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RACE, RHETORIC, AND JUDICIAL OPINIONS: MISSOURI AS A CASE STUDY

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INTRODUCTION

On November 9, 2015, the president of the University of Missouri System resigned after "months of escalating racial tension surrounding high-profile incidents on the flagship campus."[1] The resignation and events preceding it, including a graduate student's hunger strike and a threatened boycott by the University of Missouri's football team,[2] prompted local, state, and national debates on race and higher education.

On one hand, some media outlets reported that "angry black students" caused "[c]haos"[3] and "targeted" innocent students.[4] In this narrative, commentators portrayed students as throwing "tantrum[s]" and wishing to be "coddl[ed]"[5] in an "imaginary civil-rights triumph."[6] The University

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1. Elahe Izadi, *The Incidents That Led to the University of Missouri President's Resignation*, WASH. POST (Nov. 9, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/the-incidents-that-led-to-the-university-of-missouri-presidents-resignation/.

2. Douglas Belkin & Melissa Korn, *University of Missouri System President Tim Wolfe Resigns*, WALL ST. J. (Nov. 9, 2015, 8:18 PM), http://www.wsj.com/articles/university-of-missouri-system-president-tim-wolfe-resigns-1447086505.

3. Megyn Kelly, *The Kelly File*, MEDIA MATTERS FOR AM. (Nov. 11, 2015, 10:46 PM), http://mediamatters.org/video/2015/11/11/foxs-megyn-kelly-calls-protesters-in-missouri-a/206806; *see also Chaos on Campus: Students Protest, Call for Heads to Roll at Schools Around Country*, FOX NEWS (Nov. 12, 2015), http://www.foxnews.com/us/2015/11/12/university-missouri-does-not-accept-professor-resignation-over-email-flap.html.

4. Jillian Kay Melchior, *Mizzou Records Show Students Feared Violence and Felt Targeted by Protesters*, NAT'L REV. (Apr. 20, 2016, 4:00 AM), http://www.nationalreview.com/article/434260/mizzous-protesters-frightened-many-campus.

5. Kathleen Parker, *Column: Let's Hope for Another Tantrum—Over Our Coddling Culture*, CHI. TRIB. (Nov. 25, 2015, 3:27 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-college-protests-microaggressions-missouri-yale-dartmouth-amherst-perspec-112-20151125-story.html.

6. Daniel J. Flynn, *Sports Page Becomes Op-Ed Section in Wake of Missouri Football Protests*, BREITBART (Nov. 11, 2015), http://www.breitbart.com/sports/2015/11/11/sports-page-becomes-op-ed-section-in-wake-of-missouri-football-protests/.

was depicted as a community "gripped" by "fear" due to the acts of African-American students.[7]

In contrast, other media outlets reported that African-American students protested with "anti-racism demonstrations"[8] after "racist incidents" occurred at a campus with a long history of racial "injustice."[9] In this counter-narrative, students were battling "systemic racism,"[10] and the football team's boycott "influence[d] broader campus issues."[11] Opinion pieces "applaud[ed]"[12] the students' "ability to effect change"[13] in a "hostile environment[]"[14] and articulated that "racial threats" by white students "against [b]lack students" escalated,[15] leading to a "[c]risis" where black students were afraid for their safety.[16]

These competing narratives are more than mere media constructs; they are reflected in all of society, where "majoritarian narratives"[17] dominate the landscape with their themes and rhetoric.[18] And while the rhetoric of

7. Jillian Kay Melchior, *Emails Show How Fear Gripped Mizzou Amid Racial Tensions*, FOX NEWS (Apr. 20, 2016), http://www.foxnews.com/us/2016/04/20/emails-show-how-fear-gripped-mizzou-amid-racial-tensions.html.

8. Madison Pauly & Becca Andrews, *Campus Protests Are Spreading Like Wildfire*, MOTHER JONES (Nov. 19, 2015, 1:52 PM), http://www.motherjones.com/politics/2015/11/missouri-student-protests-racism.

9. Jaeah Lee, *Uncovering the Painful Truth About Racism on Campus*, MOTHER JONES (Nov. 20, 2015, 7:00 AM), http://www.motherjones.com/politics/2015/11/racism-campus-protests-mizzou-yale-craig-wilder.

10. Pauly & Andrews, *supra* note 8.

11. Travis Waldron, *How the Mizzou Protests Demonstrate the Power of College Athletes*, HUFF. POST (Nov. 10, 2015, 11:23 AM), http://www.huffingtonpost.com/entry/missouri-protests-college-athletes_us_5641fde6e4b0411d3072713d.

12. Andre M. Perry, *Campus Racism Makes Minority Students Likelier to Drop Out of College. Mizzou Students Had to Act.*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/11/campus-racism-makes-minority-students-likelier-to-drop-out-of-college/?utm_term=.b40f9d75c10a.

13. Adam Howard, *Conservative Backlash to Mizzou Protests May Backfire*, MSNBC (Nov. 13, 2015, 12:33 PM), http://www.msnbc.com/msnbc/conservative-backlash-mizzou-protests-may-backfire.

14. Perry, *supra* note 12.

15. Gerren Keith Gaynor, *Racial Threats Against Black Students Heighten on Mizzou Campus*, CENTRIC (Nov. 11, 2015, 12:30 PM), http://www.centrictv.com/news-views/centric-news/articles/2015/11/11/racial-threats-against-black-students-heighten-on-mizzou-campus.html?fb_comment_id=903319916410651_903459853063324#f2f9dae35d8ce9c.

16. Allison McGevna, *Crisis at #Mizzou: Suspects Arrested for Threats That Left Black Students Fearing for Their Lives*, HELLO BEAUTIFUL, http://hellobeautiful.com/2015/11/11/mizzou-racist-threats-lockdown/ (last updated Nov. 11, 2015, 8:44 AM).

17. *See infra* Part I for an explanation of majoritarian narratives.

18. *See* Richard Delgado, *Derrick Bell's Racial Realism: A Comment on White Optimism and Black Despair*, 24 CONN. L. REV. 527, 530 (1992); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 666 (1993) (referring to majoritarian "stories" as a tool used to keep outsider voices from being valued) [hereinafter Delgado, *On Telling Stories*]; *see also* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond the Models and*

race evolved over the twentieth century, the ubiquity of majoritarian narratives undermined any true change of the story.[19]

Missouri serves as an illustrative backdrop for discussing these narratives. Missouri was admitted into the Union as a slave state, as a "compromise,"[20] and even today, Missouri serves as a microcosm of America and American compromise. Social and political debates have found their stage in Missouri,[21] from campus protests[22] to controversial school transfers,[23] from Dred Scott[24] to Ferguson,[25] and from segregated housing[26] to public housing failures.[27] As the *New York Times* observed, "Depending on your

Public Confidence, 57 WASH. & LEE L. REV. 405, 425–31 (2000) (discussing how narratives shape the realities of and divides between African Americans and whites).

19. *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 29 (2d ed. 2012) ("[T]he breakthrough [of landmark cases like *Brown*] is quietly cut back by narrow interpretation, administrative obstruction, or delay. In the end, the minority group is left little better than it was before, if not worse.").

20. *See Primary Documents in American History*: *Missouri Compromise*, LIBRARY OF CONG., https://www.loc.gov/rr/program/bib/ourdocs/Missouri.html (last updated Nov. 16, 2015). *See generally* ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA (2007).

21. JOHN DOMBRINK & DANIEL HILLYARD, SIN NO MORE: FROM ABORTION TO STEM CELLS, UNDERSTANDING CRIME, LAW, AND MORALITY IN AMERICA 187 (2007) ("Missouri was known as a bellwether state, where many of America's policies were debated. It had a mix of urban and rural residents, a racial mix (although without many Latinos or Asians), blue-collar and white-collar workers, significant Catholic and evangelical populations, and good colleges and universities.").

22. Izadi, *supra* note 1.

23. Nikole Hannah-Jones, *This American Life, The Problem We All Live With (Part I*) (This American Life radio broadcast July 31, 2015), https://www.thisamericanlife.org/radio-archives/episode/562/the-problem-we-all-live-with.

24. In the mid-nineteenth century, St. Louis was the backdrop to Dred and Harriet Scott's freedom suit, in which they briefly won at a retrial in 1850—at the very St. Louis courthouse that contradictorily hosted slave auctions. *See* 1 ENCYCLOPEDIA OF RACE, ETHNICITY AND SOCIETY 418 (Richard T. Schaefer ed. 2008) (noting the Supreme Court's decision in Dred Scott v. Sandford, 60 U.S. 393 (1856), "energized abolitionists, intensified the conflict between the northern and southern states, and is thus widely considered to be the first shot in the Civil War"); *see also* JOHN A. WRIGHT, DISCOVERING AFRICAN AMERICAN ST. LOUIS: A GUIDE TO HISTORIC SITES 9 (2d ed. 2002); Tim O'Neil, *Look Back 250: Slavery Was a Fact of Life in St. Louis from the Beginning*, ST. LOUIS POST-DISPATCH (May 17, 2014), http://www.stltoday.com/news/local/govt-and-politics/look-back-slavery-was-a-fact-of-life-in-st/article_aec80774-80a2-52e9-b0e9-7a0c5522c66c.html. The Missouri Supreme Court later sat to overturn the jury's decision granting the Scotts' freedom, writing, "As to the consequences of slavery, they are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa." Scott, A Man of Color v. Emerson, 15 Mo. 576, 587 (1852).

25. For a broad overview of the events of Ferguson, Missouri, see S. David Mitchell, *Ferguson: Footnote or Transformative Event*, 80 MO. L. REV. 943, 950–52 (2015).

26. *See* Rigel C. Oliveri, *Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis*, 80 MO. L. REV. 1053, 1055–65 (2015) (discussing several historic fair housing cases stemming from segregationist housing practices).

27. Katharine G. Bristol, *The Pruitt-Igoe Myth*, 44 J. ARCHITECTURAL ED. 163, 163 (1991).

perspective, Missouri is either the southernmost northern state . . . or the northernmost southern state . . . ."[28]

Using Missouri-based judicial opinions, this Essay demonstrates the influence of majoritarian narratives and how evolving rhetoric perpetuated stagnant narratives. In other words, these opinions, when viewed in historical context, demonstrate how the "status quo narrative" continued in society even after the law changed. This Essay examines opinions centered on both the legal and de facto segregation of African Americans and whites in three landmark cases: *State ex rel. Gaines v. Canada*,[29] *Kraemer v. Shelley*,[30] and *Liddell v. Board of Education*.[31]

In 1937, the Missouri Supreme Court reasoned, in *State ex rel. Gaines v. Canada*, that the State's segregationist education public policy extended to prohibiting African-American students from attending the University of Missouri.[32] The United States Supreme Court reversed *Gaines*[33] and began the legal erosion of "separate but equal" in higher education, setting the stage for *Brown v. Board of Education*.[34] In response to the *Gaines* reversal, Missouri adopted legislation to maintain its status quo.[35] It was not until 1950, eleven years later, that the University admitted its first African-American students.[36]

A decade later, in *Kraemer v. Shelley*, the Missouri Supreme Court enforced a racially restrictive housing covenant, articulating that the contractual rights of white homeowners outweighed the equal protection rights of African Americans.[37] The United States Supreme Court reversed *Kraemer*,[38] sparking activism and the creation of the fair housing movement.

28. Micah Cohen, *In Missouri's Move to the Right, A Question of How Far*, N.Y. TIMES: FIVETHIRTYEIGHT (Aug. 21, 2012, 1:28 PM), http://fivethirtyeight.blogs.nytimes.com/2012/08/21/in-missouris-move-to-the-right-a-question-of-how-far/.

29. 113 S.W.2d 783 (Mo. 1937) (en banc), *rev'd*, 305 U.S. 337 (1938).

30. 198 S.W.2d 679 (Mo. 1946) (en banc), *rev'd*, 334 U.S. 1 (1948).

31. 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir. 1980).

32. *See* 113 S.W.2d at 785–87.

33. *See Gaines*, 305 U.S. 337.

34. 347 U.S. 438 (1954); Andrew Kull, *Post*-Plessy, *Pre*-Brown*: "Logical Exactness" in Enforcing Equal Rights*, 24 J. SUP. CT. HIST. 155, 158 (1999) (positing that the U.S. Supreme Court's decision in *Gaines* "shows that *Plessy v. Ferguson* was no longer persuasive to a majority of the Court as a reading of the Fourteenth Amendment").

35. State *ex rel.* Gaines v. Canada, 131 S.W.2d 217, 218–19 (Mo. 1939) (en banc) (citing MO. REV. STAT. §§ 9618, 9622 (1929)).

36. *On Campus: Recent Campus Changes*, MO. ALUMNUS, Oct 1950, at 5, 5.

37. 198 S.W.2d 679, 683 (Mo. 1946) (en banc), *rev'd*, 334 U.S. 1 (1948).

38. *See Shelley*, 334 U.S. at 23.

Housing discrimination continued, however, and St. Louis remains one of the nation's most segregated cities.[39]

In 1979, in *Liddell v. Board of Education*,[40] a Missouri federal district court held that the judiciary could not remedy segregation in St. Louis schools because there was no proof of intentional segregation by the school board.[41] The United States Court of Appeals for the Eighth Circuit reversed and remanded,[42] and St. Louis's city and suburban school districts entered into the "nation's largest and longest-running school desegregation program."[43] After years of increased integration, however, the program saw steep decline in participation when court supervision of the program ended in 1999.[44] Since 2000, the St. Louis Public School District has struggled to maintain its State accreditation.[45]

Part I of this Essay gives a brief overview of majoritarian narratives and minority counter-narratives, the scholarship of Critical Race Theory, and the judiciary's rhetoric in race-based cases. Part II analyzes the narratives and language of *Gaines*, *Kraemer*, and *Liddell*, provides the social context of these cases, and traces their historical outcomes. The Essay then concludes that long-lasting societal change has been elusive because without explicitly rebutting majoritarian narratives and giving voice to counter-narratives, even progressive judicial opinions cannot effectively challenge the status quo.

I. RACIAL NARRATIVES AND JUDICIAL RHETORIC

Rhetorical analysis of judicial opinions identifies narratives in the law, the language of the law, and the law's impact on society. This approach recognizes that the law itself is a "negotiated construct[], coproduced by

39. CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 223–25 (1959); Carol Rose, *Property Stories:* Shelley v. Kraemer, *in* PROPERTY STORIES 188, 219 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009); Oliveri, *supra* note 26, at 1053.

40. Liddell v. Bd. of Educ., 469 F. Supp. 1304, 1362–64 (E.D. Mo. 1979), *rev'd sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir. 1980).

41. *Liddell*, 469 F. Supp. at 1362–64.

42. *Adams*, 620 F.2d 1277.

43. Elisa Crouch, *St. Louis Desegregation Program Headed for Phase Out*, ST. LOUIS POST-DISPATCH (June 10, 2016), http://www.stltoday.com/news/local/education/st-louis-desegregation-program-headed-for-phase-out/article_9dadfa4c-3d49-5b80-b6ec-2b1c03d2e5c7.html.

44. *Id.*; Kristen Taketa, *Voluntary Deseg Program to Close for New Students in 2024*, ST. LOUIS POST-DISPATCH (Nov. 18, 2016), http://www.stltoday.com/news/local/education/voluntary-deseg-program-to-close-for-new-students-in/article_8a8a0b54-c88c-532f-af8e-8cebfe7fd487.html.

45. Jessica Bock & Elisa Crouch, *Superintendents Ask State for Accreditation Upgrade*, ST. LOUIS POST-DISPATCH (Oct. 23, 2015), http://www.stltoday.com/news/local/education/superintendents-ask-state-for-accreditation-upgrade/article_d893de1b-9283-503b-b69a-03c27d097f96.html.

rhetors and their audiences."[46] It begins by asking, "[W]hat voices does the law allow to be heard[;] what relations does it establish among them? With what voice, or voices, does the law itself speak?"[47]

Among their dynamic and significant work, scholars of Critical Race Theory apply rhetorical analysis to the intersection of race and the law,[48] revealing how majoritarian narratives inform the law and perpetuate systemic discrimination.[49] The disparity in experiences[50] between African Americans and whites regarding socio-economic and political issues[51] amounts to more than differences in "personally-held viewpoints."[52] Rather, this disparity is reflective of what scholars call "different cultural 'narratives'"—narratives that form cultural communities and individual realities.[53]

Legal opinions, however, rarely reflect the existence of differing narratives, because the law is written in the form and voice of the majority,[54] which in defining itself, creates its meaning and perpetuates the dominant law.[55] "Empowered groups long ago established a host of . . . narratives," and many people today hear these narratives as certainties, or as ingrained convictions about "merit, causation, blame, responsibility, and racial justice."[56] The "majoritarian faith" therefore lauds dominant stories as rhetorical myth and memory or, in other words, as "truth."[57] Moreover, as these

46. MAROUF HASIAN JR., LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE 1 (2000).

47. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 697 (1985).

48. *See, e.g.*, Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).

49. *See also* Ifill, *supra* note 18, at 441. *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 3d ed. 2013).

50. DELGADO & STEFANCIC, *supra* note 19, at 47 ("People of different races have radically different experiences as they go through life.").

51. Ifill, *supra* note 18, at 424, 439. Ifill cited to several polls and studies revealing differing perspectives between African Americans and whites on issues related to race, such as the "meaning and power of discrimination," to "ostensibly nonracial issues" such as taxes, and to the existence of racial bias in the criminal justice system. *Id*. at 424–25.

52. *Id.* at 439.

53. *Id.*; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1957 (1991).

54. The very language of the law is anathema to the counter-narrative, preferring legalese and vague precepts to vivid and empathetic stories about people. *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101, 2106, 2123 (1989) (discussing potential use of empathy in judicial opinions); *see also* ANNE STRICK, INJUSTICE FOR ALL: HOW OUR LEGAL SYSTEM BETRAYS US 58–63 (1996) (citing FRED RODELL, WOE UNTO YOU, LAWYERS! 127 (1957) (criticizing legal language as inaccessible)).

55. THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS 12 (1996); *see* STRICK, *supra* note 54, at 15.

56. Delgado, *On Telling Stories*, *supra* note 18, at 666.

57. *Id.* at 670–71. Rhetorical myths are "[e]nduring narratives" that might transcend cultures based on shared values. HASIAN JR., *supra* note 46, at 15. Rhetorical memories "influence the

narratives are adopted by courts and become dominant law, they are imposed on all of society, including minority communities and minority community members.[58] In this way, majoritarian narratives can reflect "status quo narratives," which perpetuate centuries-long subjugation of minority voices and a segregated nation.

Within these majoritarian narratives exist problematic themes that maintain the majoritarian faith as truth. These themes provide an internal continuity, allowing readers to incorporate future experiences back into dominant stories without reflecting on the validity or value of the status quo. Professor Thomas Ross has identified the themes of "black abstraction" and "white innocence,"[59] and Professors Richard Delgado and Jean Stefancic have analyzed the theme of "imposition."[60] In the theme of black abstraction, courts "refus[e] to depict blacks in any real and vividly drawn social context" or provide a complete picture of the experiences of African Americans within majoritarian narratives.[61] African-American actors are merely secondary characters within a story that is not their own, with judicial rhetoric "obscur[ing] the humanness of black persons."[62]

White innocence refers to "the insistence on the innocence or absence of responsibility of the contemporary white person."[63] This theme presumes that white people should not be punished for societal inequality

way entire generations selectively think about the relationship between the past, present, and future." *Id.*; *see also* STRICK, *supra* note 54, at 144 ("[T]he most pernicious bias consists in believing oneself to have none."); Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571, 1580 (1999) [hereinafter Delgado, *Making Pets*].

58. Ifill, *supra* note 18, at 439–40; *see* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 81–86 (2006) (analyzing law's coercive function and contribution in creating and perpetuating racial classifications).

59. *See* Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 1–2 (1990) [hereinafter Ross, *Rhetorical Tapestry*]. *See generally* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

60. *See* Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994).

61. Ross, *Rhetorical Tapestry*, *supra* note 59, at 2. Ross further articulates: "Rhetoric is a magical thing. It transforms things into their opposites. Difficult choices become obvious. Change becomes continuity. Real human suffering vanishes as we conjure up the specter of righteousness. Rhetoric becomes the smooth veneer to the cracked surface of the real and hard choices in law." *Id.* Aristotle wrote, "First, then, one should grasp that on whatever subject there is need to speak or reason it is necessary to have the facts belonging to that subject . . . either all or some of them; for if you had none, you would have nothing from which to draw a conclusion." ARISTOTLE, ON RHETORIC: A THEORY OF CIVIL DISCOURSE 169 (George A. Kennedy trans., 2d ed. 2007).

62. Ross, *Rhetorical Tapestry*, *supra* note 59, at 6.

63. *Id.* at 3.

through affirmative action or race-based judicial remedies.[64] White innocence also suggests a lack of collective responsibility for present-day inequality, and that discussion of white privilege is either hidden by abstract language or omitted entirely. This silence coincides with the privilege white people carry to dismiss the very concept of "whiteness" and instead adopt the view that their perception is truly colorblind neutrality, a mirror of the nation's long-held "values, perspectives, and ideals."[65]

Similar to how black abstraction and white innocence assume a white world by default, the theme of imposition depicts an "outsider" or "reformer" as a "nuisance,"[66] or as "one who is overstepping, is abusing his or her welcome, or is going too far."[67] Thus, by seeking equal rights and affirmative action, African Americans are presented as agitators, hostile to white innocence.[68]

Specifically, there are four ways courts present the tale of outsider imposition to discredit the outsider's argument: impugning the outsider personally,[69] impugning the outsider's motives,[70] impugning the outsider's actions,[71] or characterizing the reform sought as leading to outrageous results.[72] To use these themes effectively, courts use persuasive writing techniques.[73] The rhetorical language of the law is, after all, persuasion.[74]

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64. ROSS, *supra* note 55, at 27–28; *see also* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 78 (1998) ("[W]hite people tend to view intent as an essential element of racial harm; nonwhites do not.").

65. Ifill, *supra* note 18, at 423–24.

66. *See* Delgado & Stefancic, *supra* note 60, at 1029; *see also* BEVERLY TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?": AND OTHER CONVERSATIONS ABOUT RACE 26 (1997) ("To the extent that members of targeted groups do push societal limits—achieving unexpected success, protesting injustice, being 'uppity'—by their actions they call the whole system into question.").

67. Delgado & Stefancic, *supra* note 60, at 1029.

68. *Id.* at 1036–37 (looking specifically at the plurality opinion in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which implied "the backers of the Richmond program, which would have increased the number of minority contractors, were themselves racially hostile and were prepared to be unfair to innocent whites").

69. *Id.* at 1030 ("Sometimes courts and others deem an individual guilty of imposing by virtue of who he or she is—that is, simply by being a Jew, woman, Chinese, or black, engaged in some ordinary activity of life.").

70. *Id.* at 1036. Delgado and Stefancic argue that, from the perspective of the courts, "[t]he outsider is not looking for social justice, but spoiling for a fight, with a chip on his or her shoulder. Or the outsider has an impermissible motive—advancing social claims to win funding, acclaim, or power he or she does not deserve." *Id.*

71. *Id.* at 1039 ("[T]hey hold that the reformer is doing something wrong—either demanding something that by its very nature constitutes imposition, or going about things the wrong way, e.g., by trying to vault to the head of the line.").

72. *Id.* at 1043 (observing that courts invoke *reductio ad absurdum* and the "where would you draw the line?" arguments most often in law reform cases).

73. *See generally* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) (stating that judges write opinions to "rein-

Historically, judicial opinions explicitly used race-based rhetoric.[75] But, as the rhetoric of race evolved in the twentieth century, the explicit rhetoric was replaced with either hollow facts obfuscating important racial context or wholesale omission of any explicit discussion regarding the history or reality of systemic racial discrimination.[76]

In many cases, explicit race-based rhetoric was replaced by the use of enthymemes.[77] Enthymemes are a form of argument where a conclusion is reached without stating the underlying assumption on which it is based.[78] Because the reader already presumes the truth underlying the reasoning and is actively engaged in using their own assumptions to understand the speaker, the speaker's argument becomes all the more persuasive.[79] Judicial use of enthymemes allows courts to presume the reader will accept the unstated premise based on the reader's incorporation of the problematic themes and ingrained narratives. Majoritarian enthymemes are particularly disconcerting because of their elusiveness; the minor premises perpetuate without being articulated.

Indeed, judicial language dealing with race often "masquerad[es]" as being built upon "neutral principles,"[80] but in fact, it has historically contin-

force our oft-challenged and arguably shaky authority" and "justify our power to decide matters important to our fellow citizens").

74. Lawrence Douglas, *Constitutional Discourse and its Discontents: An Essay on the Rhetoric of Judicial Review*, *in* THE RHETORIC OF LAW 225, 226 (Austin Sarat & Thomas R. Kearns eds., 1996).

75. In *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, Professor Thomas Ross analyzes the explicit race-based rhetoric permitting black subjugation in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), the rhetoric of "black abstraction" and "white innocence" in the *Civil Rights Cases*, 109 U.S. 3 (1883), and the rhetoric of a black "self-imposed stigma" in *Plessy v. Ferguson*, 163 U.S. 573 (1896), before discussing twentieth century opinions. Ross, *Rhetorical Tapestry*, *supra* note 59, at 9–19.

76. *Cf.* Ross, *Rhetorical Tapestry*, *supra* note 59, at 20–34 (analyzing the rhetoric of Brown v. Board of Education, 347 U.S. 483 (1954), Brown v. Board of Education, 349 U.S. 294 (1955), Milliken v. Bradley, 418 U.S. 717 (1974), City of Memphis v. Greene, 451 U.S. 100 (1981), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

77. For more on Aristotle, enthymemes, and legal rhetoric, see Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61 (2002).

78. *See* JAMES J. MURPHY ET AL., A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 68–70 (4th ed. 2014); *see also* ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 223 (Theresa Enos ed., 1996) ("Although variously used in history, *enthymeme* generally refers to claims in arguments that are supported by probable premises assumed to be shared by the audience."); James C. Raymond, *Enthymemes, Examples, and Rhetorical Method*, *in* ESSAYS ON CLASSICAL RHETORIC AND MODERN DISCOURSE 140 (Robert J. Connors et al. eds., 1983) (defining enthymemes as "those patterns of demonstration that presume upon the audience's acceptance of assumptions, often unstated").

79. ARISTOTLE'S POLITICS: A CRITICAL GUIDE 17–18 (Thornton Lockwood & Thanassis Samaras eds., 2015).

80. Ifill, *supra* note 18, at 440–41; *see also* Enid Trucious-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race and Public Schools in Louisville, Kentucky*, 112 PENN. ST. L. REV. 947, 948 (2008).

ued the majoritarian faith and promoted the status quo.[81] Thus, while the language of legal decisions no longer relies on explicit race-based rhetoric, the underlying narratives of historic lower court opinions retain vitality outside of the courts.[82] The effect of these majoritarian narratives and their reliant themes is a continuing assumption that systemic inequality is natural, even acceptable.[83] This is especially true in the realms where African-American and white segregation is most socially apparent, such as higher education,[84] housing,[85] and public education.[86]

II. RACIAL RHETORIC OF MISSOURI-BASED DECISIONS

A. The Rhetoric of "Separate but Equal": State *ex rel.* Gaines v. Canada

1. Social and Legal Context

In 1868, the passage of the Fourteenth Amendment provided a new promise of equality.[87] Majoritarian narratives, however, remained unaffected, and legal rhetoric evolved to incorporate that promise of equality into the narratives by harmonizing equality and separation. "Separate but equal" became an ideograph for segregation in *Plessy v. Ferguson*.[88] It was presented as "enlightened public policy" but was still "rooted in white suprem-

81. Delgado, *supra* note 18, at 666; Ifill, *supra* note 18, at 439–40.

82. Richard Delgado, *Storytelling for Oppositionists and Others*, 87 MICH. L. REV. 2411, 2412 (1988); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and* Brown v. Board of Education *(Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 476 (2004) ("[T]he gap between Whites and Blacks—and other non-White minorities—remains remarkably the same year after year, and that holds true whether you look at wages, longevity, infant mortality, school completion, family wealth, or anything else."). In this way, majoritarian narratives hijack what James B. White refers to as the "machine" in order to subvert justice and equality. *See* James Boyd White, *Imagining the Law*, *in* THE RHETORIC OF LAW, *supra* note 74, at 32–34.

83. *See* Delgado, *supra* note 82, at 2413.

84. ANTHONY P. CARNEVALE & JEFF STROHL, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 29, 37 (2013), https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf.

85. JOHN R. BROWN, SEPARATE AND UNEQUAL IN SUBURBIA 4, 11 (2010), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report12012014.pdf; JOHN R. LOGAN, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA 1 (2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report0727.pdf.

86. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 10 (2016), http://www.gao.gov/assets/680/676745.pdf.

87. *Primary Documents in American History: 14th Amendment to the U.S. Constitution*, LIB. OF CONG., https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html (last updated Nov. 25, 2015).

88. 163 U.S. 537 (1896).

acy."[89] That is, the word "equal" was "not really about treating people the same, but about the reasonableness of the lines that the government inevitably dr[ew] in treating people differently."[90] Thus, this rhetoric allowed the Court to reconcile the Fourteenth Amendment with majoritarian narratives.

In the 1930s, the NAACP launched a concerted campaign to battle "separate but equal," with an incremental legal assault on segregated education, in an effort to build support for a direct attack of *Plessy*.[91] The plan was to attack educational inequality because of education's "centrality to advancement and fulfillment within American culture."[92] To accomplish this, the NAACP employed a three pronged approach: (1) addressing "[d]esegregation of public graduate and professional schools," (2) fighting for equalization of salaries among African-American and white teachers, and (3) opposing segregation of elementary and secondary schools.[93]

For its vehicle to reach the United States Supreme Court, the NAACP chose Missouri's segregated university system[94]:

> Missouri is a border state. Negroes vote there. Two Negro legislators have been in the state capitol in recent times—the first in the 1920's. On three sides Missouri is bounded by Kansas, Iowa and Illinois. It has a great liberal newspaper, the St. Louis *Post-Dispatch.* What better place to pitch a battle?[95]

As the NAACP was preparing for its Missouri challenge, Lloyd Gaines was graduating from Lincoln University—Missouri's African-American college—with an exemplary academic record.[96] He wanted to be a lawyer, but Lincoln University did not offer a law degree.[97] Although Gaines knew that the University of Missouri did not accept African-American students, he applied to its law school because he wanted to attend a school that was, in part, funded by "the taxes of his family."[98] His appli-

89. MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 8 (2007); Waldo E. Martin, Jr., *Introduction* to BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS 1, 22 (Waldo E. Martin, Jr. ed., 1998).

90. Kull, *supra* note 34, at 158.

91. Martin, Jr., *supra* note 89, at 7, 13.

92. *Id.*

93. *Id.* at 13–14.

94. JAMES ENDERSBY & WILLIAM HORNER, LLOYD GAINES AND THE FIGHT TO END SEGREGATION 55 (2016) (noting the NAACP first successfully challenged segregated law schools in Maryland in Pearson v. Murray, 182 A. 590, 169 Md. 478 (1936), but Maryland did not appeal and the precedential value was limited).

95. Roy Wilkins, *Citizenship Rights and Sociology*, CRISIS, July 1939, at 193, 209.

96. Lucile Bluford, *The Lloyd Gaines Story*, 32 J. ED. SOC. 242, 242–43 (1959).

97. *Id.* at 243.

98. *Id.*

cation was rejected because of his race.[99] During Gaines's application process, the NAACP took him on as a client and filed a writ of mandamus asking the Boone County Circuit Court to order the University of Missouri to admit Gaines to the law school.[100] The Circuit Court denied the writ, and the NAACP appealed to the Missouri Supreme Court.[101]

2. Missouri Supreme Court

The Missouri Supreme Court used three rhetorical techniques to affirm the circuit court decision. First, the court used the theme of black imposition to prejudice the reader against Gaines before addressing the merits of his claim. Second, the court used black abstraction to transform a facially neutral law governing admission to the University of Missouri into one meant to benefit only white students. Third, in failing to articulate the actual premise for why Gaines should not attend the University of Missouri Law School, the court relied on an enthymeme to support its application of "separate but equal" jurisprudence.

To establish Gaines as an imposter, the entire first section of the opinion did nothing more than articulate the numerous educational opportunities provided to Gaines by the state: "He was educated in the public schools maintained by the State for the education of negroes, including education in the common school, high school, and Lincoln University."[102] The court relied on the Missouri Constitution and Missouri statutes to argue that Missouri laws not only allowed, but also required, segregation.[103] The Missouri Constitution provided: "Separate free public schools shall be established for the education of children of African descent."[104] Missouri statutes made it "unlawful" for African-American and white students to attend the same school; the statutes further provided for the establishment of separate schools for African-American students when enrollment required it and transfers to an African-American school when enrollment was insufficient for the establishment of a new school.[105] To harmonize these laws with the

99. *Id.* It was over six months later that an admissions decision was finally made when the Board of Curators adopted a statement rejecting Gaines's application explicitly because of his race. The Board of Curators justified its decision because of the ample opportunity that Lincoln University provided and because the State would pay Gaines's tuition to a law school in a neighboring state until such time as Lincoln University established a law school. *Id.*

100. *Id.*

101. *Id.*

102. State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 784 (Mo. 1937) (en banc), *rev'd*, 305 U.S. 337 (1938).

103. *Id.* at 785–87.

104. *Id.* at 785 (quoting MO. CONST. art XI, § 3).

105. *Id.* (citing MO. REV. STAT. §§ 9216–17 (1929)).

"separate but equal" jurisprudence, the court posited a cursory conclusion that the separate educational opportunities were "equal."[106]

The court, therefore, used the theme of imposition to impugn Gaines by presenting his requested reform as outrageous[107]—contrary to the laws, the public policy, and the constitution of Missouri. The laws used to set the stage and incorporate this seemingly outrageous result, however, were applicable only to secondary education.[108] Therefore, the inclusion and depth of treatment of those laws was valuable solely for the rhetorical purpose of incorporating the black imposition theme into the opinion to discredit Gaines.

As the court turned to the first legal issue—whether the state's laws, constitution, or public policy prohibited integration in higher education—it resorted to black abstraction to discount a statute that, on its face, should have allowed Gaines's admission to the University of Missouri.[109] Missouri Revised Statute Section 9657 stated: "*All youths*, resident of the state of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the state of Missouri without payment of tuition."[110] Despite the facially neutral language of the statute, the court concluded that it was "obvious" that the legislative intent (and the public policy of the state) was to keep the races separate at the university level.[111] But in order to reach this "obvious" conclusion, the court had to read the phrase, "all youths," as referring to only all *white* youths. The court contended that the statutory establishment of Lincoln University was evidence of the legislature's "clear intention" to provide "equal opportunity for higher education, *but* in separate schools."[112] This position could be perceived as palatable only because of the court's use of black abstraction to present the seemingly inclusive statutory language as exclusionary.

Having established that segregated higher education was the law in Missouri, the court used an enthymeme to harmonize this outcome with the federal "separate but equal" rhetoric. First, the court criticized Gaines for not applying for legal studies at Lincoln University, despite the fact that no such program existed.[113] The court reasoned that the Board of Curators would have been obligated to consider opening a law school upon such a

106. *Id*. at 788.
107. *Cf.* Delgado & Stefancic, *supra* note 60, at 1043.
108. *Gaines*, 113 S.W.2d at 785.
109. *Id.* at 786.
110. *Id.* at 787 (emphasis added).
111. *Id.*
112. *Id.* at 786–87 (emphasis added).
113. *Id.* at 789.

request.[114] But the court did not address the logical disconnect of expecting a student to apply to a program that did not exist. Second, the court elaborately detailed the equality of costs and program components in the neighboring states of Illinois, Iowa, Kansas, and Nebraska, where Gaines could attend law school at Missouri's expense.[115] The court failed to address, however, why Missouri could pay for an integrated education elsewhere, even though integrated education was seemingly abhorrent to the public policy of Missouri.[116] Finally, and perhaps most importantly, the court never stated why it was objectionable for Gaines to attend the University of Missouri. This premise did not need to be said because segregation was so ingrained in majoritarian narratives that the premise could simply be assumed as truth.

3. United States Supreme Court

Gaines and the NAACP appealed to the Supreme Court of the United States.[117] The Supreme Court used neutral judicial rhetoric to reverse and remand to the Missouri Supreme Court.[118] Yet the Court did not address the majoritarian narrative of keeping African-American students out of an all-white university. The Court never described the personal story of Lloyd Gaines, other than to identify him as "a negro, [who] was refused admission to the School of Law at the State University of Missouri."[119] Nor did the Court mention the funding disparities between the University of Missouri and Lincoln University and how those disparities might affect the equality of the programs offered.

Instead, the Court rested its decision on (1) the obligation of Missouri to provide an equal law school opportunity within its state borders and (2) the lack of any equal opportunity for Gaines to attend law school in Missouri.[120] Therefore, the Court concluded that Gaines "was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training *within* the State."[121] In this way, the Court left open the question of whether Missouri could continue its segregationist policies if the State opened a law school at Lincoln University instead of allowing Gaines admission to the University of Missouri.[122] This

114. *Id.*
115. *Id.*
116. *See id.*
117. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 342 (1938).
118. *See id.* at 352.
119. *Id.* at 342.
120. *See id.* at 352.
121. *Id.* (emphasis added).
122. *Id.* at 349–50.

limited victory served as the first federal case in the NAACP's incremental attack on "separate but equal."[123]

4. Outcomes

The battle in Missouri was not over. Rather than admit Gaines to the state law school, the legislature passed the Taylor Bill, which authorized $200,000 to establish an African-American law school in St. Louis.[124]

On remand, the Missouri Supreme Court again heard *Gaines* and sent the case to the Boone County Circuit Court to determine whether the African-American law school in St. Louis was "substantially equivalent" to the law school at the University of Missouri.[125] But that determination was never made; Gaines inexplicably disappeared, and the NAACP was forced to withdraw its case.[126]

The NAACP pushed on in Missouri, taking on the case of Lucille Bluford, an African-American journalist with a degree from the University of Kansas.[127] Bluford applied to attend the University of Missouri Journalism Graduate School in both January and September of 1939.[128] In *Bluford v. Canada*,[129] the Missouri Supreme Court stood behind its "separate but equal" rhetoric.[130] It evaluated Bluford's claim under new legislation, which required the Board of Curators to create new African-American graduate programs upon "demand," and then found that Bluford "made inquiry (but not demand) to the President of Lincoln about a course of journalism in that school."[131] In this way, the court distinguished *Bluford* from the United States Supreme Court's decision in *Gaines*.[132]

Despite the 1939 NAACP victory in *Gaines*, the University of Missouri did not enroll its first African-American students until 1950.[133] In the fall of 2015, one of the student groups protesting at the University of Mis-

123. Wilkins, *supra* note 95, at 209. After the decision, the NAACP reflected, "[t]he South needed a reminder that its procedure was not in accord with the American ideal. The Gaines case was that reminder." *Id.*

124. Bluford, *supra* note 96, at 244.

125. State *ex rel.* Gaines v. Canada, 131 S.W.2d 217, 220 (Mo. 1939) (en banc).

126. Bluford, *supra* note 96, at 245–46.

127. State *ex rel.* Bluford v. Canada, 153 S.W.2d 12, 13 (Mo. 1941).

128. *Id.* at 14.

129. 153 S.W.2d 12 (Mo. 1941).

130. *See id.* at 17.

131. *Id.* at 15–16.

132. *Id.*

133. Dale Smith & Erik Potter, *A Timeline of Mizzou Achievements*, MAG. MIZZOU ALUMNI ASS'N, https://mizzoumag.missouri.edu/2013/11/a-timeline-of-mizzou-achievements/ (last updated Nov. 22, 2013).

souri linked its struggle to the *Gaines* and *Bluford* stories by identifying itself as Concerned Student 1950.[134]

B. The Rhetoric of Property Rights: Kraemer v. Shelley

1. Social and Legal Context

One majoritarian narrative of housing in the twentieth century is a story of white value and black destruction. For example, 1915 propaganda by the St. Louis United Welfare Association urged residents to vote for a racial zoning ordinance that would institute housing segregation.[135] In a postcard picturing a row of houses, the Association showed "[a]n entire block ruined by negro invasion" and declared, "SAVE YOUR HOME! VOTE FOR SEGREGATION!"[136] In a special election, St. Louis voters adopted the racially exclusionary zoning ordinance by a margin of 52,220 to 27,877.[137]

But in 1917, the Unites States Supreme Court ruled that racial zoning laws similar to the one passed by St. Louis voters violated the Fourteenth Amendment.[138] That ruling, however, did not destroy the majoritarian housing narrative, and white homeowners found a new way to "save" themselves and their property through the use of racially restrictive covenants.[139] Courts upheld these agreements under the auspices that the covenants were private actions, not state actions covered by the Fourteenth Amendment, and white residents quickly adopted restrictive covenants as a means of preserving the perceived value of their property.[140]

Often lost in this story of white property owners and their property value was the counter-narrative of African-American homeowners and tenants. By the 1940s, juxtaposed with white residents' concern for property values, was an African-American populace with increased job opportuni-

134. Alicia Lu, *What Is Concerned Student 1950? The University of Missouri Peaceful Protests Were Led by a Standout Organization*, BUSTLE (Nov. 9, 2015), http://www.bustle.com/articles/122575-what-is-concerned-student-1950-the-university-of-missouri-peaceful-protests-were-led-by-a-standout.

135. Postcard, United Welfare Association (1915), http://mappingdecline.lib.uiowa.edu/_includes/documents/rp_doc7.pdf (last visited Apr. 2, 2017). The propaganda came from the United Welfare Association, an "umbrella group" for various improvement groups, which "advocate[d] for a racially exclusionary zoning ordinance." LANA STEIN, ST. LOUIS POLITICS: THE TRIUMPH OF TRADITION 14 (2002); Oliveri, *supra* note 26, at 1055.

136. *See* Postcard, *supra* note 135.

137. STEIN, *supra* note 135, at 15.

138. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917).

139. Oliveri, *supra* note 26, at 1055.

140. Wendell E. Pritchett, Shelley v. Kraemer*: Racial Liberalism and the U.S. Supreme Court*, *in* CIVIL RIGHTS STORIES 5, 7–8 (Myriam E. Gilles & Risa L. Goluboff eds., 2008); Rose, *supra* note 39, at 204–06 (providing an overview of judicial lenience for racially restrictive covenants and stating, "Nowhere, . . . was this lenience towards racial restrictions more evident than in the case history of *Shelley* itself").

ties, income, and a "desire for decent housing."[141] Due to racially restrictive covenants, however, while the African-American population in St. Louis grew from 40,000 in 1910 to more than 117,000 by the mid-1940s, the area in which African Americans could live was "narrowed, surrounded and circumscribed almost completely."[142] African-American families were forced into overcrowded housing, with multiple families sharing dwellings designed for one.[143] This overcrowding naturally led to an increase in mortality rates, health problems, crime, and rent costs.[144] Large numbers of African-American families were forced to pay inflated prices for substandard living conditions and, due to restrictive covenants, were unable to buy new suburban homes despite their ability to afford them.[145]

In this setting, on September 11, 1945, J.D. and Ethel Shelley moved into the lower portion of a rowhouse at 4600 Labadie Avenue that they had purchased for $5,700.[146] By the end of the day, the Shelleys' neighbors, with the assistance of the Marcus Avenue Improvement Association, brought a lawsuit to enforce a racially restrictive neighborhood covenant against the Shelleys.[147] The covenant, created in 1911 for "the property fronting on Labadie Avenue," stated that "no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race," and it explicitly prohibited occupancy "by people of the Negro or Mongolian Race."[148]

141. Pritchett, *supra* note 140, at 8–9. Additionally, the brief written to the Supreme Court on behalf of Orsel and Minnie McGhee (in a case that the Court consolidated with *Shelley*) stated: "At the end of [World War II], income distribution among colored American citizens in the northern urban centers more nearly approximated that obtaining for the entire population than ever before." Brief for Petitioners, Shelley v. Kraemer, 334 U.S 1 (1948) (No. 87), 1947 WL 30427, at *82.

142. Transcript of Record at 23–24, Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946) (No. 39997) (en banc), *rev'd*, 334 U.S. 1 (1948).

143. *Id.* at 24. In St. Louis, 20.2% of African Americans were living in dwellings with more than 1.5 persons per room, compared to only 5.1% of whites. Brief for Petitioners, *supra* note 141, at 52.

144. *Id.* at 56–59, 66.

145. *Id.* at 83; Transcript of Record, *supra* note 142, at 24 ("[A]nother result . . . is to increase the rental which they pay far beyond that paid by the average city dweller for even better housing accommodations, and Negroes are compelled to pay much higher prices for the property they buy to live in than white citizens.").

146. Transcript of Record, *supra* note 142, at 181–82, 184; VOSE, *supra* note 39, at 110–11.

147. *Kraemer*, 198 S.W.2d at 680–81; VOSE, *supra* note 39, at 111–12. On Oct. 9, 1945, the court issued a temporary restraining order barring the Shelley's from their home until after a hearing. Transcript of Record, *supra* note 142, at 12–13.

148. *Kraemer*, 198 S.W.2d at 681.

2. Missouri Supreme Court

In a decision reflecting a continuation of a majoritarian narrative to protect the property rights of "innocent" white homeowners, the Missouri Supreme Court divested the Shelleys of both their property and their right to equality under the law.[149] The opinion employed black abstraction to remove the Shelleys from the court's story, and then shifted the focus to white innocence by emphasizing the rights of the white homeowners to create racially restrictive covenants. Additionally, the court professed its own inability to correct segregated housing. Finally, the court relied on supposedly neutral rhetoric to uphold the covenant while still employing logic based on explicitly racially charged precedent and enthymemes suggesting that the presence of African-American homeowners decreased property values.

The court's inevitable holding was clear from the opinion's opening theme of black abstraction. The court began its story by describing white property owners unremarkably signing a racially restrictive covenant: "In 1911 some of the owners of the property fronting on both sides of Labadie Avenue . . . signed the restrictive agreement set out below."[150] The court did not begin with J.D. and Ethel purchasing their home, nor did the court set the stage by telling the history of racially restrictive covenants in America, generally, or St. Louis, in particular.[151] In fact, the court neglected to refer to the Shelleys at all until the end of the second paragraph.[152] And, even then, the court simply described the Shelleys as "defendants Shelley and his wife, negroes, who are occupying the premises."[153] From the court's first few sentences, the reader could predict the outcome. It was clear that the story to be told, the story that mattered, was the story of the white property owners' rights; the African-American property owners were abstract, auxiliary to the court's holding.[154]

In following majoritarian housing narratives, the court needed to justify why, under the Fourteenth Amendment, judicial enforcement of racially discriminatory covenants was acceptable. Relying on the theme of white innocence, the court used seemingly neutral reasoning, not to avoid a discussion of equal rights, but instead to focus on the importance of protecting the equal rights of white homeowners to contract.[155] Under this view of the

149. *See id.* at 682–83.

150. *Id.* at 680.

151. *See id.*

152. *Id.*

153. *Id.*

154. *Cf.* Ross, *Rhetorical Tapestry*, *supra* note 59, at 6–7 (explaining that courts have used black abstraction to "blunt" a reader's empathy).

155. *Kraemer*, 198 S.W.2d at 682–83.

state and federal equal protection amendments, the court concluded that sustaining the Shelleys' claim would "deny the [white] parties to such an agreement one of the fundamental privileges of citizenship, access to the courts."[156]

But while white citizens' access to the court was a fundamental privilege, the court distanced itself from sharing any blame over how that access led to judicial enforcement of racial covenants. The court determined that it was unable to remedy the racial harms of housing segregation or address white collective responsibility for then-current policies and practices, because that was a matter for the legislature and not the court. The court relied on the rhetoric of judicial restraint to limit its own power and responsibility to address societal issues[157] and stated that, while the trial court found housing segregation caused social ills,[158] those facts were irrelevant.[159] The court thus failed to acknowledge its role or responsibility in ameliorating the discriminatory regime courts routinely enforced.

Instead, the court's rhetoric concealed aspects of majoritarian narratives through seemingly neutral language and the use of enthymemes. For example, at no time did the court discuss why white homeowners created racially restrictive covenants. The law, the understood dominant truth, was written by a white author for a white audience who shared the same narrative and the same assumptions.[160] And in this narrative, readers understood the reason why white homeowners did not want African Americans living in their neighborhoods. That narrative was so deeply understood that it did not need to be acknowledged.[161] Providing the details of the narrative risked revealing that the "neutral" language used by the court was merely a facade for its discriminatory reasoning.[162]

156. *Id.* at 683.

157. *Cf.* Ross, *Rhetorical Tapestry*, *supra* note 59, at 5 (using the phrase "judicial helplessness" to argue that judges, like Justice Taney in *Dred Scott*, rely on precedent to keep the court from enacting change).

158. *See* Transcript of Record, *supra* note 142, at 217.

159. *Kraemer*, 198 S.W.2d at 683.

160. *Cf.* White, *supra* note 47, at 692; Ross, *supra* note 48, at 399–406 (writing about how Justice Scalia's opinion in *City of Richmond v. J.A. Croson Co.* relied on "[w]hite [i]magination" and the reader to provide "vividness" to "language which seems abstract, formal, and quite ordinary").

161. *See* RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 164 (2013) ("[W]hen courts held that these covenants were valid, they had to assume a background social norm of racism."). For more on assuming majoritarian narratives as truth, see Delgado, *supra* note 18, at 670–71. *See also* Delgado, *Making Pets*, *supra* note 57, at 1580–81.

162. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 524 (1985) ("The state's law that permits enforcement of such contracts is hardly value neutral; it makes a choice to favor discrimination over equality.").

The court employed another enthymeme when it found the restrictive convent conferred a benefit to white homeowners without stating explicitly what that benefit was. The unstated assumption, understood by the readers, was that there was a benefit in keeping African Americans out of white neighborhoods, or at least in "prevent[ing] greatly increased occupancy by negroes."[163] Thus, this use of enthymemes granted the court the ability to continue to rely on majoritarian language from prior cases while simultaneously shifting to seemingly egalitarian rhetoric. For example, when suggesting that racially restrictive covenants did not violate public policy, the court cited to a 1918 case, which held it was acceptable for white homeowners to use covenants to "preserve" property from African Americans.[164] Similarly, the court cited to a 1931 case that used the imagery of white homeowners collecting signatures for neighborhood restriction agreements "to protect the neighborhood against negro invasion" and "to block the stampede of negroes."[165] In yet another case relied on by *Shelley*, the court referred to "negro occupancy" as an "encroachment."[166] By relying on these cases and basing its logic on explicit race-based decisions, the court continued a majoritarian narrative that demanded the Shelleys lose their home solely because of their race while at the same time presenting the court as a neutral actor simply upholding the right of white homeowners to contract.

3. United States Supreme Court

Following the Missouri Supreme Court's decision in *Kraemer v. Shelley*, African-American community leaders created the Real Estate Brokers Association of St. Louis, an organization with a goal of ending restrictive covenants and taking the Shelleys' case to the United States Supreme Court.[167] The Association published "A Call to Action" in the African-American newspaper *The St. Louis Argus*, explaining the impact of the *Kraemer* decision and soliciting donations.[168]

163. *See Kraemer*, 198 S.W.2d at 682; *see also* BROOKS & ROSE, *supra* note 161, at 151; Rose, *supra* note 39, at 212.

164. *Kraemer*, 198 S.W.2d at 682 (citing Koehler v. Rowland, 205 S.W. 217 (Mo. 1918) (per curiam)); *see Koehler*, 205 S.W. at 220.

165. *Kraemer*, 198 S.W.2d at 682 (citing Pickel v. McCawley, 44 S.W.2d 857 (Mo. 1931) (per curiam)); *see Pickel*, 44 S.W.2d at 860.

166. *Kraemer*, 198 S.W.2d at 682 (citing Porter v. Pryor, 164 S.W.2d 353, 355 (Mo. 1942) (per curiam)); *see Porter*, 164 S.W.2d at 355.

167. JEFFREY D. GONDA, UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 97 (2015); VOSE, *supra* note 39, at 119.

168. VOSE, *supra* note 39, at 120.

The Shelleys and the Association succeeded in obtaining certiorari from the United States Supreme Court.[169] But they were not alone. *Sipes v. McGhee*,[170] a case out of Michigan, reached the Court at the same time. The petitioners' brief for Orson and Minnie McGhee told the story that the Missouri Supreme Court was hesitant to tell. Co-written by Thurgood Marshall, the brief rebutted hidden majoritarian narratives and the unstated assumptions underlying the decisions from both Missouri and Michigan:

> Are there any such justifications for the racial restrictive covenants? Is it true, as has been loosely alleged, that the invasion of the Negro destroys the property? The evidence compiled by housing and real estate experts is conclusive to the contrary.[171]

The white respondents in *McGhee* relied on the theme of black imposition, contending that denying the white homeowners the right to create racially restrictive covenants would mean "that the Negro petitioners, and Negroes generally, [would] have rights superior to and beyond white citizens."[172] Similarly, in their response brief, the Kraemers did not deny discriminatory motives. They did not, however, expressly concede that point either; instead, they argued that imposition and equality would essentially lead to outrageous results[173]:

> [T]hen no contract could be made whereby a negro could be refused service in a restaurant; no contract could be enforced the provisions of which denied a negro participation at a dance place; no contract could be made whereby a party to it could refuse, because bound by a contract, to admit a negro to a private swimming pool.[174]

But even with the counter-narrative in hand, and even deciding the case in favor of the Shelleys,[175] the U.S. Supreme Court still did not articulate the majoritarian narrative of exclusion or its discriminatory precepts. Further, the Court failed to tell the story of overcrowded African-American neighborhoods and the overwhelming need for fair housing. Instead, the

169. Shelley v. Kraemer, 334 U.S. 1 (1948).

170. 25 N.W.2d 638 (Mich. 1947).

171. Brief for Petitioners, McGhee v. Sipes, 331 U.S. 804 (1947) (No. 87), 1947 WL 30427, at *72.

172. Brief for Respondents in Reply to Brief for United States as Amicus Curiae at 1–2, Shelley v. Kraemer, 334 U.S. 1 (1948) (Nos. 87, 290, 291), 1948 WL 31625, at *2.

173. *Cf.* Delgado & Stefancic, *supra* note 60, at 1043–45 (noting that black imposition relies on arguing that the reformer is seeking a ridiculous remedy).

174. Respondents' Brief Opposing Issuance of Writ of Certiorari, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72), 1947 WL 30431, at *15.

175. *See* Barbara J. Flagg, *"And Grace Will Lead Me Home": The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 125 (2013) (noting the opinion "fairly can be said to reflect an anti-subordinationist vision of race equality").

Court used neutral language to decide the case for the Shelleys, emphasizing the balance between the law of equality and the law of property rights: "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."[176] Therefore, while the Court in *Shelley* began to erode explicitly race-based rhetoric, the Court did not discuss the history of discrimination or its effects on African-American citizens.[177]

4. Outcomes

Although the United States Supreme Court's decision was a landmark victory for civil rights, the ingrained majoritarian narrative, the "myth of 'property values,'"[178] led white homeowners to employ other means to continue segregated housing. These tactics included "steer[ing]" by real estate agents and real estate organizations,[179] discriminatory policies of the lenders and the Federal Housing Administration,[180] and outright violence.[181] Continued activism helped create the Fair Housing Act of 1968,[182] but some commentators argue that the Act does not go far enough.[183]

Today, true fair housing remains elusive.[184] Majoritarian narratives that promote segregating whites from African Americans continue,[185] with "white market abandonment and resource withdrawal" still an unstated assumption.[186] St. Louis remains one of America's most segregated cities.[187]

176. *Shelley*, 334 U.S. at 22.

177. *See* Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 832–33 (2008).

178. VOSE, *supra* note 39, at 227.

179. Rose, *supra* note 39, at 219.

180. VOSE, *supra* note 39, at 225 (noting the Federal Housing Administration "made a practice of refusing to insure loans" to African Americans wishing to purchase in "white areas"); Rose, *supra* note 39, at 219.

181. Pritchett, *supra* note 140, at 22 ("In Chicago . . . there were dozens of attacks by whites on black newcomers in the late 1940s.").

182. *Id.* at 23.

183. *See, e.g.*, DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 428 (6th ed. 2008) (noting that the FHA relies on enforcement "by overburdened agencies or injured individuals who typically have few resources").

184. *Id.* at 427–28.

185. *Id.*

186. Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1059 (1998).

187. Oliveri, *supra* note 26, at 1053.

C. *The Rhetoric of School Desegregation:* Liddell v. Board of Education

1. *Social and Legal Context*

Despite the Supreme Court decision in *Brown v. Board of Education*, efforts to desegregate St. Louis schools—once the nation's second-largest segregated school system[188]—were stifled.[189] The segregated schooling requirements articulated in *Gaines* ensured a separate and unequal dual school system. In fact, it was not until 1976 that the provision of Missouri's constitution segregating primary and secondary schools was officially repealed.[190] Moreover, housing discrimination in St. Louis continued post-*Shelley*, with many African-American residents "confined to segregated, dilapidated neighborhoods," while white residents fled to the suburbs.[191] In the early 1970s, there had been little progress towards integration[192]; two-thirds of the students in St. Louis were African American, and "90 percent of the schools had enrollments that were 90 percent or more of one race."[193] Within predominantly African-American schools, students were taught with outdated textbooks in "substantially overcrowded" and "dilapidated buildings."[194]

On the national level, headway towards integration ended in 1974, twenty years after the Court's holding in *Brown*, when the Supreme Court began the "resegregation era."[195] In *Milliken v. Bradley*,[196] the Court struck

188. Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), https://www.propublica.org/article/ferguson-school-segregation.

189. *See* GERALD W. HEANEY & SUSAN UCHITELLE, UNENDING STRUGGLE: THE LONG ROAD TO AN EQUAL EDUCATION IN ST. LOUIS 17 (2004).

190. Adams v. United States, 620 F.2d 1277, 1280 (8th Cir. 1980).

191. HEANEY & UCHITELLE, *supra* note 189, at 16–17; Tim O'Neil, *Look Back: Lengthy Desegregation Case Puts Thousands of Students on Buses*, ST. LOUIS POST-DISPATCH (Jan. 4, 2015), http://www.stltoday.com/news/local/metro/look-back-lengthy-desegregation-case-puts-thousands-of-students-on/article_a2243e6c-a164-5e00-885d-2c0ede29a00d.html.

192. HEANEY & UCHITELLE, *supra* note 189, at 17.

193. O'Neil, *supra* note 191.

194. Kimberly Jade Norwood, *Minnie Liddell's Forty-Year Quest for Quality Public Education Remains a Dream Deferred*, 40 WASH. U. J.L. & POL'Y 1, 7 (2012). Several articles have already been written about court decisions regarding desegregating Kansas City public schools in the *Jenkins* cases. *See, e.g.*, José F. Anderson, *Perspectives on* Missouri v. Jenkins*: Abandoning the Unfinished Business of Public School Desegregation 'With All Deliberate Speed'*, 39 HOW. L.J. 693 (1996); Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101 (1996); Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597 (1996); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999).

195. Thomas F. Pettigrew, *Justice Deferred: A Half Century After* Brown v. Board of Education, 59 AM. PSYCHOLOGIST 521, 523 (2004).

196. 418 U.S. 717 (1974).

down an interdistrict desegregation plan, because while there was evidence of de jure segregation within the school district, that was insufficient to include surrounding school districts in the remedy.[197] Thus, the *Milliken* decision removed one of the only effective means of desegregating urban cities—interdistrict busing.[198] The combination of predominantly African-American, urban school districts and their inability to integrate with white suburbs led to resegregation.[199] Thus, a few short years after the Court finally articulated an ultimate goal of integration, the Court, in essence, ended all progress towards that goal.

The *Milliken* decision could not have come at a worse time for St. Louis. Two years earlier, in 1972, a St. Louis mother, Minnie Liddell, had finally had enough. Faced with poor schools and the St. Louis Public School Board's "repeated redrawing of attendance lines and the constant opening and closing of black schools,"[200] Ms. Liddell brought a class action lawsuit in federal court, commencing a decades-long court battle.[201]

On Christmas Eve, 1975, the Liddell plaintiffs and the Board finally reached a consent decree.[202] Under the agreement, the Board agreed to increase the percentage of minority teachers, but it denied culpability for running a segregated school system.[203] The Board further agreed only to "study" feeder school realignments and "consider" elementary magnet schools, among other means to relieve "residence-based racial imbalance."[204] Busing was not contemplated. And, in accordance with *Milliken*, the court-approved decree reached only the St. Louis Public School District; St. Louis County schools were not part of the agreement.[205]

197. *Id.* at 745–47. The Court concluded: "Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts." *Id.* at 749.

198. Pettigrew, *supra* note 195, at 523; *see* Cedric Merlin Powell, *From Louisville to* Liddell*: Schools, Rhetorical Neutrality, and the Post-Racial Equal Protection Clause*, 40 WASH. U. J.L. & POL'Y 153, 166 (2012) (styling *Milliken* as a "retreat from substantive equality to a process-based conception of individual rights"); Ross, *Rhetorical Tapestry*, *supra* note 59, at 27 (calling *Milliken* "the end of the promise of *Brown* for public school integration").

199. James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 140 (2007) ("[U]rban districts were typically required to engage in all-out busing because of *Swann*, while *Milliken* ensured that the suburbs remained off limits. The combination was deadly. Extensive busing within cities gave those with economic means a reason to flee to the suburbs, and *Milliken* promised them that they would be safe upon arrival.").

200. HEANEY & UCHITELLE, *supra* note 189, at 19; Norwood, *supra* note 194, at 10.

201. Liddell v. Bd. of Educ., 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir. 1980). To raise money for filing fees, Ms. Liddell and the other parents "held barbeques, dances, and bake sales." Norwood, *supra* note 194, at 13.

202. *Liddell*, 469 F. Supp. at 1309.

203. *Id.* at 1310.

204. *Id.*; *see also* HEANEY & UCHITELLE, *supra* note 189, at 86.

205. *Liddell*, 469 F. Supp. at 1310.

Finding the agreement to be "woefully inadequate,"[206] and believing the decree failed to create a unitary school system,[207] the NAACP sought to intervene,[208] with the NAACP's national general counsel declaring, "If it takes busing to end segregation, so be it."[209] The district court denied the NAACP's petition to intervene, and the NAACP appealed to the Eighth Circuit.[210] The Eighth Circuit granted the petition and noted that *Milliken* "seemingly" prohibited interdistrict desegregation orders without a finding of overt racially discriminatory acts.[211] The Eighth Circuit suggested, however, that *Milliken* did not prohibit "voluntary cooperation" between city and county schools to achieve desegregation.[212]

The subsequent years of litigation brought dozens of decisions,[213] only two of which are germane to this Essay. First, in 1979, the Eastern District of Missouri held there was no proof of any "racially segregative purpose" by the St. Louis Public School Board and therefore ordered no remedy.[214] And second, in 1980, the Eighth Circuit reversed that decision and ordered the Board to develop a comprehensive integration plan.[215]

2. Eastern District of Missouri

The 1979 district court ruling considered whether the St. Louis School Board's de facto segregated schools discriminated against African-American students.[216] The decision was extensive—the culmination of a three-week trial in which approximately 1,200 exhibits were introduced.[217] The themes in the 1979 opinion paralleled the themes in *Milliken*.[218] Professor Ross analyzed those themes to highlight how black abstraction and white innocence controlled the rhetoric behind de facto segregated school

206. O'Neil, *supra* note 191.

207. HEANEY & UCHITELLE, *supra* note 189, at 86.

208. *See* Liddell v. Caldwell, 546 F.2d 786, 769 (8th Cir. 1976); *see also* Norwood, *supra* note 194, at 13–14 (discussing the impact of the NAACP's intervention in making the case about integration).

209. O'Neil, *supra* note 191 (quoting Nathaniel Jones, National General Counsel, NAACP).

210. *See Liddell*, 546 F.2d at 774.

211. *Id*.

212. *Id*.

213. *See* Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 WASH. U. J.L. & POL'Y 181, 182 n.1 (noting citations to the *Liddell* litigation beginning in 1979).

214. Liddell v. Bd. of Educ., 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir. 1980).

215. *See Adams*, 620 F.2d at 1295–97.

216. *See generally Liddell*, 469 F. Supp. at 1304.

217. *Id.* at 1312.

218. *See* Ross, *Rhetorical Tapestry*, *supra* note 59, at 26–28.

systems and the court's unwillingness to remedy the problem in *Milliken*.[219] Likewise, in *Liddell*, the court first used black abstraction to detract from any larger historical or social context behind the de facto segregated school system. Second, the court used white innocence to conclude the Board did not commit any intentional wrongs.

Using the theme of black abstraction, the court never provided any true counter-narratives of students and families attending segregated schools. Instead, it began by noting that the boundaries of the St. Louis Public School District had remained the same since 1876,[220] and that post-*Brown*, "the State of Missouri effectively removed all barriers at the state level to desegregation of the schools."[221] In fact, the court's only mention of any burdens faced by African-American students in a segregated school system pre-*Brown* was that busing students to the "core of the City" "resulted in some extremely large attendance zones for black schools."[222] Even in reviewing the evidence of pre-*Brown* living conditions for African-American students, the court buried the only real description of the harms of housing discrimination in a single sentence,[223] before stating that there was merely a "tendency of certain groups of common race . . . to settle in certain areas of the City."[224]

Instead, the court utilized the theme of white innocence by praising St. Louis School Board officials for working to desegregate post-*Brown* and detailing the steps the Board took to comply with the Supreme Court's mandate.[225] While the district court acknowledged the existence of "[r]esegrative [f]actors" post-*Brown*, it did not assign any blame to the Board or local actors.[226] The court mentioned "[t]he exodus of whites and affluent blacks"[227] to St. Louis County, but the court also stated that the moves were caused by a series of factors, beginning with an innocent

219. *Id.*

220. *Liddell*, 469 F. Supp. at 1313.

221. *Id.* at 1314.

222. *Id.* at 1315.

223. That sentence reads: "Nevertheless, as of 1954, segregation in housing existed due to private discriminatory practices and actions and policies of the Federal Housing Administration." *Id.* Note the court's use of passive voice.

224. *Id.*

225. *See id.* at 1316–17.

226. *See id.* at 1318–26. Elaborating on this point, Ross notes that in the *Milliken* decision:

> Burger's rhetorical structure obscured the reality of white flight, thereby suggesting that the segregation of the suburban school districts was serendipitous or somehow mysterious. This rhetorical move preserved the nonperpetrator status of the suburban school districts. It also raised doubts about the victim status of the black school children locked into the segregated city school system. After all, if this pattern of segregation just happened, no one is to blame and no one is a victim.

Ross, *Rhetorical Tapestry*, *supra* note 59, at 28.

227. *Liddell*, 469 F. Supp. at 1319.

enough reason—"widespread automobile ownership and building of expressways."[228] After listing additional reasons for white flight, including the allure of suburban homes and job opportunities, the court stated, in the middle of a forty-six-word sentence, that white flight was "accompanied, and partially caused or accelerated by the movement of the blacks" to historically white neighborhoods.[229] Regardless of the court's rhetoric, the effects of white flight in the 1970s were monumental: "from 1970 to 1978 approximately 30 [City] schools [were] closed,"[230] and between the 1971-72 and 1978-79 school years, white enrollment in the St. Louis Public School District dropped from 35,000 to 18,000.[231]

The court additionally used white innocence to establish that the Board's post-*Brown* assignment of students was not an intentional wrong. Post-*Brown*, the Board appeared to assign students to schools on a "neutral basis"—by drawing school boundaries based on neighborhoods.[232] The court highlighted this as the Board's "good faith" and stated that, "so long as neighborhood school attendance zones are not gerrymandered, or pupil assignments otherwise abused so as to foster segregation, the use of neighborhood schools is allowed."[233] Thus, the court concluded that the Board should not be punished with desegregation orders because the Board committed no intentional wrong.[234] The unstated premise of this enthymeme is that integration is a punishment.[235]

This enthymeme was particularly effective because the Board did not need to gerrymander or abuse pupil assignments; the work was done for it. St. Louis's historically segregated housing created segregated neighborhoods. When the Board used those neighborhoods to draw school boundaries, the inevitable result was segregated schools. The court concluded by keeping the consent decree in effect and stating that any further plans should focus on "quality education, which includes integration of the races, where practical and feasible."[236]

228. *Id.*

229. *Id.*

230. *Id.* at 1341.

231. HEANEY & UCHITELLE, *supra* note 189, at 92.

232. *Liddell*, 469 F. Supp. at 1360.

233. *Id.* at 1361.

234. *Id.* at 1363.

235. *Cf.* Ross, *Rhetorical Tapestry*, *supra* note 59, at 28 (noting that the Court in *Milliken* believed that busing suburban white students through interdistrict desegregation "would be a victimization of innocents").

236. *Liddell*, 469 F. Supp. at 1365.

3. Eighth Circuit

In a victory for school integration, the Eighth Circuit reversed the lower court decision and ordered the Board to "develop a system-wide plan for integrating" the St. Louis Public School District.[237] Rejecting the theme of black abstraction, the court remarkably relied on historical context; the decision began by recounting how Missouri outlawed education for African Americans "[p]rior to 1865" and that post-1865 state law required segregation.[238] With this context, the court laid the foundation for the analysis and remedy to come, explaining how equal education has always been a struggle in Missouri.

Moving to more recent history, the Eighth Circuit reasoned that the Board's 1954-1956 neighborhood school plan could not have remedied segregation post-*Brown*, because projections from the 1950s showed the plan would keep many schools completely or predominantly segregated.[239] Simply creating a neighborhood school system based on segregated neighborhoods did not fulfill the Board's duties.[240] As the court stated, the Board "never dealt with [the] overwhelming reality" that pre-*Brown* segregated African-American schools stayed segregated because of the Board's plans.[241]

The Eighth Circuit stripped away the theme of white innocence when it assigned blame to the Board for perpetuating segregation by (1) using intact busing, (2) opening new segregated schools, and (3) using block busing. First, in the 1960s, the Board enacted intact busing—a policy of "send[ing] an entire class of [mostly African-American] students, with their teacher, from an overcrowded school to a vacant classroom" in "white schools."[242] Instead of integrating African-American students into the white schools, bused students attended a school within a school, often arriving, having recess, eating lunch, and departing on a separate schedule than other students in the school.[243] Second, the Board opened thirty-six new elementary schools between 1962 and 1975 to alleviate overcrowding, but only one was "integrated to any significant degree."[244] The Eighth Circuit recognized this as a "durable pattern of segregative school construction."[245] Third, after ceasing intact busing, the Board instituted an era of block bus-

237. Adams v. United States, 620 F.2d 1277, 1295 (8th Cir. 1980).
238. *Id.* at 1280.
239. *Id.* at 1284.
240. *Id.* at 1287.
241. *Id.* at 1291.
242. *Id.*
243. *Id.*
244. *Id.* at 1289.
245. *Id.*

ing.[246] Thousands of students were bused to relieve overcrowding, but African-American students were sent to predominately African-American schools and white students were sent to predominately white schools.[247] By highlighting these policies, the Eighth Circuit did not permit the Board to hide behind white innocence; it found that the Board's actions had, in fact, "enhanced" segregation in the St. Louis Public School District.[248] The court reversed and remanded with instructions for the Board to "develop[] and implement[]" a comprehensive integration plan.[249]

4. Outcomes

The Eighth Circuit's break from majoritarian narratives and the Board's subsequent comprehensive integration plan[250] caused outcry from parents.[251] Both sides of the *Liddell* litigation appealed to the Eighth Circuit, claiming that the plan went too far or not far enough.[252] In the fall of 1980, after the Eighth Circuit affirmed the order, however, over 7,500 students were bused within St. Louis Public School District to alleviate segregation.[253]

A new district court judge took over the case and, in 1981, approved a voluntary expansion of the plan to include St. Louis County schools.[254] When only five districts initially participated, the judge stated he "would begin legal proceedings leading to a mandatory interdistrict desegregation plan."[255] Before the 1983 school year, all twenty-three County schools agreed to a settlement.[256] The district court decision accepting the interdistrict settlement ended with an appendix extensively quoting a 1947 book titled *Inside U.S.A.* and overviewing Missouri's historically segregated education system, including the cases of Lloyd Gaines and Lucile Bluford.[257]

246. *Id.*

247. *Id.*

248. *Id.* at 1288.

249. *Id.* at 1296.

250. Maura Lerner, *Expert: School Plan Breaks New Ground*, ST. LOUIS POST-DISPATCH, May 22, 1980, at 1A.

251. HEANEY & UCHITELLE, *supra* note 189, at 92–93.

252. Liddell v. Bd. of Educ., 667 F.2d 643, 647 (8th Cir. 1981); HEANEY & UCHITELLE, *supra* note 189, at 96.

253. O'Neil, *supra* note 191.

254. HEANEY & UCHITELLE, *supra* note 189, at 112–13.

255. *Id.* at 113.

256. Liddell v. Bd. of Educ., 567 F. Supp. 1037, 1040 (E.D. Mo. 1983), *aff'd in part, rev'd in part*, 731 F.2d 1294 (8th Cir. 1984); HEANEY & UCHITELLE, *supra* note 189, at 122.

257. *Liddell*, 567 F. Supp. at 1062–63.

Even with the order, Missouri attorneys general continued to politicize the program.[258] In 1999, the court-supervised program ended,[259] and a "downsized" program managed by a private company took its place.[260] Since that time, fewer and fewer students have participated in the program, with approximately 4,470 city students participating in 2016, compared to 13,263 students at the program's peak in 1998—the year before court-supervision ended.[261]

In 2001, the state lowered the St. Louis Public School District's rating to "Provisional Accreditation," and it was not until 2015 that the District finally achieved scores qualifying it again for "Full Accreditation."[262] The desegregation program is currently winding down for a phase out by 2024.[263]

III. CONCLUSION

When viewed through the lens of history, the long journey towards education and housing desegregation has fallen short. The nation continues to suffer from segregated colleges, neighborhoods, schools, and an overall disparity in opportunities.

The three lower court cases presented in this Essay all relied on the same assumptions: there is no collective responsibility for the harms of racial inequality and no remedy for centuries of systemic harms. The unstated minor premises in these opinions are that segregation is natural, that racial inequality is ordinary, and that the status quo should not be upset by social engineering.[264] The three appeals cases, however, represented then-progressive views. When those cases are read together, one might expect the next half-century or so would have seen an egalitarian society with truly integrated schools and housing. As shown above, the outcome has uniformly been otherwise.

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258. Hannah-Jones, *supra* note 188 (referring to successive state attorneys general who sought to end the program); *see also* Tim Bryant, *State Pleads Case for Ending Desegregation Aid*, ST. LOUIS POST-DISPATCH, Mar. 5, 1996, at 1A (covering the Missouri Attorney General's proposal to phase out the program).

259. Liddell v. Bd. of Educ., No. 4:72CV100 SNL, 1999 WL 33314210, at *9 (E.D. Mo. Mar. 12, 1999).

260. HEANEY & UCHITELLE, *supra* note 189, at 195–99.

261. Taketa, *supra* note 44.

262. *SLPS Qualifies for Full Accreditation for First Time Since 2000*, ST. LOUIS PUBLIC SCHOOLS (Oct. 23, 2015), http://www.slps.org/site/default.aspx?PageType=3&DomainID=8340&ModuleInstanceID=36022&ViewID=047E6BE3-6D87-4130-8424-D8E4E9ED6C2A&RenderLoc=0&FlexDataID=26741&PageID=30786.

263. Crouch, *supra* note 43.

264. Delgado, *On Telling Stories*, *supra* note 18, at 670–71; *see also* Delgado, *Making Pets*, *supra* note 57, at 1580–81.

The continued disparities and resegregation are due, in part, to the ubiquity of the majoritarian narratives and the limited voice given to counter-narratives even when the court's holding is favorable. The "right" holdings were not enough; the majoritarian narratives continued to dictate the long-term social outcomes.

For the decisions of tomorrow to effectuate lasting change, courts must critically examine a past that advocated "equality for all" but failed to fully include the voices and stories represented in counter-narratives. Such examination will rarely be popular, but it is unequivocally necessary—because the hope for enduring social change rests, in part, on court opinions where majoritarian enthymemes are articulated and dismissed, where social and historical context to discrimination is stated, and where previously untold stories are instead given amplification.