demonstrated that "racial classifications are not *per se* invalid under the Fourteenth Amendment."[254] That opinion, again citing *Brown*, spoke of "the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism."[255] Well-designed affirmative action programs were consistent with this antisubordination premise. "[T]here is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him

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[248] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). *See id.* at 295 (maintaining that "[i]t is far too late [after *Brown*] to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others").

[249] Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring).

[250] *Id.* at 496.

[251] *Id.* at 515.

[252] *Bakke*, 438 U.S. at 316–17.

[253] *Fullilove*, 448 U.S. at 524 (1980) (Stewart, J., dissenting). *See id.* at 523 (citing *Bolling* for the "proposition that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid").

[254] *Bakke*, 438 U.S. at 356 (Brennan, J., concurring in part and dissenting in part).

[255] *Id.* at 357–58.

throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them," Brennan stated.[256] Both Marshall and Brennan further insisted that affirmative action programs were legitimate responses to the harms done by past *Brown* violations. "[T]he conclusion is inescapable," Brennan wrote, "that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination."[257] Marshall, after discussing the history of race discrimination "from *Plessy* to *Brown v. Board of Education*," concluded that "[i]t is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America."[258]

C. *From Warren to Rehnquist*

The Burger years were a transition period for *Brown* and *Bolling*. That transition was partly marked by the shift from the debate over whether *Brown* was correctly decided to the debate over the extent to which *Brown* supported the central claims of various civil rights movements.[259] That transition was also marked by a shift in citation practice. Citations to *Brown* during the early 1970s that referred to ongoing political efforts in the South aimed at maintaining Jim Crow were gradually replaced with celebrity citations that took for granted a public consensus that *Brown* and *Bolling* were correctly decided. During the early Burger years, Justices continued to mention the 1954 and 1955 school segregation case when making historical comments about the resistance to school desegregation. "The city of Jackson was one of many places where the consistent line of decisions following from *Brown* had little or no effect," White declared in his *Palmer* dissent.[260] Justice Brennan in 1970 observed that "the various statutes and resolutions that constituted Mississippi's response to *Brown* that . . . are bound together

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[256] *Id.* at 375.

[257] *Id.* at 372.

[258] *Id.* at 401 (Marshall, J., concurring in part and dissenting in part).

[259] *See supra* notes 146–169 and accompanying text.

[260] *Palmer*, 403 U.S. at 246 (White, J., dissenting). *See San Antonio*, 411 U.S. at 112 n.69 (Marshall, J., dissenting) (noting that several states repealed constitutional mandates for public education in the wake of *Brown*); *Lemon v. Kurtzman*, 403 U.S. 602, 632 (1971) (Douglas, J., concurring) (noting that "Arkansas, as part of its attempt to avoid the consequences of *Brown v. Board of Education*, . . . withdrew its financial support from some public schools and sent the funds instead to private schools").

as the parts of a single plan" dedicated to preventing desegregation.[261] Given the message Mississippi was communicating, he concluded, that complex of legal actions ought to have been interpreted as giving unconstitutional official sanction to racial discrimination by private businesses.[262] As that official resistance diminished and *Brown* became a cultural icon, the practice of celebrity citation developed. *Brown* increasingly became the citation of choice for obvious points about constitutional law and politics that no Justice, lawyer or major political actor disputed.

"Equity is flexible" was the most frequent celebrity citation to *Brown* during the Burger years.[263] Supreme Court Justices frequently repeated this claim in both school desegregation and other contexts almost as a reflex whenever an opinion for some reason mentioned equity. Rarely did opinions indicate the specific ways in which *Brown* contributed to the flexibility of equitable remedies. Four of the five opinions issues in *Milliken v. Bradley* intoned "equity is flexible" when determining whether courts could order interdistrict remedies for race discrimination in a particular school district; none elaborated in any detail on the meaning of this phrase.[264] Chief Justice Burger ritually cited *Brown* for the flexibility of equity in an opinion holding that states were not required to refund unconstitutional payments to religious schools.[265] That equity was flexible, Rehnquist later declared when he cited *Brown*, should have no bearing on the appropriate remedies for constitutional torts.[266]

Burger Court Justices for almost twenty years found numerous ways of referring to *Brown* as little more than a case that everyone agreed was correctly decided. Several celebrity citations had some content, although most persons might find the point obvious. *Brown* was commonly cited as

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[261] Adickes v. S. H. Kress & Co., 398 U.S. 144, 200 (1970) (Brennan, J., dissenting in part).

[262] *See id.* at 179–80 (Douglas, J., dissenting) (placing discrimination by private businesses in the context of Mississippi's resistance to *Brown*).

[263] *See Brown I*, 349 U.S. at 300.

[264] *Milliken I*, 418 U.S. at 738–39 (1974); *id.* at 753 n.1 (Stewart, J., concurring); *id.* at 772-73 (White, J., dissenting); *id.* at 808 (Marshall, J., dissenting). For other citations in the context of school desegregation, see *Milliken II*, 433 U.S. 267, 288 (1977); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 239 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11–12, 15 (1971).

[265] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). *See* Bangor Punta Operations, Inc. v. Bangor & A. R. Co., 417 U.S. 703, 724 (1974) (Marshall, J., dissenting) (explaining why shareholders of a mismanaged company were entitled to certain equitable remedies).

[266] Carlson v. Green, 446 U.S. 14, 42–43 (1980) (Rehnquist, J., dissenting).

demonstrating that minors had some constitutional rights, although no Justice asserted that *Brown* provided specific support for the particular constitutional right of minors being asserted.[267] Justice Marshall cited *Brown* when observing that expert testimony was useful for determining whether a constitutional standard that depended on certain fact findings had been violated.[268] Other celebrity citations were more vacuous jurisprudentially. These included claims that *Brown* was an important decision,[269] that *Brown* was controversial when decided,[270] that courts played an important role in the desegregation process,[271] that courts could order remedies of some sort for race discrimination,[272] that lawyers who successfully proved race discrimination provided important social services,[273] and that *Brown* was an example of a well-known decision.[274] Several opinions cited *Bolling* or *Brown* for the unsurprising principle that persons who claimed to be victims of race discrimination by a school board had stated a cause of action under federal constitutional and statutory law.[275] *Maher v. Roe* pointed to *Brown* when observing that states could fund public schools.[276] Justice White won

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[267] H. L. v. Matheson, 450 U.S. 398, 435 n.19 (1981) (Marshall, J., dissenting) (abortion rights of minors); David Levell W. v. California, 449 U.S. 1043, 1046 (1980) (Marshall, J., dissenting from denial of certiorari) (Fourth Amendment rights of minors); Carey v. Population Servs. Int'l, 431 U.S. 678, 692 n.14 (1977) (opinion of Brennan, J.,) (birth control rights of minors).

[268] Rhodes v. Chapman, 452 U.S. 337, 376 n.8 (1981) (Marshall, J., dissenting). *See* Goosby v. Osser, 409 U.S. 512, 517 n.5 (1973) (citing *Brown* as establishing that the existence of a Fourteenth Amendment claim does not depend on the difficulty of formulating a remedy); Elrod v. Burns, 427 U.S. 347, 354–55 (1976) (citing *Brown* as establishing that the actual operation of a practice matters when assessing constitutionality).

[269] Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 386–87 n.15 (1979).

[270] Beal v. Doe, 432 U.S. 438, 461 (1977) (Marshall, J., dissenting).

[271] Cannon v. Univ. of Chicago, 441 U.S. 677, 701 n.29 (1979).

[272] *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

[273] Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 718 (1974).

[274] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 954 (1982) (Powell, J., dissenting) (noting that all school officials should have heard about *Brown* by the 1970s). *Brown* also became the citation of choice for historical claims that compulsory education did not exist in the eighteenth century or when the Fourteenth Amendment was ratified. *See* Wallace v. Jaffree, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring); Ingraham v. Wright, 430 U.S. 651, 660 n.14 (1977).

[275] Davis v. Passman, 442 U.S. 228, 242–43 (1979); *Cannon*, 441 U.S. at 727 n.18 (1979) (White, J., dissenting); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 n.5 (1978).

[276] 432 U.S. 464, 477 (1977).

the award for most gratuitous cite by using the phrase "all deliberate speed" with the obligatory mention of *Brown* in an passage of an opinion devoted to determining how quickly the Navy was legally obligated to obtain certain permits."[277]

The Burger years also witnessed an important shift in the Justices who most vigorously associated *Brown* with the colorblind constitution. When Burger first assumed the judicial reigns, Douglas was both the leading proponent of the colorblind constitution[278] and the Supreme Court Justice most likely to cite *Brown* as supporting the central claims of the civil rights movement. During the 1970s, Powell and, to a lesser extent, Stewart became the new champions for claims that all racial classifications should be strictly scrutinized.[279] While Powell rejected some more expansive readings of *Brown*, he endorsed others. His *Brown* was a precedent that required the Justices to sustain wide ranging remedies for desegregation imposed by federal district courts[280] and warranted heightened scrutiny for classifications based on status at birth.[281] Justice Stewart was far more willing than Nixon's judicial appointees to find that school districts had violated *Brown*[282] and he maintained *Bolling*'s interpretation of due process provided precedent support for judicial decisions declaring unconstitutional bans on abortion.[283] The next generation of colorblind constitutionalists would never cite *Brown* was supporting any constitutional claim made by the civil rights movement or their liberal political legal allies.[284]

IV.. THE REHNQUIST COURT

Citations to *Brown* and *Bolling* continued to decline modestly during the first half of the Rehnquist Era before taking a dramatic nosedive to below late 1950s levels. From 1986 to 1995, Rehnquist Court Justices cited the 1954 and 1955 school segregation cases each year an average of 17.5 times

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[277] Weinberger v. Romero-Barcelo, 456 U.S. 305, 325 n.6 (1982).

[278] *See* DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

[279] For Powell, see *Fullilove*, 448 U.S. at 497, 516 (Powell, J., concurring); 438 U.S. *Bakke*, at 293-95, 307 (opinion of Powell, J.,); for Stewart, see *Fullilove*, 448 U.S. at 524 (Stewart, J., dissenting).

[280] Milliken v. Bradley, 433 U.S. 267, 296 (1977) (Powell, J., concurring).

[281] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172, 176 (1972).

[282] *See, e.g.*, Wright v. Council of Emporia, 407 U.S. 451 (1972).

[283] Roe v. Wade, 410 U.S. 113, 158 (1973) (Stewart, J., concurring).

[284] *See infra* notes 315–317 and accompanying text.

in an average of six opinions handed down in slightly less than four cases.[285] Eight opinions during this time period cited those decisions more than five times. Half of these opinions cited *Brown* or *Bolling* more than ten times. This represents a slight drop from the Burger Court years, although the drop is more substantial if 1992 is eliminated. From 1996 to 2005, citations were reduced to slightly more than two a year in slightly less than two opinions handed down in an average of 1.5 decisions per year. Only two opinions written in that decade cited *Brown* or *Bolling* as many as three times. Citations to *Bolling* almost disappeared entirely and were largely limited to the accepted claim that the Fifth Amendment had an equal protection component.[286] In no year was that opinion cited more than twice. No opinion cited *Bolling* after the Supreme Court's 2001 term.

The reduction in the total number of cases decided by the Rehnquist Court as well as the number of opinions written by Rehnquist Court Justices explains only a small fraction of the decrease in citations. The decline in cases and opinions hardly explains the decline in the average number of citations to *Brown* and *Bolling* in opinions that cited those cases. Moreover, the decline largely took place after 1992 (although 1990–1992 were transitional years). Even accounting for the steep reduction in cases decided, number of opinions issued, and total pages written noted in Table 10, the first decade of the Rehnquist years is considerably below the Burger Court average for all years and slightly below the Burger Court averages after 1977. The Rehnquist Court averages from 1996 to 2005 are substantially below the averages for any ten year period than began after 1960, even when controlled for the number of cases.

Table 11 – Summary of Decisions, Opinions and Pages: Burger through Rehnquist

Term	Cases Decided[287]	Number of opinions written[288]	Pages of writing[289]	Volumes as US reports

[285] The citation counts discussed in this section can be found in Part I *supra*.

[286] See Miller v. Albright, 523 U.S. 420, 472 (1998) (Breyer, J., dissenting); United States v. Armstrong, 517 U.S. 456, 464 (1996); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 616 (1991); United States v. Sperry Corp., 493 U.S. 52, 65 (1989); San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542 n.21 (1987); Lyng v. Castillo, 477 U.S. 635, 636 n.2 (1986).

[287] This does not include opinions associated with summary affirmances or denial of certiorari.

[288] This includes per curiam decisions.

[289] As US Reports pages. Includes per curiam decisions.

Term	Cases Decided[287]	Number of opinions written[288]	Pages of writing[289]	Volumes as US reports
1969	94	216	2339	4
1970	122	319	2881	4
1971	151	350	3572	5
1972	164	409	3815	5
1973	157	356	4076	5
1974	137	289	3237	4
1975	159	374	4359	6
1976	142	373	3594	5
1977	135	359	3821	5
1978	138	338	3677	5
1979	149	384	3788	5
1980	138	348	3643	5
1981	167	397	4229	5
1982	162	372	4415	5
1983	163	358	4410	5
1984	151	330	4818	5
1985	159	409	3920	5
1986	152	382	3855	5
1987	142	303	3318	4
1988	143	347	4312	5
1989	139	342	3858	5
1990	120	262	3517	4
1991	116	280	3088	4
1992	114	258	3401	4
1993	87	234	2516	3
1994	86	200	2502	3
1995	79	192	2568	3
1996	86	192	2487	3
1997	93	209	2231	3
1998	81	192	2278	3
1999	77	194	2659	3
2000	86	200	2142	3
2001	81	190	2259	3
2002	78	192	1377	2

Term	Cases Decided[287]	Number of opinions written[288]	Pages of writing[289]	Volumes as US reports
2003	83	200	2992	4
2004	79	203	1387[290]	2
2005	81	176		N/A
2006	73	175		N/A
Totals	**4564**	**10904**	**117341**	**149**

[290] Through May 31, 2005.

The changing judicial docket of the Rehnquist Court explains some of the reduction in citations to *Brown*. As discussed in the section on the Burger Court, *Brown* tended to be cited most frequently in school busing cases.[291] The decline in citations that began in 1979 continued during the Rehnquist years in part because of the continued decline in the number of decisions on remedies for past segregation. Still, Rehnquist Court Justices did not cite *Brown* as frequently when deciding school busing and related cases. As important, the Justices managed to avoid citing *Brown* or citing *Brown* with any great frequency when handing down opinions on the wide variety of race discrimination or equal protection decisions that did come before the Rehnquist Court.

Brown unsurprisingly continued to be cited in cases concerned with remedies for past school segregation, but the citations became increasing stylistic. Many citations simply pointed out that the struggle to desegregate schools began with *Brown*. Justice White quoted *Brown* when declaring "[i]n 1954, this Court held that the concept of 'separate but equal' has no place in the field of public education."[292] Opinions in this vein included the standard citation to the number of years that had passed since 1954. Justice Antonin Scalia that year complained, "though our cases continue to profess that judicial oversight of school operations is a temporary expedient, democratic processes remain suspended, with no prospect of restoration, 38 years after *Brown*." [293] "It is almost 38 years since this Court decided *Brown*," Blackmun responded.[294] "In those 38 years," he continued, "the [majority of 'black'] students in DeKalb County, Ga., never have attended . . . a school that was not disproportionately black."[295] Rehnquist Court Justices following the standard formula then cited *Brown* for the proposition that local officials must "eliminate every vestige of racial segregation and discrimination in the schools."[296] Justice Anthony Kennedy in *Freeman v. Pitts* insisted, "the rationale and the objective of *Brown I* and *Brown II*" required "a school district once segregated by law . . . to take all steps necessary to eliminate the

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[291] *See supra* notes 124–71and accompanying text.

[292] United States v. Fordice, 505 U.S. 717, 721 (1992) (quoting *Brown I*, 347 U.S. at 495).

[293] Freeman v. Pitts, 503 U.S. 467, 500 (1992) (Scalia, J., concurring) (citation omitted).

[294] *Id.* at 509 (Blackmun, J., concurring in judgment) (citation omitted).

[295] *Id.*

[296] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion).

vestiges of the unconstitutional *de jure* system."[297] When considering appropriate remedies, *Brown II* was usually trotted out for the proposition that lower courts could exercise some discretion and imagination.[298] "[E]quity has been characterized by a practical flexibility in shaping its remedies," Kennedy's opinion *Missouri v. Jenkins* intoned.[299]

While most Justices on the Rehnquist Court explicitly supported the "all vestiges" standard and none openly challenged that claim, *Brown* seemed of increasingly little use in determining what constituted a vestige of segregation. Rehnquist Court Justices fought over the meaning of *Brown* in school cases far less often than Burger Court Justices. For the most part, agreement seemed to be developing that *Brown* was not particularly helpful in determining the school segregation problems arising at the turn of the twenty-first century. Justice Kennedy's opinion in *Missouri v. Jenkins* exhibited this tendency to treat references to *Brown* as a preliminary to more serious discussions on the nature of racial equality. He praised "the judges of the District Courts and Courts of Appeals" for being "courageous and skillful in implementing [*Brown*'s] mandate," and cited *Brown* as recognizing that "courage and skill must be exercised with due regard for the proper and historic role of the courts."[300] No citation or analysis of *Brown* followed on just what was the "proper and historic role of the courts." *Brown* was simply a symbol, not the source of guidelines and principles constitutionally useful for determining whether the vestiges of past segregation continued to haunt school policy.

More often than not, Rehnquist Court Justices cited *Brown* as a case that was rightly decided or that stood for propositions that were no longer subject to any serious contestation. In many instances, the Justices as a legal matter might have cited hundreds of cases to prove the same point. *Brown* was cited only as the best known instance of the phenomenon in question. The best example of that practice may be Breyer's invocation of *Brown* in *Bush v. Gore*. That decision, he stated, was an example of a case decided under a "constitutional provision designed to protect a basic human right."[301] Justice Ruth Bader Ginsburg a year previously cited *Brown* as an instance when

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[297] *Freeman*, 503 U.S. at 485. *See Wygant*, 476 U.S. at 305 (Marshall, J., dissenting); Bazemore v. Friday, 478 U.S. 385, 414 (1986) (Brennan, dissenting in part).

[298] *See, e.g.*, United States v. Paradise, 480 U.S. 149, 195 n.4 (1987) (Stevens, J., concurring in judgment) (quoting *Brown*, 349 U.S. at 300); *see also* Missouri v. Jenkins, 495 U.S. 33, 78 (1990) (Kennedy, J., concurring in part and in judgment) (same); United States. v. Fordice, 505 U.S. 717, 747–48 (1992) (Thomas, J., concurring).

[299] *Missouri*, 495 U.S. at 78 (Kennedy, J., concurring in part and in judgment).

[300] *Id.*

[301] Bush v. Gore, 531 U.S. 98, 152–53 (2000) (Breyer, J., dissenting).

Supreme Court Justices "recognized the need for district courts to draw on their equitable jurisdiction to supervise various aspects of local school administration."[302] In 1994, Stevens cited *Brown* as an example of a case that might have justified an award for an attorney's fee, a matter not an issue in that case.[303] Justice Thomas when claiming that no constitutionally compelling interest existed for eradicating private discrimination based on marital status cited *Brown* for the proposition that a constitutional compelling interest would justify state laws eradicating private racial discrimination.[304]

Bolling, when cited at all during the Rehnquist years, achieved similar celebrity status. Justice David Souter's concurrence in *Washington v. Glucksberg* was the only Rehnquist Court opinion outside of affirmative action that cites *Bolling* more than once, as well as one of only two opinions written between 1996 and 2005 that cited *Bolling* or *Brown* more than twice. No reference had much substantive content. Souter cited *Bolling* as supporting the unexceptional propositions that the Justices "have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth" and that "a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims."[305] His *Glucksburg* concurrence trod on only slightly more controversial terrain when citing *Bolling* for the proposition that "almost all instances of unenumerated substantive rights are those resting on 'certain interests requir[ing] particularly careful scrutiny of the state needs to justify their abridgement.'"[306] Rehnquist Court Justices did clearly cite *Bolling* as holding that equal protection standards under the Due Process Clause of the

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[302] Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 337 n.4 (1999) (Ginsburg, J., dissenting).

[303] Landgraf v. USI Film Prods., 511 U.S. 244, 247 (1994).

[304] Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460, 461 (1994) (Thomas, J., dissenting from denial of certiorari). For other citations of *Brown* for banal propositions, see Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 289-90 (1990) (Stevens, J., dissenting) (noting that the Supreme Court has "sometimes found it necessary to limit local control over schools in order to protect the constitutional integrity of public education"); New York v. United States, 505 U.S. 144, 179 (1992) (*Brown* cited as an instance where "federal courts . . . order[ed] state officials to comply with federal law"); Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987) (*Brown* cited as an instance in which "this Court has imposed upon state officials a duty to obey the requirements of the Constitution, or compelled the performance of such duties").

[305] Washington v. Glucksberg, 521 U.S. 702, 763, 788 (1997) (Souter, J., concurring).

[306] Glucksberg, 521 U.S. at 766 (1997) (Souter, J., concurring).

Fifth Amendment were identical to equal protection standards under the Fourteenth Amendment. Given the "odious" nature of the racial classifications at issue in *Bolling*, O'Connor asserted in *Adarand Constructors, Inc. v. Pena*, "the resulting imposition on the Federal Government of an obligation [to segregate] equivalent to that of the States, followed as a matter of course."[307]

Rehnquist Court Justices made the ritual citations to *Brown* whenever opinions turned to equity or education. *Brown II* continued to be the citation of choice for propositions about the flexibility of equitable remedies. "Traditionally, equity has been characterized by a practical flexibility in shaping it's remedies," Stevens declared in *United States v. Paradise*.[308] Conservatives, liberals, and moderates all agreed on the "role of public schools in our national life," and typically noted *Brown* in the accompanying string citation.[309] In sharp contrast to Burger Court practice, Rehnquist Court citations to *Brown* on the value of public schooling rarely added much of legal substance to the judicial opinion. When justifying constitutional protection for a magazine that included "listings and photographs of residential properties," Blackmun apparently felt compelled to cite *Brown* for the "importance of education to the professional and personal development of the individual."[310] After noting that income tax laws were important, O'Connor in 2003 cited *Brown* for the proposition that education was also important.[311] Justice Marshall's opinion in *Kadrmas v. Dickinson Public Schools* was the one exception to this practice. Justice Marshall did not simply cite *Brown* on the value of education. His dissenting opinion relied on *Brown* for legal authority that "this Court should [not] sanction

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[307] 515 U.S. 200, 215–16 (1995). The other Rehnquist Court opinions which explicitly asserted that *Bolling* required the federal and state governments to adhere to identical constitutional standards was Correctional Services Corp. v. Malesko, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting).

[308] United States v. Paradise, 480 U.S. 149, 195 (1987) (Stevens, J., concurring). *See* Missouri v. Jenkins, 495 U.S. 33, 78 (1990) (Kennedy, J., concurring in part and in judgment) (same); United States v. Fordice, 505 U.S. 717, 747–48 (1992) (Thomas, J., concurring).

[309] See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 n.8 (1986) (Stevens, J., dissenting).

[310] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 437 (1993) (Blackmun, J., concurring).

[311] Franchise Tax Bd. Of Cal. v. Hyatt, 538 U.S. 488, 499 (2003). For other incantations of *Brown*'s assertion that education is important, see Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988); *id.* at 278 (Brennan, J., dissenting); Honig v. Doe, 484 U.S. 305, 309 (1988); Grutter v. Bollinger, 539 U.S. 306, 331 (2003); Zelman v. Simmons-Harris, 536 U.S. 639, 677 (2002) (Thomas, J., concurring).

discrimination against the poor with respect to 'perhaps the most important function of state and local governments'"[312]

When *Brown* was cited for more substantive points during the Rehnquist years, both liberals and conservatives insisted that case supported their distinctive and divergent constitutional opinions. In sharp contrast to Burger Court conservatives, who largely limited themselves to claiming *Brown* or *Bolling* should not be extended as far as civil rights plaintiffs believed, Rehnquist Court conservatives frequently indicated that such reformed segregationists as Jesse Helms and Strom Thurmond better understood the precedential meaning of *Brown* than did the NAACP or other lawyers for African-Americans claiming race discrimination. Rehnquist had barely assumed the Chief Justiceship when Powell signaled the conservative willingness to co-opt *Brown.* Rejecting the notion that affirmation active was a constitutional means for providing children of color with appropriate role models, Powell insisted that the civil rights attorneys who favored such policies were betraying the cause they fought for in 1954. He declared, "the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Bd. of Education*."[313] During the next two decades, *Brown* would be repeatedly cited as supporting conservative positions on racial issues and other constitutional matters, both when conservatives were objecting to affirmative action and when they were laying out broader constitutional visions.

Brown was unsurprisingly the citation of choice for justices who interpreted the Fourteenth Amendment as prohibiting racial classifications rather than forbidding racial subordination. Justice O'Connor was particularly insistent on this reading of Warren Court precedent. Dissenting in *Metro Broadcasting, Inc. v. FCC,* she cited *Bolling* for the proposition that the "Constitution's guarantee of equal protection binds the Federal Government as it does the States."[314] O'Connor reasoned from this premise that federal affirmative action programs would be justified only as necessary means to compelling government ends. "No lower level of scrutiny applies to the Federal Government's use of race classifications,"[315] she interpreted *Bolling* as holding, even when Congress claimed to be promoting racial diversity. *Bolling*, O'Connor wrote five years later, determined "that Congress, like the States, may treat people differently because of their race

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[312] Kadrmas v. Dickinson Public Sch., 487 U.S. 450, 466 (1988) (Marshall, J., dissenting) (quoting *Brown I*, 347 U.S. at 493).

[313] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion).

[314] Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting).

[315] *Id.*

only for compelling reasons."[316] Proponents of conservative notions of racial equality trotted out the 1954 school segregation decisions whenever government officials created minority-majority legislative districts. "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in public parks, buses, golf courses, beaches, and schools," Kennedy declared when citing *Brown*, "so . . . it may not separate its citizens into different voting districts on the basis of race."[317] In sharp contrast to the champions of colorblind constitutionalism on the Warren Court and somewhat less contrast to the champions of colorblind constitutionalism on the Burger Court, the Justices on the Rehnquist Court who invoked *Brown* when challenging affirmative action never invoked that decision as grounds for finding race discrimination or discrimination against any other relatively powerless group.

The more liberal Justices on the Rehnquist Court sharply criticized what they believed was a perverse appropriation of civil rights precedents to limit legislation promoting racial equality. Their *Brown* was about racial subordination. "To pretend . . . that the issue present in *Bakke* was the same as the issue in *Brown*," Ginsburg wrote, "is to pretend that history never happened."[318] Justice Souter found assertions "utterly implausible" that the "minority-majority district 'generates' within the white plaintiff here anything comparable to '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.'"[319] The injury in *Brown*, these Justices repeatedly insisted, was "state-sponsored school segregation" which "caused some students, but not others to be stamped with a badge of inferiority on account of their race."[320] Alleged victims of contemporary racial voting schemes, under this reading of *Brown*, suffered no constitutional injury. Noting that *Brown* required evidence of harm, not mere classification, Stevens could "not understand why any voter's reputation or dignity should be *presumed* to have been

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[316] Adarand Constuctors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

[317] Miller v. Johnson, 515 U.S. 900, 911 (1995). *See* Shaw v. Reno, 509 U.S. 630, 643–44 (1993) (citing *Brown* as supporting claims that "a racial classification" in legislative districting "is presumptively invalid and can be upheld only upon an extraordinary justification") (citations omitted).

[318] Adarand, 515 U.S. at 274 n.8 (Ginsburg, J., dissenting) (quoting Stephen Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 433-34 (1988)). *See* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting).

[319] Shaw v. Reno, 509 U.S. 630, 686, 687 n. 9 (1993) (Souter, J., dissenting)

[320] Shaw v. Hunt, 517 U.S. 899, 928 (1996) (Stevens, J., dissenting)

harmed simply because he resides in a highly integrated, majority-minority voting district that the legislature has deliberately created."[321]

Conservatives on the Rehnquist Court wielded *Brown* as a weapon against newly proposed remedies for past school segregation. Justice Scalia's opinion in *United States v. Fordice* completed the transition from conservative challenges to liberal extensions of *Brown* to conservative re-visioning of that case as a bulwark of the racial status quo during the 1990s.[322] Justice Scalia began his analysis of whether Mississippi higher education practices were maintaining segregated colleges in practice with the conventional assertion that many demanded remedies were not compelled by *Brown*. That decision, he insisted, was not relevant "in the context of higher education, a context in which students decide whether to attend school and if so where."[323] In his opinion, "[l]egacies of the dual system that permit (or even incidentally facilitate) free choice of racially identifiable schools—while still assuring each individual student the right to attend whatever school he wishes—do not have these [stigmatic] consequences."[324] Scalia then shifted to the stronger claim that the remedies civil rights plaintiffs were demanding might violate *Brown*. In his view, "the insistence . . . that [black majority] institutions not be permitted to endure perpetuates the very stigma of black inferiority that *Brown I* sought to destroy."[325]

Several Rehnquist Court opinions demonstrated other ways in which *Brown* might provide precedential support for limiting remedies after findings of past race discrimination. Chief Justice Rehnquist cited *Brown* for the presumption that judicial oversight of school districts should be ended as soon as possible. "From the very first," he declared in 1991, "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."[326] Four years later, Thomas insisted that *Brown*, properly interpreted, restricted federal judicial interference with local educational decisions. Federal jurisdiction over school boards, he stated, was only "briefly mentioned in *Brown II* as a temporary measure to overcome

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[321] *Id. See* Bush v. Vera, 517 U.S. 952, 1054–55 (1996) (Souter, J., dissenting); Miller v. Johnson, 515 U.S. 900, 931 (1995) (Stevens, J., dissenting).

[322] United States v. Fordice, 505 U.S. 717, 749 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[323] *Id.* at 754.

[324] *Id.* at 754–55.

[325] *Id.* at 761.

[326] Bd. of Educ. v. Oklahoma Public Schools, 498 U.S. 237, 247 (1991).

local resistance to desegregation."[327] Some conservatives interpreted the Warren Court's insistence that local officials take initial responsibility for eradicating Jim Crow as requiring deference to the local decision makers. When considering prison reform, White quoted *Brown II* when insisting "the district court defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification."[328]

Constitutional interpretation provided another site for duels over ideological possession of *Brown.* The decisions striking down school segregation had historically been understood as rooted in living constitutionalism. *Brown* was correctly decided, a generation of liberal constitutionalists insisted, even though the persons responsible for the Fourteenth Amendment did not think they were mandating integrated schools. Fueled by some conservative scholarship, Scalia and Thomas insisted that the school segregation cases were Exhibit A for the virtues of originalism. Their *Brown* was grounded in original meaning analysis, not very contestable social science evidence or changes in popular opinions.

The less conservative Justices on the Rehnquist Court adhered to the traditional view of *Brown* and *Bolling* as the most important examples of living constitutionalism. Their *Brown* refuted originalist pretensions. "In *Brown v. Board of Education*," Blackmun declared, "this Court held that, despite the fact that the legislative history of the Fourteenth Amendment indicated that Congress did *not* view racial discrimination in public education as a specific target, the Amendment nevertheless prohibited such discrimination."[329] As such, *Brown* provided precedential support for constitutional attacks on long-standing bans on abortion, homosexual conduct, and laws imposing death for murder. Justice Stevens claimed, "[i]f the age of a pernicious practice were a sufficient reason for its continued

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[327] Missouri v. Jenkins, 515 U.S. 70, 134 (1995) (Thomas, J., concurring).

[328] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392 (1992) (quoting *Brown II*, 349 U.S. at 299).

[329] McCleskey v. Kemp, 481 U.S. 279, 347 n.2 (1987) (Blackmun, J., dissenting). See Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 796–97 n.5 (1986) (White, J., dissenting) ("there will be some cases in which those who framed the provisions incorporating certain principles into the Constitution will be found to have been incorrect in their assessment of the consequences of their decision"); Van Orden v. Perry, 545 U.S. 677, 732 (2005) (Stevens, J., dissenting) ("we have construed the Equal Protection Clause of the Fourteenth Amendment to prohibit segregated schools, see *Brown v. Board of Education* [II], . . . even though those who drafted that Amendment evidently thought that separate was not unequal").

acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure."[330]

Originalist Justices during the Rehnquist Court years insisted that *Brown*, properly understood, vindicated their approach to constitutional interpretation. Justice Scalia, in 1988, denounced the common identification of *Brown* with living constitutionalism. He insisted that decision supported claims that Justices could declare unconstitutional only those punishments that "were forbidden under the original understanding of 'cruel and unusual.'" [331] *Brown*, Scalia contended, did not overturn an established practice of white supremacy. "[E]ven if one does not regard the Fourteenth Amendment as crystal clear on this point," he declared,

> [A] tradition of *unchallenged* validity did not exist with respect to the practice in *Brown*. To the contrary, in the 19th century the principle of "separate-but-equal" had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices.[332]

Judge Michael McConnell provided some historical foundation for this claim in a controversial article claiming that the persons responsible for the Fourteenth Amendment had intended to abolish school segregation. [333] Thomas immediately seized on that article. His concurrence in *Missouri v. Jenkins* claimed that originalism provided the best justification for the 1954 decision declaring segregated schools unconstitutional. Citing McConnell, Thomas declared, "*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."[334]

The tendency for all parties engaged in constitutional conflicts to invoke *Brown* as supporting their position reached an apogee in *Planned Parenthood*

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[330] Rutan v. Republican Party of Illinois, 497 U.S. 62, 82 (1990) (Stevens, J., concurring).

[331] Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting).

[332] *Rutan*, 497 U.S. at 95–6 n.1 (Scalia, J., dissenting).

[333] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995). For critiques of this position, see Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse*, *in* INTEGRITY AND CONSCIENCE: NOMOS XL 243–44 (Ian Shapiro & Robert Adams eds., 1998); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995).

[334] Missouri v. Jenkins, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

v. Casey.[335] Remarkably, Rehnquist Court Justices engaged in their most extended debate over the significance of the Supreme Court's 1954 decisions striking down Jim Crow schooling in a case concerned with the constitutional status of legal abortion. The plurality and dissenting opinions in Casey were the last to cite *Brown* with any frequency until *Parents Involved*. Less remarkably, given previous citation patterns, the frequent references to *Brown* were unconcerned with racial equality or the constitutional meaning of discrimination. Instead, the Justices divided over whether controversial judicial precedents protecting abortion rights should be maintained in light of the social consensus that *Brown* was originally a controversial decision that correctly overruled a previous judicial precedent.

Supporters of legal abortion thought the school segregation cases, correctly understood, demonstrated why the justices should not abandon the pro-choice regime instituted by *Roe v. Wade*. In their view, constitutionalists who understood why the Supreme Court correctly abandoned decisions sustaining segregated practices would understand why the Supreme Court had no reason to abandon decisions sustaining the right to terminate an unwanted pregnancy. "*Brown*," according to O'Connor, Kennedy and Souter, "rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolution[]" in *Plessy v. Ferguson*.[336] In their view, "[b]ecause neither the factual underpinnings of *Roe* [*v. Wade*]'s central holding nor our understanding of it has changed," the judicial decision in 1954 to reverse separate but equal did not support a judicial decision in 1992 permitting states to ban abortion."[337] Understood correctly, they continued, *Brown* supported the result in *Casey*. Just as the Warren Court remained steadfast in the face of resistance to desegregation, so the Rehnquist Court should remain steadfast in the face of resistance to reproductive choice. Quoting Warren's claim "[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them," the plurality opinion concluded, "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[338]

A tribunal committed to the judicial role underlying *Brown*, Rehnquist responded in dissent, would admit that previous decisions protecting abortion rights were constitutionally mistaken. His *Brown* demonstrated that "the

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[335] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[336] *Id.* at 863 (opinion of O'Connor, Kennedy, and Souter, JJ.).

[337] *Id.* at 864.

[338] *Id.* at 867 (quoting *Brown II*, 349 U.S. at 300) (alteration in original).

simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here."[339] Properly interpreted, conservatives declared, *Brown* compelled a decision overruling *Roe*. Just as the Warren Court contributed immensely to the stature of federal courts in the long run by correcting the popular misconception that Jim Crow schools were constitutional, so the Rehnquist Court would make a similar long run contribution to the stature of federal courts by correcting the popular misconception that persons had a constitutional right to terminate pregnancies. "If one assumes instead, as the Court surely did in . . . *Brown* . . .," the *Casey* dissenters stated, "that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties" as those suggested by the plurality "may be put to one side."[340]

Neither the plurality nor the dissent in Casey claimed that the substance of *Brown* had much to do with the constitutionality of legal abortion. The justices who supported *Roe* did not insist that the antisubordination principle underlying the attack on school segregation supported decisions ensuring that women would have the rights to participate as equals in the public world of work and politics. The Justices who would overrule *Roe* did not insist that *Brown* compelling judicial protection for the relatively powerless unborn. Rather, in *Casey* and other Rehnquist Court decisions, *Brown* became merely a decision without much content that everyone agreed was correctly decided. Both proponents and opponents of legal abortion invoked *Brown* as a consensual symbol of legal rectitude, rather than as a case grounded in distinctive and contested constitutional principles.

V. THE ROBERTS COURT

Parents Involved presently encompasses the entire Roberts Court engagement with the 1954 and 1955 decisions declaring school segregation unconstitutional. Five opinions in that case cited *Brown* a total of fifty-eight times. Justice Breyer's dissent referred to *Brown* twenty-four times, Thomas made twenty-two references in his concurring opinion, Roberts and Stevens cited *Brown* nine times in their respective opinions, while the Kennedy concurrence made four citations. These fifty-eight citations were more than the total number of citations to *Brown* made in Supreme Court opinions handed down after *Casey* but before *Parents Involved*. This ephemeral

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[339] *Id.* at 957 (Rehnquist, C.J., dissenting).

[340] *Id.* at 964.

discovery of *Brown* in *Parents Involved* was part of no broader trend. Only one other opinion during the Roberts years mentioned *Brown*. Justice Kennedy in 2008 made a celebrity reference by citing *Brown* for the inoffensive proposition that justices should refrain from drawing strong constitutional inferences from sketchy historical records.[341] Judging from citations alone, one cannot determine whether Roberts Court Justices are aware that *Bolling v. Sharpe* exists in the *U.S. Reports*.

More aggressively than in the past, the conservative Justices on the Roberts Court accused members of the contemporary civil rights movement of betraying their heritage. Vigorously condemning officials and Justices who sanctioned using race as a means for integrating public schools not previously segregated by law, Chief Justice John Roberts and Thomas repeatedly cited *Brown* for the proposition that racial classifications are constitutionally odious. "[W]hen it comes to using race to assign children to schools," Roberts bluntly asserted,

> history will be heard. In *Brown v. Board of Education*, 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. 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.[342]

Chief Justice Roberts believed the Warren Court taught Americans a simple truth about racial equality. Noting that "[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin," he concluded that the lesson that decision taught was that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[343] Justice Thomas detailed at some length how progressive proponents of racial equality were, in fact, parroting assertions made by the leading constitutional champions of Jim Crow. "Disfavoring a color-blind interpretation of the Constitution," he declared, "the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*."[344]

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[341] Boumediene v. Bush, 128 S. Ct. 2229, 2251 (2008).

[342] *Parents Involved*, at 2767 (opinion of Roberts, C.J.) (citations omitted).

[343] *Id.* at 2768.

[344] *Id.*, at 2768 (Thomas, J., concurring).

The dissenting Justices in *Parents Involved* maintained that *Brown* provided precedent support for the constitutional visions championed by the contemporary civil rights movement. School districts that promoted racial integration by judicious use of racial classification, in this view, were faithful to the original decisions striking down segregated schools. Breyer stated,

> [t]hese cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education*, long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake.[345]

Justices Breyer and Stevens vigorously insisted that *Brown* was committed to an antisubordination conception of equal protection. Challenging the plurality's effort to appropriate *Brown* for anticlassification purposes, Breyer declared, "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 80 years of legalized subordination."[346] Stevens observed, "[t]here is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education*," given that "only black schoolchildren" were prohibited from attending the schools of their choice. "[T]he history books," he observed, "do not tell stories of white children struggling to attend black schools."[347]

Justice Kennedy best described the contemporary status of *Brown* on the Roberts Court when he suggested that the 1954 decisions desegregated schools had little to say about the constitutional merits of present policy choices. "Fifty years of experience since *Brown v. Board of Education*," he wrote, "should teach us that the problem before us defies so easy a solution."[348] *Brown* remained a vague ideal. Kennedy piously intoned, "school districts can seek to reach *Brown*'s objective of equal educational opportunity"[349] in ways consistent with the *Parents Involved* decision. Neither *Brown* nor *Bolling*, however, provided many specifics about the constitutional vision of racial equality underlying the Kennedy concurrence or how that vision might be constitutionally achieved.

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[345] *Id.* at 2800 (Breyer, J., dissenting) (citation omitted).

[346] *Id.* at 2836 (citation omitted).

[347] *Id.* at 2797–98 (Stevens, J., dissenting).

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

[349] *Id.*

Noting that no Justice in the *Parents Involved* majority has ever cited *Brown* as supporting claims made by the contemporary civil rights movement belabors the obvious. Chief Justice Roberts has yet to cite *Brown* or *Bolling* in another case. Justice Samuel Alito has never cited *Brown* or *Bolling*. Justices Thomas and Scalia limit themselves to celebrity citations or assertions that Brown supports the racial vision that animated the Reagan Revolution.[350] More interesting is the evidence that *Brown* plays little role in the jurisprudence of the most outspoken liberal justice on the *Roberts* Court. Justice Breyer has sat on the Court for almost fifteen years, but his *Parents Involved* dissent was the only occasion in which he cited *Brown* or *Bolling* for a substantive constitutional point.

VI. CONCLUSION

Parents Involved and *Casey* highlight in different ways how *Brown I*, *Brown II*, and *Bolling* have lost whatever limited capacity they had to serve as precedents for progressive constitutional causes. *Brown* in present law rises above the disputes that divide conservatives from liberals, originalists from aspirationalists, and champions of antisubordination from champions of anti-classification. The 1954 and 1955 school segregation cases all too frequently are cited only as decisions that are uncontroversially correct. The justices in *Casey* agreed that *Brown* correctly overruled *Plessy v. Ferguson*, while debating whether *Roe v. Wade* should be overruled. The Justices in *Parents Involved* agreed that *Brown* correctly outlawed racial discrimination, while debating whether affirmative action was racial discrimination, a remedy for racial discrimination, or a means for fostering greater racial understanding. All parties to these debates insist *Brown* is a landmark decision that should be construed broadly. Ubiquity is the price of fame. Americans construe *Brown* broadly and promiscuously, in service of every prominent constitutional vision championed in the United States at the turn of the twenty-first century.

The contemporary history of *Brown* is more consistent with a diagnosis of celebretization than what has become known as "ideological drift."[351] In a series of important articles, Professor Jack Balkin of Yale Law School observes that fundamental liberal principles over time tend to be co-opted by conservatives.[352] Liberal claims that government should not interfere with the marketplace for ideas, for example, eventually spawned conservative

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[350] *See supra* notes, 304, 327, 331–332 and accompanying text.

[351] J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (1990).

[352] *See id.* at 376.

claims that government should not interfere with hate speech, campaign finance, and commercial advertising.[353] The drift metaphor implies that conservatives seized control of early free speech precedents from liberals, appropriating them for rightwing use. Diffusion may be the metaphor. Liberals did not abandon their fundamental free speech commitments when constitutional commentators on the right suddenly discovered the First Amendment. What had once been struggles over the legitimacy and extension of liberal precedents are presently struggles over ownership. *Brown* has had a similar history. Liberals have not abandoned *Brown* in the face of conservative suggestions that *Brown*, properly understood, justifies maintaining the contemporary racial status quo. Rather, what had been struggles over the legitimacy and extension of the original decisions declaring school segregation unconstitutional have become struggles over who owns *Brown*.

No political movement has title to any precedent, no matter how hard that movement worked to secure that precedent and no matter how arduous the previous opposition of those who now ardently profess their fierce devotion. Constitutions from the sixteenth century to the present are, to a fair degree, "whatever c[an] be plausibly argued and forcibly maintained."[354] In the world of popular constitutionalism, which is the world we actually inhabit, what matters is whether people can be persuaded that a particular understanding of *Brown* is correct. History is relevant only to the extent that most citizens are capable and interested in accurate history. If, as the case at present, a great many conservative citizens celebrate *Brown* as the decision that prohibits the use of racial classifications, then scholarship demonstrating that this was not the original understanding of *Brown* is of only limited political significance.

Brown contributed to problematic status of that decision at present. As is well known, Warren set out to write a "short, non-rhetorical, unemotional and, above all, nonaccusatory" opinion that would not antagonize opponents of racial equality.[355] Chief Justice Warren, in private, made clear that his commitment was to anti-subordination rather than anti-classification.[356] The

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[353] *Id.* at 394–428.

[354] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 31 (2004); John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U L. REV. 1043, 1087 (1974).

[355] S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 347 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

[356] *See* RICHARD KLUGER, SIMPLE JUSTICE 678–79 (Vintage Book 1975).

same is true for the lawyers from the NAACP Legal Defense Fund who litigated *Brown*.[357] Nevertheless, little in the *Brown* opinions suggest the broader principles underlying the school desegregation decisions. Chief Justice Warren declared that children of color developed "feeling[s] of inferiority" [358] from segregation, not that segregation and racial classifications diminished persons of all races. Still, that is a rather weak reed to hang the strong antisubordination theory necessary to sustain the dissents in *Parents Involved*.

Subsequent precedents did not make a stronger case for a *Brown* decision that would be useful to contemporary progressives. Douglas aside, most Warren Court Justices were very careful with their citations to *Brown* at the time the case was decided. More often than not, the case was not cited at all or cited for fairly narrow legal points.[359] As the Warren Court matured, *Brown* became the citation of choice for the proposition that race discrimination was wrong, but such citations rarely included substantial commentary on the constitutional meaning of race discrimination.[360] Justice Douglas and probably Goldberg had broader theories about the significance of *Brown*, but their aspirations were typically articulated in concurring or dissenting opinions.[361] Of some significance perhaps, the two Justices who believed *Brown* provided a particularly strong sword for combating the complex and substantial vestiges of discrimination against persons of color were the only justices on the Warren Court who made clear that *Brown* also prohibited race discrimination that benefited persons of color. [362] Colorblindness in the Warren Era was closely yoked to constitutional doctrines that both identified racial subordination and provided government with the constitutional tools necessary to destroy existing systems of racial caste. Colorblindness on the Rehnquist and Roberts Court was more animated by concerns that no legally innocent white person should be inconvenienced in any way when government pursues formal racial equality.

This history of *Brown* supports recent observations on the futility of judicial strategizing. Professor Lawrence Baum of Ohio State observes that, unless the evidence is absolute clear, justices have no particular capacity to

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[357] *See* Robert L. Carter, *The Conception of Brown*, 32 FORDHAM URB. L.J. 93, 97–98 (2004).

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

[359] *See supra* notes 84–88 and accompanying text.

[360] *See supra* notes 107–111 and accompanying text.

[361] *See supra* notes 89–96 and accompanying text.

[362] *See supra* notes 114–115 and accompanying text.

predict the actual impact of their decisions.[363] Hence, he concludes, justices interesting in maximizing their influence on legal policy should base rulings on their best understanding of the law and hope their judgments are vindicated.[364] Warren did not employ this approach in *Brown*. He wrote an inoffensive opinion in the hope that doing so would limit hostile political reaction in the south. The immediate aftermath of *Brown* demonstrates one flaw with this approach. Reaction to *Brown* was swift and fierce,[365] perhaps aggravated by the opinion's refusal to state clearly the constitutional principles that justified declaring segregated schools unconstitutional. This paper identifies a second problem. *Brown* had a surprisingly limited progressive impact on constitutional law because the antisubordination grounding of the decision was not clearly spelled out. Once *Brown* became established law, pushing that decision in further progressive directions became more difficult than might have been the case had Warren, following several essays in *What Brown v. Board of Education Should Have Said*,[366] specifically detailed the more fundamental constitutional commitments underlying the successful attack on Jim Crow.

Brown and probably *Roe v. Wade* suggest that justices may be best off abandoning strategic opinions, unless the evidence is overwhelming that judicial language and principle are likely to make a political difference. Backlash tends to occur whenever justices take a firm stand on any major social policy concern.[367] Much evidence exists that backlash occurs whenever any governing institution makes exceptionally controversial decisions. "Legislation that intervenes in entrenched status relationships," Professors Robert Post and Reva Siegel of Yale Law School observe, "often generates countermobilization."[368] Witness the popular mobilization against New York's repeal of abortion bans in 1971.[369] Under these conditions,

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[363] LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 14–19 (Princeton Univ. Press 2008).

[364] *Id.* at 18.

[365] *See* PHILIP A. KLINKNER & ROGERS SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 245–246 (Univ. of Chicago Press 1999); LUCAS POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 57–70 (Cambridge Univ. Press 2000).

[366] See *supra* note 20.

[367] *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 433–482 (2005).

[368] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 393–394 (2007).

[369] *See* David J. Garrow, *Abortion Before and After* Roe v. Wade: *An Historical Perspective*, 62 ALB. L. REV. 833, 840–841 (1999).

constitutional decision makers are unlikely to entrench their decision by obfuscating their underlying jurisprudential commitments. Decisions legalizing gay marriage will likely intensify cultural wars, whether made by justices or elected officials, and whether based on fundamental rights to intimate associations or an obscure speech by some framer of the Fourteenth Amendment. The best strategy under these circumstances may be to rally one's troops behind a broad statement of constitutional principle and hope for victory in the forthcoming struggle over constitutional meaning. Post and Siegel point out that "controversies about religion, family, and gender . . . . cannot be escaped by strategies of conflict avoidance. . . . [D]issenting Justices . . . [who] turn minimalist," in their view, "simply cede ground" to rival constitutional visions.[370] If the history of *Brown* is any indication, progressive justices who make firm declarations about constitutional right and wrong will not substantially increase an already intense opposition. They may, however, enable decisions to have strong precedential power once the initial conflict over their viability has been won.

Not being able to repeat the past, progressives will have to live with *Brown I*, *Brown II*, and *Bolling* as they were written and interpreted by a generation of justices. Those decisions have come to be understood as prohibiting race and other forms of arbitrary discrimination, without much analysis of what constitutes race or arbitrary discrimination. Some responsibility for the diminished contemporary understanding of *Brown* lies with racial conservatives who, recognizing they could never overrule *Brown*, have limited the scope of that decision through appropriation. Americans from 1968 to 2008 were more inclined to choose as political leaders persons who implicitly or explicitly confessed error about their racial politics during the 1950s and 1960s than those who actually participated in what is considered the greatest triumph of constitutional right in American history.[371] Not surprisingly, a southern dominated Republican coalition exhibited little interest in determining or realizing the actual original aspirations of the civil rights movement.[372] Part of the blame for the present weakened state of *Brown* also lies with the Justices who first supported the constitutional attack on Jim Crow. For misguided tactical reasons, Warren Court Justices did not create the sort of legal record or rhetoric that would unequivocally make progressives the sole champions of *Brown* at present. *Brown* has been co-opted by racial conservatives in large part because of judicial decisions to use language that might not offend racial conservatives.

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[370] *See* Post & Siegel, *supra* note 368 at 433.

[371] *See* THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (W.W. Norton & Co. 1992).

[372] *See* Klinkner & Smith, *supra* note 365, at 288–316.

That all parties to contemporary constitutional disputes cite *Brown* as supporting their most cherished conclusions does not render the decision meaningless. When conservatives made *Brown* their weapon of choice in struggles to prevent affirmative action and limit integration of public schools, they, for all practical purposes, abandoned any effort to return to a world in which explicit forms of racial supremacy were legitimate constitutional practice. That no prominent political movement in the United States longs for the good old days of early twentieth century Jim Crow is a stunning achievement, even as public schools are resegregating.[373] Barack Obama could not even have fantasized about running for the White House had *Brown* and the civil rights revolution not occurred. Professor Rogers Smith of the University of Pennsylvania and his coauthors are correct to note that in the United States one form of racial order tends to replace another form of racial order.[374] Nevertheless, Brown demonstrates that history both progresses and cycles. Racial politics at the turn of the twenty-first century are better than racial politics during the middle of the twentieth century, even if racial progress has clearly stalled.[375]

Brown, this study demonstrates, no longer advances distinctive progressive understandings about racial equality or American constitutional aspirations. Professor Bruce Ackerman of Yale Law School may be correct that we live in a constitutional universe structured by the New Deal and Great Society. He claims the political upheaval or constitutional moment necessary for the legitimate abandonment of the administrative/welfare state or the return of state-mandated segregation has not yet occurred.[376] Still, proponents of progressive constitutional visions should realize that, at least before the recent election, they lived in what Professor Mark Tushnet of Harvard Law School describes as a "chastened" constitutional order.[377]

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[373] For the resegregation of public schools, see Klinkner & Smith, *supra* note 365, at 342–43.

[374] *See* Rogers M. Smith & Desmond S. King, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005); Klinkner & Smith, *supra* note 365, at 4–7.

[375] *See* Klinkner & Smith, *supra* note 365, at 8 (noting that "although racial progress has not been either inevitable or irreversible in America, it has been in significant ways cumulative").

[376] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 50–52 (Harvard Univ. Press 1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 389–95 (Harv. Univ. Press 1998).

[377] Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 94 (1999). *See also* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (Princeton Univ. Press 2004).

Government in this racially unambitious regime does no more to advance the fundamental principles of the New Deal and Great Society than maintain in somewhat diminished form what was achieved during the 1930s through the 1960s.[378] *Brown* and the Civil Rights Act of 1964 were two of the most important achievements of that era. If, however, progressive politics is to move forward, the push will come from events that create a new and better racial order and not from a renewed commitment to the largely unexpressed principles underlying *Brown v. Board of Education*.

The nature of that new racial order cannot be accurately ascertained at present. To a fair degree, constitutional visions articulated by the party out of office rarely describe what actually happens when power shifts.[379] Power shifts typically occur when the basis of partisan competition is disrupted. These disruptions often spawn dominant coalitions quite different from those which previously fought for political supremacy.[380] Moreover, such coalitional shifts are often responses to unanticipated political events, such as the Great Depression, which force participants to revise inherited constitutional understandings.[381] Consider in this vein the history of contemporary judicial power. Conservatives during the Warren Era pledged fidelity to the gods of judicial restraint. Given new opportunities and changed circumstances after the Reagan Revolution and election of 1994, the conservative majority of the Rehnquist Court declared more federal laws unconstitutional than any other tribunal in American history.[382] Another regime shift may be in the offing, perhaps as a consequence of an Obama presidency, the financial crisis and the struggle against terrorism. One consequence may be new precedents in the future supporting new progressive conceptions of racial equality. If the past is any lesson, then the progressive justices making those decisions on a reconstituted federal judiciary should state their constitutional vision forthrightly. Bland language

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[378] Tushnet, *supra* note 377, at 64.

[379] Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 344–349 (2002).

[380] *See* JAMES L. SUNDQUIST, DYNAMICS OF A PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 19–49 (Brookings Institute 1983).

[381] *See* JOHN CHAMBERLAIN, FAREWELL TO REFORM: THE RISE, LIFE, AND DECAY OF THE PROGRESSIVE MIND IN AMERICA (Quadrangle Books 1965) (noting that the constitutional vision of progressives was very different than the constitutional vision of New Dealers); ACKERMAN, TRANSFORMATIONS, *supra* note 376 at 279–383.

[382] *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 199–253 (Univ. of Chicago Press 2004).

will not ease the political struggle to establish that better racial order and may inhibit what that order might accomplish once established.