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Ronald Turner

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## WAS *BROWN V. BOARD OF EDUCATION* CORRECTLY DECIDED?

RONALD TURNER \*

For decades now, judicial nominees, including those for seats on the Supreme Court of the United States, have been asked and have answered questions about the correctness of *Brown v. Board of Education*,<sup>1</sup> the Supreme Court's landmark 1954 decision, and its "unshakable precedent"<sup>2</sup> holding that state laws prohibiting black schoolchildren from attending public school with white students violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>3</sup>

In recent judicial nominee confirmation hearings before the United States Senate Committee on the Judiciary, Senator Richard Blumenthal, a Democrat from Connecticut, has posed the *Brown* question to President Donald J. Trump's nominees for lower federal court judgeships.<sup>4</sup> Unlike judicial nominees in previous administrations, a number of President Trump's nominees for lifetime appointment to the federal bench have refused to answer the *Brown* query. For example, federal district court nominee Wendy Vitter responded: "I don't mean to be coy, but I think I can get into a difficult, difficult area when I start commenting on Supreme Court decisions—which are correctly decided and which I may disagree with."<sup>5</sup> Andrew Oldham, nominated for a seat on the United States Court of Appeals for the Fifth Circuit, did not answer the question, citing "the so-called

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\* A.A. White Professor of Law, University of Houston Law Center. J.D., University of Pennsylvania Law School; B.A., Wilberforce University.

1. (*Brown I*), 347 U.S. 483 (1954).
2. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 101 (2018).
3. U.S. CONST. amend. XIV; (*Brown I*), 347 U.S. at 495; see also Fallon, *supra* note 2, at 101.
4. "It's hardly a trick question. They can either answer it or refuse, which many have done, but past nominees have answered it and then declined to answer questions about other precedents." See Zoe Tillman, *Trump's Judicial Nominees Are Finally Saying Brown v. Board of Education Was Right After at Least One Republican Senator Complained*, BUZZFEED NEWS (June 21, 2019, 4:31 PM), <https://www.buzzfeednews.com/article/zoetillman/trump-judicial-nominees-brown-v-board-education> (quoting Senator Richard Blumenthal).
5. Dahlia Lithwick, *Trump's Nominees Won't Say if Brown v. Board of Education Was Decided Correctly*, SLATE (Apr. 11, 2019, 6:40 PM), <https://slate.com/news-and-politics/2019/04/trump-judicial-nominees-brown-v-board-of-education-precedent-refuse-questions.html> (quoting Wendy Vitter).

‘Ginsburg Rule[s]’<sup>6</sup> as support for his reply that “even the most universally accepted Supreme Court case is outside the bounds of a federal judge to comment on.”<sup>7</sup> Neomi Rao, nominated for the United States Court of Appeals for the District of Columbia Circuit seat formerly occupied by Justice Brett M. Kavanaugh, said “*Brown* is a really important precedent of the Supreme Court, and one that overturned *Plessy v. Ferguson*,<sup>8</sup> which you know was a real black mark on our history.”<sup>9</sup> She refused to go further, however, stating that it was “‘not appropriate’ to comment on the ‘correctness of particular precedents.’”<sup>10</sup>

Asked if *Brown* was correctly decided, Ada Brown, now a federal district judge in Dallas, Texas, replied that “*Brown* [was] a landmark case” and that,

because of [*Brown*], I went to an excellent integrated school [while] my father went to a very poor segregated school. That being said, I think it would be violative of Canon 3A(6) for me to give a thumbs-up or a thumbs-down as to whether or not the Supreme Court correctly decided the case.<sup>11</sup>

And the United States Court of Appeals for the Second Circuit nominee, Michael H. Park, stated in his responses to senators’ questions for the record that “*Brown* is a landmark decision of the Supreme Court and is binding precedent on all lower courts” and that he “would faithfully follow it. Beyond that, it would be inappropriate to opine on whether *Brown*, or any other decision of the Supreme Court that I would be bound to follow, was cor-

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6. Oldham was referring to then-Judge Ruth Bader Ginsburg’s testimony at her 1993 Supreme Court confirmation hearing in which she stated, “once a judge starts committing, promising, hinting, previewing, forecasting, agreeing or disagreeing with precedent at this confirmation table, we’re in the process then of campaign promises. . . . Once we do that, I’m fearful for the independence of judiciary.” Lori A. Ringhand & Paul M. Collins, Jr., *Neil Gorsuch and the Ginsburg Rules*, 93 CHI.-KENT L. REV. 475, 484 (2018) (footnote omitted). “[T]he so-called ‘Ginsburg Rule[s]’ both shepherded in and exemplified a modern practice of nominees refusing to answer questions.” *Id.* at 480. It should be noted that as a judicial nominee Ginsburg did answer the *Brown* question and endorsed *Brown*. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 474 (2000).

7. Ariane de Vogue, *Senate Panel Advances Judicial Nominees Who Drew Controversy for Brown v. Board Answer*, CNN: CNNPOLITICS (May 24, 2018, 12:52 PM), <https://www.cnn.com/2018/05/24/politics/vitter-oldham-brown-v-board-senate/index.html> (quoting Andrew Oldham).

8. 163 U.S. 537 (1896).

9. Lithwick, *supra* note 5 (quoting Neomi Rao).

10. *Id.*

11. Maria Recio, *Why Trump Judicial Nominees Won’t Endorse Brown v. Board of Education*, AUSTIN AM.-STATESMAN (May 16, 2019, 6:32 PM), <https://www.statesman.com/news/20190516/why-trump-judicial-nominees-wont-endorse-brown-v-board-of-education>. Canon 3A(6) of the Code of Conduct for United States Judges provides that “[a] judge should not make public comment[s] on the merits of a matter pending or impending in any court.” CODE OF CONDUCT FOR U.S. JUDGES, Canon 3A(6) (2019). Senator Blumenthal has disputed nominees’ reliance on this canon, arguing that it is “completely inapplicable” with respect to established decisions like *Brown*. Recio, *supra* note 11.

rectly decided.”<sup>12</sup> As support for this position, Park quoted Justice Elena Kagan’s Supreme Court confirmation hearing statement that “it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.”<sup>13</sup> In fact, during her confirmation hearing, Senator Ben Cardin, a Democrat from Maryland, asked Justice Kagan if she believed that *Brown* was relevant today. She responded, “I hope and I know that *Brown v. Board of Education* and the principles that [*Brown*] set forth are still relevant today[,] and they’re the principles that the Equal Protection Clause has set forth.”<sup>14</sup> The foregoing refusals to answer the *Brown* question did not derail the nominations, as the Senate confirmed Vitter, Oldham, Rao, Park, and Brown.

What explains this refusal to say that *Brown* was correctly decided? One theory posits that “nominees d[id] not want to open the door to a discussion of what they think of other Supreme Court precedents,”<sup>15</sup> such as the Court’s reproductive rights<sup>16</sup> and campaign speech decisions.<sup>17</sup> Keeping that door “closed likely makes it easier . . . to get confirmed.”<sup>18</sup> Senator John Cornyn, a Republican from Texas, suggests that expressing a view on the correctness of *Brown* presents “ethical and practical challenges” for nominees who would find themselves on a slippery slope.<sup>19</sup> “You can be asked about a [sixty-five]-year-old decision, which we celebrate here after all of these years as an important landmark in our guarantee of equal justice under the law. But you can also be asked about a decision of the Supreme Court last week.”<sup>20</sup>

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12. *Nomination of Michael H. Park U.S. Court of Appeals for the Second Circuit Questions for the Record: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 10 (2019), <https://www.judiciary.senate.gov/imo/media/doc/Park%20Responses%20to%20QFRs.pdf> (statement of Michael H. Park).

13. *Id.* (citing *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64 (2010) (statement of Hon. Elena Kagan)).

14. *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 185 (2010) (emphasis added), <https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>; see also *id.* at 63 (discussing *Brown*, Kagan stated “that if you look at the specific intent of the drafters of the 14th Amendment, they thought that the 14th Amendment was perfectly consistent with segregated schools. . . . But in *Brown*, the [C]ourt said otherwise. And . . . in large part because of what Justice Marshall did . . . we got to a place where the [C]ourt said it is inconsistent with the principle of equal protection of the laws . . . to have segregated schools”).

15. Ramesh Ponnuru, *Trump’s Nominees and Brown v. Board: Two Theories*, NAT’L REV. (Apr. 12, 2019, 2:59 PM), <https://www.nationalreview.com/corner/trumps-nominees-and-brown-v-board-two-theories>.

16. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

17. See *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310 (2010).

18. Ponnuru, *supra* note 15.

19. Recio, *supra* note 11 (quoting Senator John Cornyn).

20. *Id.*

Other reasons have been proffered for the judicial nominees' refusal to respond to the *Brown* question. For writer, Dahlia Lithwick, the failure to respond, "has nothing to do with whether *Brown* is still good precedent."<sup>21</sup> Rather,

[w]hat changed is that judicial nominees are carving a path toward saying that they needn't be bound by *any* precedent, and also that every precedent is now on the table. When judicial nominees say, as they now regularly do, that *Brown* is a precedent of the [C]ourt, what they are really saying is that a case that was decided was decided, and that it's the law until it's reversed. That is a truism—it is a description of what is. It is also a departure from a standard that existed until quite recently.<sup>22</sup>

Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Education Fund, has observed that:

[t]he ugly truth is that declining to offer approval of *Brown* signals a willingness to question the project of democracy that *Brown* created—one in which African Americans and other marginalized groups compelled the federal courts to honor the spirit of equal justice embodied in the words of the 14<sup>th</sup> Amendment.<sup>23</sup>

This is not "just deeply troubling; it's also downright dangerous. Once positioned near the center of the canon of Supreme Court jurisprudence, it's hard not to conclude that a move is afoot to move *Brown* to the margins."<sup>24</sup>

When Senator Tim Scott, a Republican from South Carolina, expressed his frustration with the nominees' refusals to answer the *Brown* query, the Department of Justice reportedly informed nominees that continued refusals to respond could result in opposition to their confirmations.<sup>25</sup> Thereafter, nominees testifying at a May 22, 2019, Judiciary Committee hearing answered "yes" to the *Brown* question, and other nominees who had previously refused to answer the question in their hearings communicated their belief that *Brown* was correctly decided to the Judiciary Committee or to their home state senators.<sup>26</sup> The don't-open-the-door and judicial canon justifications for not answering thus quickly gave way to affirmative responses following a Republican senator's criticism, revealing that the initial refusal to answer was at least in part a tactical move designed to allow the nominee to avoid answering the *Brown* question without rais-

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21. Lithwick, *supra* note 5.

22. *Id.*

23. Sherrilyn Ifill, *If Judicial Nominees Don't Support Brown v. Board, They Don't Support the Rule of Law*, WASH. POST (May 12, 2019, 4:21 PM), [https://www.washingtonpost.com/opinions/if-judicial-nominees-dont-support-brown-v-board-they-dont-support-the-rule-of-law/2019/05/12/d12c542a-734d-11e9-8be0-ca575670e91c\\_story.html](https://www.washingtonpost.com/opinions/if-judicial-nominees-dont-support-brown-v-board-they-dont-support-the-rule-of-law/2019/05/12/d12c542a-734d-11e9-8be0-ca575670e91c_story.html).

24. *Id.*

25. *See* Tillman, *supra* note 4.

26. *See id.*

ing concern among the Republican senators that could complicate the prospects of confirmation.

I agree with Sherrilyn Ifill's aforementioned observation regarding the "ugly truth" evidenced by the nominees' unwillingness to simply state that *Brown* was correctly decided (assuming that that is their view), a reluctance that decenters *Brown* from its place in the Supreme Court's canon<sup>27</sup> and appears to be part of an effort to move the decision to the margin of the Court's jurisprudence. This Article presents and considers a related issue. Nominees who do not answer the *Brown* question can insulate themselves from a different question, such as the one posed by Chief Justice John G. Roberts Jr. in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>28</sup> In that case, a deeply divided Court held that race-sensitive student assignment plans voluntarily adopted by school boards in Seattle, Washington, and Louisville, Kentucky, violated the Equal Protection Clause.<sup>29</sup> In the closing pages of his plurality opinion, the Chief Justice, joined by three other Justices, considered what he termed "the heritage of *Brown*"<sup>30</sup> and argued that the Equal Protection Clause presumptively forbids the consideration of race where racial segregation is not mandated by the state but is instead "notionally attributable to the decisions of private individuals or institutions."<sup>31</sup> As that position was not adopted by a majority of the *Parents Involved* Court, the issue of *Brown*'s heritage has not been definitively resolved.

This Article proceeds as follows. A prefatory Part I will discuss *Brown*. Part II will then turn to *Parents Involved* and the Justices' debate over *Brown*'s heritage. Part III will return to the nominees' refusal to answer the was-*Brown*-correctly-decided question and will acknowledge that a nominee who declines to do so will undoubtedly not respond to heritage-of-*Brown* inquiries that could shed informative light on the nominees' views on and interpretive approaches to the resolution of cases alleging that certain race-sensitive governmental actions violate the Equal Protection Clause. Yet, unanswered questions on these important subjects can still have value for those deciding whether to support or oppose a nominee's confirmation.

## I. THE SEMINAL *BROWN V. BOARD OF EDUCATION* RULING

This Part provides a brief overview of the Court's seminal 1954 *Brown* decision (*Brown I*) wherein the Court addressed and answered in the af-

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27. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (stating *Brown* "is the classic example" of a canonical "set of decisions whose correctness participants in constitutional argument must always assume"); see also Ifill, *supra* note, 23.

28. 551 U.S. 701 (2007).

29. *Id.* at 711, 746–47 (plurality opinion).

30. *Id.* at 747.

31. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 30, 51 (2018).

firmative whether the separate-but-equal doctrine as applied to elementary and secondary schools violated the Equal Protection Clause.<sup>32</sup> This Part also discusses *Brown II*,<sup>33</sup> the Court's subsequent decision remanding the Segregation Cases to the lower courts for consideration of appropriate remedies for the unconstitutional discrimination identified in *Brown I*. Additionally, this Part comments on what the Court did not say in *Brown I* and the implications thereof for the heritage of *Brown* issue raised fifty-three years later in *Parents Involved*.<sup>34</sup>

#### A. The Court's 1954 and 1955 Decisions

On May 17, 1954 (for segregationists, "Black Monday"),<sup>35</sup> the Supreme Court issued its unanimous decision in *Brown v. Board of Education (Brown I)*, holding public school segregation on the basis of race as unconstitutional.<sup>36</sup> Chief Justice Earl Warren's intentionally short opinion<sup>37</sup> observed, among other things, that in its 1896 *Plessy v. Ferguson*<sup>38</sup> decision the Court validated the separate-but-equal doctrine as applied in the context of public railway accommodations.<sup>39</sup> During the half-century between *Plessy* and *Brown I*, the Court decided six racial segregation in public education cases, including *Sweatt v. Painter*<sup>40</sup> in which the Court expressly reserved deciding the state-mandated segregation issue taken up by the *Brown I* Court.

The Segregation Cases came to the Court from Kansas, South Carolina, Virginia, and Delaware.<sup>41</sup> In *Brown I*, the Chief Justice noted that in the four cases the buildings, curricula, teacher qualifications and salaries, and other tangible factors in black and white schools had been equalized. Therefore, he focused on the "separate" component of the separate-but-equal doctrine and segregation's effect on public education.<sup>42</sup> Concluding

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32. 347 U.S. 483 (1954).

33. 349 U.S. 294 (1955).

34. 551 U.S. 701 (2007).

35. TOM P. BRADY, BLACK MONDAY (1954). Written by a Mississippi circuit judge, vice president of the Mississippi Bar Association, and later Mississippi Supreme Court Justice, Brady's anti-*Brown* and pro-segregationist book was treated as a movement guide by White Citizens Councils opposed to school desegregation. See Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 31-32 (2006).

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

37. In a pre-decision memorandum to his colleagues accompanying a draft of the *Brown* opinion, Chief Justice Warren advised his colleagues that the opinion was prepared on the theory that it "should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory." RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 699 (1976) (quoting Chief Justice Warren's memorandum).

38. 163 U.S. 537 (1896).

39. *Id.* at 550-52.

40. 339 U.S. 629 (1950).

41. See *Brown*, 347 U.S. at 486 n.1.

42. *Id.* at 492.

“we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,”<sup>43</sup> he focused on “public education in the light of its full development and its present place in American life throughout the Nation.”<sup>44</sup> Discussing public education circa 1954, the Chief Justice stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today [education] is a principal instrument in awakening the child to cultural values, in preparing [the child] for later professional training, and in helping [the child] to adjust normally to [their] environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if [they are] denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>45</sup>

Chief Justice Warren then shifted his focus “to the question presented: Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?”<sup>46</sup> The Court’s answer: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>47</sup>

The Chief Justice quoted the Kansas court’s finding that racial segregation harmed black schoolchildren:

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43. *Id.* The Segregation Cases were initially argued to the Court in 1952 and were restored to the Court’s docket for re-argument. *Id.* at 488. The parties were asked to address five questions on re-argument, including the following: “What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?” *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953) (per curiam). Note that only state legislatures considered the ratification of the Fourteenth Amendment; no state conventions were assembled for that purpose. See KLUGER, *supra* note 37, at 619 n.\*.

In *Brown I*, the Court considered the Fourteenth Amendment when it was before Congress, the then-extant racially segregative practices, and the views of those for and against the Amendment. *Brown*, 347 U.S. at 489. Chief Justice Warren concluded, “although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.” *Id.* For critiques of and disagreement with the Court’s not-conclusive determination, see RICHARD A. POSNER, *OVERCOMING LAW* 62 (1995); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991).

44. *Brown I*, 347 U.S. at 492–93.

45. *Id.* at 493.

46. *Id.*

47. *Id.* at 494.

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.<sup>48</sup>

“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, [the Court’s] finding is amply supported by modern authority” cited in footnote eleven of the Court’s opinion.<sup>49</sup> Rejecting but not overruling *Plessy*,<sup>50</sup> the Court declared, “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>51</sup> As the Court now found school segregation unconstitutional it set the cases for reargument on the issue of the remediation of the equal protection violation.<sup>52</sup>

The following year, the Court issued another unanimous decision (*Brown II*) and directed the lower courts “to take such proceedings and enter such orders . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”<sup>53</sup> As Thurgood Marshall predicted, “all deliberate speed”

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48. *Id.* (alterations in original).

49. *Id.* at 494 n.11. One study cited in footnote 11, Dr. Kenneth Clark’s *Effect of Prejudice and Discrimination on Personality Development*, reported the results of a doll test in which 253 northern and southern black children were given black dolls with brown skin and black hair, and white dolls with white skin and blonde hair. *Id.*; see Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 351 (2019). When asked to pick the “nice doll” and the doll that “is a nice color,” a majority of the children preferred the white doll and rejected the black doll. *See id.* at 351–52.

For discussion and critiques of Clark’s doll test, see ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 13–15 (1996); Gwen Bergner, *Black Children, White Preference: Brown v. Board, the Doll Tests, and the Politics of Self-Esteem*, 61 AM. Q. 299 (2009); Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 293–95 (2005).

50. See David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1070 (2008) (“*Brown* did not formally overrule *Plessy*” but did squarely address *Plessy*’s central claim “that segregation did not necessarily denote inferiority.”).

51. *Brown I*, 347 U.S. at 495. It should be noted that excellent black public schools existed during the era of state-mandated school segregation. See ALISON STEWART, *FIRST CLASS: THE LEGACY OF DUNBAR, AMERICA’S FIRST BLACK PUBLIC HIGH SCHOOL* (2013); VANESSA SIDDLE WALKER, *THEIR HIGHEST POTENTIAL: AN AFRICAN AMERICAN SCHOOL COMMUNITY IN THE SEGREGATED SOUTH* (2000).

52. See *Brown I*, 347 U.S. at 495.

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

would be interpreted to mean “S-L-O-W.”<sup>54</sup> And *Brown* plaintiffs’ lawyer (and later federal judge) Robert L. Carter observed that this remedial formula “was a grave mistake” that “sacrificed individual and immediate vindication of the newly discovered right to desegregated education in favor of a mass solution.”<sup>55</sup> In fact, of the children involved in the *Brown* litigation only one, Linda Brown, ever attended a desegregated school, and she did so in Springfield, Missouri, after her family relocated there in the late 1950s.<sup>56</sup>

### B. *What The Court Did Not Say*

A more recent Supreme Court decision considered in the next Part, *Parents Involved*, relied heavily on Chief Justice Roberts’ framing and characterization of *Brown I*’s reasoning.<sup>57</sup> What *Brown I* did not say warrants comment.<sup>58</sup> The absence of specifics about race and racism and the protective scope of the Equal Protection Clause left room for others to construct their own narratives about *Brown I*’s reasoning and meaning.

As previously noted, Chief Justice Warren’s *Brown I* opinion was deliberately short, non-rhetorical, unemotional, and non-accusatory.<sup>59</sup> The “diffident” opinion said “remarkably little about segregation’s origins, ideology, implementation, or aims.”<sup>60</sup> A more in-depth opinion could have provided important information concerning the Court’s view of the history and specifics of white supremacy’s racist regime of which the separate-but-supposedly-equal doctrine was a part. Nor did the opinion “acknowledg[e] the actual perpetrators of Jim Crow racism: white Southerners” or explain the white-supremacist desire to deploy state-commanded racial segregation in schools and other contexts.<sup>61</sup> “Missing from the most honored race relations decision in American constitutional law is any express reckoning with racism.”<sup>62</sup>

Moreover, the Court did not discuss the ways in which posited black inferiority was embedded in and internalized by society, or how whites benefitted from entrenched structural racism, or the harms and “dehumanizing effects of racism on Whites and their damaging consequences for our

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54. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* 10 (2004).

55. Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1969).

56. See Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 437 (1999).

57. 551 U.S. 701 (2007).

58. 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., 2001).

59. See *supra* note 37 and accompanying text.

60. Randall L. Kennedy, *Ackerman’s Brown*, 123 YALE L.J. 3064, 3067 (2014).

61. Onwuachi-Willig, *supra* note 49, at 354.

62. *Id.* (emphasis omitted) (quoting Randall L. Kennedy, *Ackerman’s Brown*, 123 YALE L.J. 3064, 3067–68 (2014)).

ability to achieve an equal society.”<sup>63</sup> While acknowledgement and discussion of those subjects would have been contrary to Chief Justice Warren’s desire to avoid casting blame on those who formulated, enforced, and benefitted from the cradle-to-grave racial segregation of black persons,<sup>64</sup> the “watered down” *Brown* opinion<sup>65</sup> “simply left the door open for future civil rights doctrine to ignore it” and “left the false impression that all that was needed to achieve true racial equality was formal legal access to what Whites had *real access* to.”<sup>66</sup> That false impression has provided fertile ground for differing views on *Brown*’s meaning and heritage.<sup>67</sup>

## II. PARENTS INVOLVED AND THE BROWNS’ HERITAGE ISSUE

More than fifty years after *Brown I* and *II*, a deeply divided Court in *Parents Involved in Community Schools v. Seattle School District No. 1* held that race-sensitive student assignment plans voluntarily adopted by school boards in Seattle, Washington, and Louisville, Kentucky, violated the Equal Protection Clause.<sup>68</sup> The Court concluded that the challenged plans unconstitutionally sought to attain a level of student body diversity by approximating the overall racial demographics of the school districts, reasoning that the plans were not narrowly tailored to achieve the diversity-related educational and social benefits. This Part focuses on the plurality part of the Court’s opinion and the Justices’ debate over what Chief Justice Roberts termed “the heritage of *Brown*.”<sup>69</sup>

### A. The Plurality Opinion Rewrites Key Aspects of *Brown*

In the plurality part of the *Parents Involved* decision, Chief Justice Roberts noted what he called a debate between the parties and amici over

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63. *Id.* at 355; see also Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428 (1960) (“I can heartily concur in the judgment that segregation harms the white as much as it does the Negro. Sadism rots the policeman; the suppressor of thought loses light; the community that forms into a mob, and goes down and dominates a trial, may wound itself beyond healing. Can this reciprocity of hurt, this fated mutuality that inheres in all inflicted wrong, serve to validate the wrong itself?” (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959))).

64. See Paul Finkelman, *Breaking the Back of Segregation: Why Sweatt Matters*, 36 T. MARSHALL L. REV. 7, 8–9, 14 (2010) (explaining that segregation extended beyond public schools and included segregated funeral parlors, cemeteries, jails and prisons, textbooks, libraries, churches, Bibles used in courtrooms, and state schools for the blind).

65. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 28 (2019).

66. Onwuachi-Willig, *supra* note 49, at 362.

67. See *supra* notes 57–66 and accompanying text.

68. The Court concluded that the at-issue plans were not narrowly tailored to the achievement of the assertedly compelling governmental interest in student body diversity. 551 U.S. 701, 726 (2007).

69. *Id.* at 747 (plurality opinion).

which side was more faithful to the heritage of *Brown*.<sup>70</sup> While not pertinent to the Court's invalidation of the student diversity issue, the plurality opinion took sides in that debate and set forth an understanding of *Brown* that differed from their colleagues' reading of the Court's opinion.

Chief Justice Roberts, joined by Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr., invoked the *Brown* plaintiffs to support their understanding of the Court's 1954 decision.<sup>71</sup> The plaintiffs' position "was spelled out in their brief and could not have been clearer: '[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.'" <sup>72</sup> "What do the racial classifications at issue here do," the Chief Justice asked, "if not accord differential treatment on the basis of race?" <sup>73</sup> Having sided with (his characterization of) the plaintiffs' position, Chief Justice Roberts quoted the following sentence from *Brown* lawyer Robert L. Carter's 1952 oral argument to the Court: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." <sup>74</sup> Chief Justice Roberts found "no ambiguity in that statement," and argued that the position prevailing in *Brown I* was subject to *Brown II*'s call for the admission of the plaintiffs "as soon as practicable on a nondiscriminatory basis" <sup>75</sup> Again, Chief Justice Roberts asked, "What do the racial classifications do in [the Seattle and Louisville] cases, if not determine admission to a public school on a racial basis?" <sup>76</sup>

Justice Anthony M. Kennedy denied the Chief Justice a fifth and majority-creating vote on the no-racial-classifications point, stating, "The enduring hope is that race should not matter; the reality is that too often it does." <sup>77</sup> For Justice Kennedy, Chief Justice Roberts' position suggested "an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account." <sup>78</sup> Justice Kennedy further noted that Chief Justice Robert's opinion was "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." <sup>79</sup>

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70. *See id.*

71. *Brown I*, 347 U.S. 483 (1954).

72. *Parents Involved*, 551 U.S. at 747 (quoting Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument in *Brown I*, O.T. 1953, p. 15 (Summary of Argument)).

73. *Id.*

74. *Id.* (quoting Transcript of Oral Argument at 7, *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954)).

75. *Id.* (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955)).

76. *Id.*

77. *Id.* at 787 (Kennedy, J., concurring in part and concurring in the judgment).

78. *Id.*

79. *Id.* at 787–88.

As for the Chief Justice's reliance on *Brown II*'s "nondiscriminatory basis" and "nonracial basis" language, those references do not define and delimit the substantive constitutional violation found in *Brown I*.<sup>80</sup> Remediation of the anti-black segregative practices inflicted on black schoolchildren (the unequal protection found in *Brown I*) commonsensically requires the elimination of that racial discrimination, i.e. requires admissions on a nondiscriminatory and nonracial basis. Thus, *Brown II*'s remediation language should not be confused or merged with the substantive constitutional violation found in *Brown I*.

Furthermore, Chief Justice Roberts's argument that the Equal Protection Clause unambiguously prohibits any and all racial classifications is a plausible one if, and only if, his account of the *Brown* plaintiffs' brief and Carter's oral argument is accurate. However, that is not the conventional or standard account of *Brown I*. The posited absence of ambiguity in Carter's 1952 argument vanishes, however, when the totality of Carter's argument is considered. Carter did not focus on racial classification *simpliciter*; rather, he was fully aware of and specifically noted the ways in which state-mandated public school segregation made it "impossible for Negro children to secure equal educational opportunities within the meaning of the equal protection of the laws."<sup>81</sup> The racial classification of African-American schoolchildren was thus the discriminatory means to a racially subordinating and segregative end. Speaking in 2007, after the Court issued the *Parents Involved* decision, Judge Carter rejected Chief Justice Roberts' characterization of Carter's *Brown* arguments. "All that race was used for at that point in time was to deny equal opportunity to black people. . . . It's to stand that argument on its head to use race the way they use [it] now."<sup>82</sup>

It is also noteworthy that Chief Justice Roberts did not refer to *Brown* lawyer Thurgood Marshall's 1953 argument to the *Brown* Court.<sup>83</sup> Marshall argued that separate-but-equal laws could not be distinguished from

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80. See *id.* at 747 (plurality opinion); see *supra* Part I.B.

81. Transcript of Oral Argument at 4, *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 281 (Philip B. Kurland & Gerhard Casper eds., 1975).

82. Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), <https://www.nytimes.com/2007/06/29/us/29assess.html>; see also *id.* (elucidating *Brown* lawyer William T. Coleman, Jr.'s view that *Parents Involved* "is 100 percent wrong" and is "dirty pool").

83. Mark Tushnet, *Parents Involved and the Struggle for Historical Memory*, 91 IND. L.J. 493, 501 (2016). Professor Mark Tushnet has observed that, in quoting Carter and not Marshall, Chief Justice Roberts was aware that the four members of the *Parents Involved* Court who had served with Justice Marshall

knew—insofar as anyone could know—what Marshall would have thought about the constitutionality of Seattle's program had he been presented with it before he left the Court. . . . Claiming *Marshall's* authority for the result in *Parents Involved* . . . would have been an insult to Marshall's memory in a way that using Carter's words was not quite insulting to Marshall. For that reason, it would have weakened the Chief Justice's opinion.

*Id.*

the post-emancipation Black Codes,<sup>84</sup> and that “the only way” for the Court to rule against the plaintiffs “[was] to find that for some reason Negroes [were] inferior to all other human beings.”<sup>85</sup> Marshall made clear that the *Brown* plaintiffs sought relief from the historical and ongoing subordination of African Americans and the “inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible; and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.”<sup>86</sup> Marshall’s contextual and historical argument clearly identifies and challenges racial subordination and is not some abstract, acontextual, and ahistorical understanding of equal protection that is disconnected and hermetically sealed from anti-black discrimination and the opportunity-denying effects thereof.

*B. The Plurality’s Abstractional, Acontextual, and Ahistorical Approach*

Chief Justice Roberts’ abstractional, acontextual, and ahistorical approach is also on display in his description of the public-school segregation addressed in *Brown*. Recall Chief Justice Warren’s statement of the question presented in *Brown I*: “Does segregation of children in public schools solely on the basis of race . . . *deprive the children of the minority group of equal educational opportunities?*”<sup>87</sup> Now consider Chief Justice Roberts’ decolorized account of pre-*Brown* segregation: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”<sup>88</sup> Responding to and noting the “cruel irony” in the Chief Justice’s description, Justice John Paul Stevens correctly pointed out that before *Brown*, “it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. . . . In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.”<sup>89</sup>

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84. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935–41 (2019) (discussing the Black Codes). The Black Codes were enacted in the former states of the Confederacy and restricted freedpersons’ rights to enter into contracts, own property, travel, and gain access to courts. See *Timbs v. Indiana*, 139 S.Ct. 682, 688 (2019) (discussing the history of the Black Codes); NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 34 (2006).

85. Transcript of Oral Argument at 21, *supra* note 81, at 522–23.

86. *Id.* at 523.

87. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954) (emphasis added); see *supra* notes 44–52, and accompanying text.

88. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007) (plurality opinion).

89. *Id.* at 798–99 (Stevens, J., dissenting) (citation omitted); see also *id.* at 803 (“It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”).

In the penultimate paragraph of his plurality opinion, Chief Justice Roberts declared, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>90</sup> This rhetorical tautology<sup>91</sup> supposes that all considerations of race, no matter the context or history, are constitutionally impermissible.<sup>92</sup> But “discrimination” is not always wrong or unlawful; it “is important and even necessary in some instances” and involves distinctions routinely drawn “among people in public policy and law as well as in business, school settings, and private life.”<sup>93</sup> Whether certain conduct is or is not constitutional involves normative judgments about equal protection and “an independent account of what equal protection means and the values underlying such a judgment.”<sup>94</sup> Who is being treated differently, the reasons for and the forms of that differential treatment, and other pertinent facts and details must be considered before a conclusion of constitutionality or unconstitutionality can be reached.

Additionally, Chief Justice Roberts’ “stop discrimination” postulate<sup>95</sup> problematically conceptualizes “race” as a skin color and “as a superficial individual trait, disconnected from vertical understandings of group hierarchy.”<sup>96</sup> On that understanding, any governmental consideration of “race” is contrary to an imagined colorblind Constitution;<sup>97</sup> that approach is indifferent to history and context and the actual lived experiences of those subjected to anti-black and other discrimination. Reflexively concluding that all considerations of race are forbidden without regard to “complex social facts” or additional “information about the evaluated action beyond the

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90. *Id.* at 748 (plurality opinion); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1222 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (“The way to end racial discrimination is to stop discriminating by race.”), *rev’d and remanded*, 551 U.S. 701 (2007).

91. *See* Richard R. W. Brooks, *The Banality of Racial Inequality*, 124 *YALE L.J.* 2626, 2661 (2015).

92. *But see Parents Involved*, 551 U.S. at 833–35 (Breyer, J., dissenting) (arguing that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause” and that the context of the Seattle and Louisville cases “is not one in which race-conscious limits stigmatize or exclude,” “pit the races against each other or otherwise significantly exacerbate racial tensions,” or “impose burdens unfairly upon members of one race alone”).

93. DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 2–3, 172 (2008); *see also id.* at 2 (explaining that the word discrimination has negative connotations and positive associations as well, and “it is sometimes permissible and sometimes impermissible to draw such distinctions among people”).

94. Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 *NW. U. L. REV.* 1163, 1183 (2019).

95. *See Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) (“The plurality’s postulate . . . is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* . . . should teach us that the problem before us defies so easy a solution.”).

96. OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 115–116 (2014).

97. *See Parents Involved*, 551 U.S. at 730 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting)).

moral valuation”<sup>98</sup> lumps together exclusionary anti-black discrimination and inclusionary considerations of race in the pursuit of student body diversity, thereby erroneously treating alike that which is markedly, contextually, and historically different.<sup>99</sup>

By contrast, “race” as a lived experience and as a racialized marker has historically been used to create and maintain both a racial and racist hierarchy. Race has a social meaning that is not captured by Chief Justice Roberts’ approach. Knowledge and comprehension of a particular social meaning, such as racial segregation’s “putting of the Negro in a position of walled-off inferiority,”<sup>100</sup> is crucial to the application of “a normative theory for why (and when)” consideration of race is “worthy of moral concern.”<sup>101</sup> Do not discriminate tautologies are no substitute for contextual and nuanced analysis.

A pointed response to Chief Justice Roberts’ “stop discriminating on the basis of race” approach was issued by Justice Sonia Sotomayor in her dissent from the Court’s 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*.<sup>102</sup> The genesis of her *Schuette* dissent began the previous year when the Court considered Abigail Fisher’s equal protection challenge to the University of Texas at Austin’s race-conscious undergraduate admissions program.<sup>103</sup> It has been reported that after the oral argument in that case the Justices initially voted five to three to invalidate the university’s program and Chief Justice Roberts assigned the majority opinion to Justice Kennedy.<sup>104</sup> Justice Ginsburg, the most senior of the dissenting Justices, assigned the drafting of the main dissent to Justice Sotomayor,<sup>105</sup> who had joined the Court two years after *Parents Involved*. Justice Sotomayor circulated a draft dissent and personal defense of affirmative action.<sup>106</sup> After reading the heated draft dissent, Justice Kennedy sought a compromise and wrote an opinion for a seven-Justice majority remanding the case to the

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98. Kohler-Hausmann, *supra* note 94, at 1171.

99. *See Parents Involved*, 551 U.S. at 865 (Breyer, J., dissenting) (noting that the plurality’s “view of the law rests . . . upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria” and “slows down and sets back the work of local school boards to bring about racially diverse schools”).

100. Black, *supra* note 63, at 427.

101. Kohler-Hausmann, *supra* note 94, at 1214.

102. 572 U.S. 291, 300, 312–14 (2014) (rejecting an equal protection challenge to an amendment to the Michigan Constitution prohibiting affirmative action in public education, employment, and contracting).

103. *See Fisher v. Univ. of Tex. Austin*, 570 U.S. 297, 302 (2013).

104. *See* JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200–01* (2014).

105. *See id.* at 205.

106. *See id.* at 206.

United States Court of Appeals for the Fifth Circuit.<sup>107</sup> Justice Sotomayor joined the majority opinion and withdrew her dissent.<sup>108</sup>

Justice Sotomayor reviewed the draft sections of her *Fisher* dissent as she wrote her *Schuetz* opinion.<sup>109</sup> Her published dissent responded to the Chief Justice's *Parents Involved*'s "stop discriminating" statement.<sup>110</sup> In her view, that approach expressed "a sentiment out of touch with reality, . . . one that has properly been rejected as 'not sufficient' to resolve cases of this nature."<sup>111</sup> Cataloguing ways in which "race matters,"<sup>112</sup> Justice Sotomayor observed that "race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'"<sup>113</sup> She wrote:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the *unfortunate effects of centuries of racial discrimination*. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works

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107. *See id.* at 205–09. On remand, the Fifth Circuit held that the university's admissions program passed constitutional muster and the case returned to the Supreme Court. *Fisher v. Univ. of Tex. Austin*, 136 S. Ct. 2198, 2207 (2016). In 2016, the Court held that the program withstood strict scrutiny review. *See id.* at 2214.

108. *See* JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 267 (2019).

109. *See id.* at 280.

110. 572 U.S. at 380 (Sotomayor, J., dissenting) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion)).

111. *Id.* (citing *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment)).

112. *Id.* at 380–81. Justice Sotomayor's discussion of this point warrants quotation:

Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. . . .

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. . . .

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?" regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

*Id.*

113. *Id.* at 381.

harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.<sup>114</sup>

Thus, and unlike Chief Justice Roberts' focus on "race," Justice Sotomayor went beyond "the epidermal lottery into which we are all cast"<sup>115</sup> and focused on *racism* and "what race has done and been asked to do throughout history."<sup>116</sup>

Chief Justice Roberts responded to Justice Sotomayor's reproach in his two-paragraph *Schuetz* concurrence joined by no other Justice.<sup>117</sup> "[I]t is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt [about belonging], and—if so—that the preferences do more harm than good."<sup>118</sup> In his view, disagreement regarding the costs and benefits of what he called racial preferences (and what Justice Sotomayor has termed "race-sensitive" policies)<sup>119</sup> "is not to 'wish away, rather than confront,' racial inequality. . . . People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate."<sup>120</sup> In her recently published biography of Chief Justice Roberts, legal analyst Joan Biskupic observes that his reply to Justice Sotomayor "remains one of the most revealing of his tenure so far. It reflects the passion with which he approaches questions of race as well as his disdain for anything from a [J]ustice that could be interpreted as a personal or policy judgment."<sup>121</sup>

The significance of Chief Justice Roberts' view that *Brown* stands for the proposition that the Equal Protection Clause forbids any and all governmental consideration of race lies in the implications of that view for future cases challenging programs and policies in which race is considered as a factor in decisionmaking, for example, in college and university admissions.

Accepting the premise that *Brown* should be understood as a decision prohibiting racial classifications *simpliciter* could render constitutionally problematic race-sensitive affirmative action plans and provide a jurispru-

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114. *Id.* (first emphasis added).

115. Jelani Cobb, *Donald Trump's Idea of Selective Citizenship*, NEW YORKER (July 21, 2019), <https://www.newyorker.com/magazine/2019/07/29/donald-trumps-idea-of-selective-citizenship>.

116. Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 37 (2013); see also Ronald Turner, "The Way to Stop Discrimination on the Basis of Race . . .", 11 STAN. J. C.R. & C.L. 45, 84–87 (2015) (comparing and contrasting Chief Justice Roberts' race-based and Justice Sotomayor's racism-based approaches).

117. *Schuetz*, 572 U.S. at 315 (Roberts, C.J., concurring).

118. *Id.*

119. *Id.* at 352 (Sotomayor, J., dissenting); see also BISKUPIC, *supra* note 104, at 208 (2014) (discussing Justice Sotomayor's preference for "phrases such as 'race-sensitive admissions policies' to the phrase 'affirmative action'").

120. *Schuetz*, 572 U.S. at 315–16 (Roberts, C.J., concurring).

121. BISKUPIC, *supra* note 108, at 284.

dential basis for their invalidation. Acceptance of a different premise, that *Brown* targeted state-mandated segregation and subjugation of black schoolchildren, involves not just racial classification but racial subordination. A nominee who accepts the classification premise may, like Chief Justice Roberts, want to ban all considerations of race no matter the history or context. Such information may be of interest and useful to an inquiring senator and the public whether they advocate or oppose race-sensitive affirmative action.

The importance of the *Brown* question and answers or non-responses thereto remain on the table. Did *Brown* determine that all governmental considerations and uses of race violate the Equal Protection Clause? Under the aforementioned anti-classification approach,<sup>122</sup> consideration of race is the constitutional injury; whether that consideration is a factor in segregating or integrating minority children does not matter. “Thus, Linda Brown, who had to walk over train tracks to the inferior black school, and the white children in the superior school were harmed in the same way as Linda walked by.”<sup>123</sup> That approach, shorn of history and context, invisibilizes the anti-black racism challenged in *Brown*.

Or (as I believe) is *Brown* best or better understood as a declaration that the Equal Protection Clause prohibits segregative and subordinating anti-black discrimination targeting black schoolchildren? This anti-subordination approach referenced in the preceding paragraph distinguishes “between benign and invidious discrimination” and is concerned, as was the *Brown* Court, with “practices that disproportionately harm members of marginalized groups.”<sup>124</sup> Thus, any and all claimed differential treatment, no matter the issue or context, is not automatically of constitutional concern. The protective and remedial focus of *Brown* was legally classifying and treating as inferior, not all schoolchildren, but black schoolchildren.

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122. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287 (2011). This principle applies in cases involving non-remedial considerations of race, and not in cases in which a finding of unlawful intentional discrimination has been made and race is considered in remedying that violation. See *United States v. Paradise*, 480 U.S. 149, 166 (1987); see also Greene, *supra* note 31, at 51 (“[T]rial courts that find de jure racial segregation of public schools are empowered to put in place and enforce the most coercive remedies known to constitutional law: busing of children across county lines and retaining jurisdiction over local educational decisions for decades.”).

123. Kimberlé Crenshaw, *The Court’s Denial of Racial Societal Debt*, 40 HUM. RTS. 13 (2013).

124. Siegel, *supra* note 122, at 1288–89; see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 157 (1976) (discussing the “group-disadvantaging principle” applicable to laws that “aggravate[]” or “perpetuate[] . . . the subordinate position of a specially disadvantaged group”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) (explaining that “the conviction” of the antisubordination principle is “that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups”).

Or (as I also believe) *Brown* can fairly be read and understood as both an anticlassification *and* antisubordination decision<sup>125</sup> prohibiting the deployment of racial classification as an inferiority-signaling and subordinating mechanisms for separating black and nonwhite schoolchildren from white students. On the latter two views, *Brown*'s "heritage" does not render unconstitutional all governmental race-sensitive policies and programs without regard to relevant context and history.

### III. REFUSAL TO ANSWER THE *BROWN* QUESTION

As previously discussed,<sup>126</sup> President Trump's judicial nominees' recent refusals to answer the question of whether *Brown* was correctly decided is an interesting and important phenomenon warranting our attention. Among the justifications offered for that refusal is the slippery slope concern that expressing a view on the correctness of *Brown* would open the door to questions about other Court decisions.<sup>127</sup> Additionally, some nominees who initially refused to answer the *Brown* question ultimately only answered after a Republican senator expressed his frustration with their non-responsiveness.<sup>128</sup>

This Article has offered an additional and important reason: the possibility of follow-up questions, not just about other Supreme Court decisions, but about the nominee's views on *Brown*'s heritage and what those views may suggest or reveal regarding the nominee's jurisprudential commitments. And a nominee's favorable confirmation hearing comments about *Brown* do not mean that a potential judge would not today agree with the *Parents Involved* plurality's no-consideration-of-race interpretation of the Equal Protection Clause. Supreme Court nominees Roberts, Thomas, and Alito<sup>129</sup> spoke approvingly of *Brown* but joined the plurality opinion.

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125. See Samuel R. Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 TEX. L. REV. 415, 415–16 (2014) (reviewing JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014)).

126. See *supra* notes 4–14 and accompanying text.

127. See *supra* notes 19–20 and accompanying text.

128. See *supra* note 25 and accompanying text.

129. During his confirmation hearing, nominee John Roberts stated: *Brown* "is more consistent with . . . the original understanding of the Fourteenth Amendment than *Plessy v. Ferguson*" and is "based on the conclusion that the separation of the races in the schools was itself a violation of equal protection." Emily Bazelon, *What John Roberts Really Thinks*, SLATE (Sept. 15, 2005), <https://slate.com/news-and-politics/2005/09/what-john-roberts-really-thinks.html>.

Nominee Clarence Thomas stated: *Brown* "changed my life and changed the South." Paul Gordon, *All Current SCOTUS Justices Supported Brown v. Board at Their Nominations Hearings—Why Won't Some of Trump's Nominees?*, PEOPLE FOR THE AM. WAY (Apr. 30, 2018), <http://www.pfaw.org/nlog-posts/all-current-scotus-justices-supported-brown-v-board-at-their-nominations-hearings-why-wont-some-of-trumps-nominees>.

Nominee Samuel Alito stated: *Brown* is "one of the greatest, if not the single greatest thing that the Supreme Court of the United States has ever done." *Id.*

Given *Parents Involved*'s unresolved debate about *Brown*'s heritage (and therefore future) and recent changes in the Court's composition,<sup>130</sup> the views of lower court nominees who may decide future cases addressing these and other race-sensitive issues, decisions that may come before the Court for review, are of obvious importance. Nominees who refuse to answer whether *Brown* was correctly decided will undoubtedly refuse to respond to heritage-of-*Brown* and other *Brown*-related questions, especially where doing so does not derail their confirmations. Nevertheless, posing queries that go unanswered can still be of value to inquiring senators and the public who may consider that disinclination as evidence of an effort to marginalize *Brown* and therefore a reason to oppose a nominee's confirmation.<sup>131</sup>

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130. Justices Stevens, Scalia, and Kennedy participated in *Parents Involved* but are no longer on the Court. If the Court returns to the *Browns*' heritage issue, will Justice Scalia's and Kennedy's replacements, Justices Neil M. Gorsuch and Brett M. Kavanaugh, adopt the *Parents Involved* plurality position and provide a Court majority for Chief Justice Roberts' reading of *Brown*?

During his Supreme Court confirmation hearing, Gorsuch, asked by Senator Blumenthal if he agreed with the result in *Brown*, stated that *Brown* "was a correct application of the law of precedent." *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 211 (2017) (statement of Judge Gorsuch). Blumenthal asked Gorsuch if he would agree with nominee Roberts' following response in his confirmation hearing to the observation that *Brown* concluded that segregating children in public schools solely on the basis of race was unconstitutional: "I do." *Id.* Gorsuch's reply: "Senator, there is no daylight here." *Id.* As noted by Professor Lori Ringhand, "It is difficult to know what to make of this exchange. It is unlikely that Gorsuch was expressing disagreement with *Brown*, but nor was he willing to simply affirm it as had Roberts (and every other nominee testifying before the Judiciary Committee in recent decades)." Ringhand & Collins, *supra* note 6, at 483.

Nominee Kavanaugh, asked by Senator Amy Klobuchar, Democrat from Minnesota, if *Brown* "is settled law," answered, "I think *Brown versus Board of Education* as I've said many times before, is the single greatest moment in Supreme Court history. . . . It's correct because it corrected a historic mistake in *Plessy v. Ferguson*." *Senate Judiciary Committee Hearing on the Nomination of Brett Kavanaugh to be an Associate Justice on the Supreme Court*, Fed. News Serv. Transcripts (Sept. 6, 2018), 2018 WLNR 27463623 at 17; see also Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 688 (2016) (*Brown* is one of "the greatest moments in American judicial history" as "judges stood up to the other branches, were not cowed, and enforced the law. That takes backbone, or what some call judicial engagement. To be a good judge and a good umpire, you have to possess strong backbone.").

131. See Ifill, *supra* note 23.