

ON NEUTRAL AND PREFERRED
PRINCIPLES OF CONSTITUTIONAL LAW

Ronald Turner

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Ronald Turner*

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In his famous and controversial article Towards Neutral Principles of Constitutional Law Professor Herbert Wechsler addressed the legitimacy of judicial review and the standards to be followed in interpretation, and declared that courts must issue principled decisions resting on reasons “that in their generality and their neutrality transcend any immediate result that is involved.” Focusing on the United States Supreme Court’s seminal Brown v. Board of Education decision, Wechsler argued that the Court’s ruling was not a principled decision meeting his standard of neutrality. This article examines Neutral Principles and Wechsler’s critique of Brown. More specifically, the article (1) argues that the “neutral principle” concept is indeterminate and oxymoronic, (2) focuses on and responds to Wechsler’s position that there was a point in Plessy v. Ferguson’s observation that if state-mandated separation of the races stamped African Americans with a “badge of inferiority” it was “solely because the colored race chooses to put that construction upon it”; and (3) demonstrates that Wechsler preferred, not a neutral principle applicable to racial discrimination claims, but a non-neutral freedom-of-association principle (an innovation of the Civil War period) that ignored the asymmetrical meaning of segregation and the differences between inclusion and exclusion and served as a justification for the segregationist status quo. In addition, the article submits that Wechsler’s neutral principles approach and critique of Brown has contemporary relevance and importance, as illustrated by certain aspects of the Supreme Court’s 2007 decision in Parents Involved in Community Schools v. Seattle School District No. 1.

A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result.

—Herbert Wechsler¹

¹ Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

The one thing that is absolutely certain about the American experience is that never in our history as a people have any of us, black or white, been “neutral” on the matter of race. It has been, and remains, the great overriding issue throughout all our history, in all our law, in all our institutions.

—Norman Amaker²

The past is never dead. It’s not even past.

—William Faulkner³

INTRODUCTION

In his famous and controversial article *Towards Neutral Principles of Constitutional Law*⁴ Professor Herbert Wechsler addressed the legitimacy of judicial review and “the standards to be followed in interpretation.”⁵ Declaring that

² Norman C. Amaker, *The Haunting Presence of the Opinion in Brown v. Board of Education*, 20 S. ILL. U. L.J. 3, 6–7 (1995).

³ WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (Vintage Books 1962) (1951).

⁴ See Wechsler, *supra* note 1; see also Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 9–10 (2011) (*Neutral Principles* is “arguably the most influential article on constitutional law ever written”); Fred R. Shapiro, *The Most Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 760 (1996) (noting that *Neutral Principles* is the second most cited law review article of all time); Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.I (2012) (noting that *Neutral Principles* is the fifth most cited article of all time); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 5 (1992) (*Neutral Principles* is “the most celebrated essay in all of constitutional law”).

⁵ Wechsler, *supra* note 1, at 10–11. *Neutral Principles*, an expanded version of Wechsler’s 1959 Oliver Wendell Holmes Lecture at the Harvard Law School, responded to Judge Learned Hand’s 1958 Holmes lecture in which Hand argued that “nothing in the United States Constitution . . . gave courts any authority to review the decisions of Congress,” and that “since [the] power [of judicial review] is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer.” LEARNED HAND, *THE BILL OF RIGHTS* 10–15 (1958). Disagreeing with Hand, Wechsler “famously defended what he called ‘neutral principles’ by arguing that judicial review was ‘grounded in the language of the Constitution’ . . .” PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 12 (2008) (quoting Wechsler, *supra* note 1, at 10).

Hand also asked whether the United States Supreme Court’s decision in *Brown v. Board of Education* meant “to ‘overrule’ the ‘legislative judgment’ of states by its own reappraisal of the relative values at stake?” HAND, *supra*, at 54. Concluding that he could not “frame any definition that will

a court of law must not act as a “naked power organ,” he wrote that courts “are—or are obliged to be—entirely principled” and must issue principled decisions resting “on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”⁶ Wechsler argued that the Supreme Court’s seminal ruling in *Brown v. Board of Education*⁷ was not a principled decision meeting his standard of neutrality. Finding “it hard to think that the judgment [in *Brown*] really turned upon the facts,”⁸ Wechsler concluded that the Court’s decision “must have rested on the view that racial segregation is, in principle, a denial of equality to the minority group against whom it is directed”⁹ This view was problematic, he contended, as it involved an inquiry into the motives of the legislature and “made the measure of validity of legislation the way it is interpreted by those who are affected by it.”¹⁰

This article examines *Neutral Principles* and Wechsler’s critique of *Brown* and approach to the question of discrimination on the basis of race¹¹ in the context

explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority,” Hand said this about *Brown*: “I have never been able to understand on what basis it does or can rest except as a *coup de main*.” *Id.* at 55. “For myself, it would be irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.” *Id.* at 73.

⁶ Wechsler, *supra* note 1, at 19.

⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁸ Wechsler, *supra* note 1, at 33.

⁹ *Id.*

¹⁰ *Id.*

¹¹ In using the term “race” I note and agree with Professor Dorothy Roberts’ position that race is a political and not a biological category. See DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011).

[R]ace is a political system that governs people by sorting them into social groupings based on invented biological demarcations. Race is not only interpreted according to invented rules, but, more important, race *itself* is an invented political grouping. Race is not a biological category that is politically charged. It is a political category that has been disguised as a biological one.

Id. at 4. The race-is-biological concept “served an important ideological function in revolutionary America. Biological difference was essential to justifying the enslavement of Africans in a nation founded on a radical commitment to liberty, equality, and natural rights. White Americans had to explain black subjugation as a natural condition, not one they imposed by brute force for the nation’s economic profit.” *Id.* at 24. The delusional belief in “intrinsic racial difference” is critical and foundational. “The diabolical genius of making this political system seem biological is that the very

of Jim Crow¹² public school education. More specifically, the article: (1) argues that the “neutral principle” concept and project is incoherent, indeterminate, and oxymoronic; (2) focuses on and responds to Wechsler’s startling position that there was a point in *Plessy v. Ferguson*’s statement “that if ‘enforced separation stamps the colored race with a badge of inferiority’ it is solely because its members chose ‘to put that construction upon it’”;¹³ and (3) demonstrates that Wechsler’s contention that state-mandated racial segregation involved, not a question of discrimination, but a denial of the freedom to associate revealed his preference for a non-neutral principle which “was an innovation of the Civil War period, devised specifically in order to authorize discrimination against African Americans.”¹⁴

The discussion proceeds as follows. Part I provides an overview of certain developments in race and the law and considers the path from *Plessy v. Ferguson*,¹⁵ wherein the Supreme Court constitutionalized racial apartheid in public transportation, to *Brown v. Board of Education*¹⁶ and the Court’s holding that state-mandated racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹⁷ Part II turns to Professor Wechsler’s *Neutral Principles* article and analysis (an analysis which says nothing about and gives no recognition to the developments and history set out

unequal conditions it produces become an excuse for racial injustice.” *Id.*; see also *id.* at 77 (asking “why most Americans cling to a false belief that biological races really do exist”); *id.* at 78 (arguing that a belief in race “can be compared to believing in astrology”); *id.* at 79 (“[r]ace persists because it continues to be *politically useful*”).

¹² The term “Jim Crow” had its origins in nineteenth-century minstrelsy and was popularized by Thomas “Daddy” Rice, a white minstrel. “Using burned cork to blacken his face, attired in the ill-fitting, tattered garment of a beggar, and grinning broadly, Rice imitated the dancing, singing, and demeanor generally ascribed to Negro character,” and called his dance routine “Jump Jim Crow.” LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* xiv (1998). Many whites that attended minstrel shows “came away . . . with distorted images of black life, character, and aspirations reinforced.” *Id.*; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 30–35 (2010) (recounting the birth of Jim Crow); DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 638–39 (2007) (discussing minstrel shows and Thomas “Daddy” Rice).

¹³ Wechsler, *supra* note 1, at 33 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896)).

¹⁴ ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, *A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION* 1 (2009).

¹⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷ U.S. CONST. amend. XIV, § 1.

in Part I) and the subjects addressed in the preceding paragraph. Part III submits that examining the neutral principles approach and critique of *Brown* advocated by Wechsler in his 1959 article has contemporary relevance and importance, as illustrated by the Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁸ and the Justices' debate in that case over the meaning and heritage of *Brown*. It is especially timely given the Court's decision and remand in *Fisher v. University of Texas at Austin*.¹⁹

I. AFRICAN AMERICANS, THE CONSTITUTION, AND THE PATH FROM *PLESSY* TO *BROWN*

A. *The Color Line*

In 1619 John Rolfe wrote in the journal of Jamestown, Virginia that, "about the last of August, there came to Virginia a Dutchman of Warre that sold us twenty negers."²⁰ Since that time the "problem of the color line,"²¹ and the racialization of persons of African descent,²² has been and continues to be one of the enduring and pressing issues facing this nation.

¹⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹⁹ See 133 S. Ct. 2411 (2013) (holding that the United States Court of Appeals for the Fifth Circuit did not apply the correct standard of strict scrutiny in its review of the university's race-conscious admissions process).

²⁰ A. Leon Higginbotham, Jr. & Aderson Bellegarde Francois, *Looking for God and Racism in All the Wrong Places*, 70 DENV. U. L. REV. 191, 193 (1993); see also HENRY LOUIS GATES, JR., LIFE UPON THESE SHORES: LOOKING AT AFRICAN AMERICAN HISTORY: 1513–2008, at 3 (2011) ("The history of the African American people in what is now the United States began in late August 1619, when the first cargo of '20 and odd' Africans aboard an English ship called the *White Lion* landed in Jamestown, Virginia."); A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 20 (1978). Professor Henry Louis Gates, Jr., notes that "Americans tend to forget that the slave trade to the New World was already a full century old by the time it began in the United States in 1619, a year before the *Mayflower* landed at Plymouth Rock. In fact, only a very small percentage of all the slaves shipped to the New World even came to the United States." GATES, *supra*, at 4.

²¹ See W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 45 (David W. Blight & Robert Gooding-Williams eds., Bedford Books 1997) (1903) ("The problem of the twentieth century is the problem of the color line—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."); see also JOHN HOPE FRANKLIN, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY (1993); RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY (2011).

²² Racialized persons and groups are those who have been subordinated and defined as inherently inferior by a majority of society, with that subordination "enforced by the perception of racial difference." Luis Angel Toro, "A People Distinct from Others": *Race and Identity in Federal Indian*

While the United States Constitution of 1789 did not explicitly use the terms “race” or “slavery,”²³ a number of that document’s provisions directly or indirectly referred to those subjects.²⁴ For instance, the Constitution prohibited any congressional interference with the slave trade before 1808,²⁵ mandated that slaves who escaped to a free state must be “delivered up” and returned to the slave state from which they fled,²⁶ and provided that black persons were to be counted as “three fifths of all other Persons” for purposes of determining representation in the United States House of Representatives, the Electoral College, and for levying taxes among the states.²⁷ The “peculiar institution” of American chattel slavery²⁸ was justified, in part, by a racist theory of congenital inferiority which posited that

Law and the Hispanic Classification in OMB Directive No. 15, 26 TEX. TECH L. REV. 1219, 1229–30 (1995).

²³ See Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT. 733, 759 (2007).

²⁴ See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 3 (1987); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760–1848*, at 62–63 (1977).

²⁵ See U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the year one thousand eight hundred and eight, but a Tax or duty may be imposed on such importation, not exceeding ten dollars for each Person.”).

²⁶ U.S. CONST. art. IV, § 2, cl. 3; see *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842).

²⁷ See U.S. CONST. art. I, § 2, cl. 3; GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 532 (2009). The three-fifths clause, the so-called “federal ratio,” was a compromise reached by a committee of the Continental Congress. See GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 2 (2003). Presented with proposals to count two slaves as one white person or three slaves for every two whites, the committee decided on a “ratio of five slaves to three whites,” thereby declaring that a slave was to be considered “three-fifths of a white person.” FRANCIS D. ADAMS & BARRY SANDERS, *ALIENABLE RIGHTS: THE EXCLUSION OF AFRICAN AMERICANS IN A WHITE MAN’S LAND, 1619–2000*, at 60 (2003). As this federal ratio also established a state’s representation in the Electoral College, the three-fifths clause “richly rewarded the southern states, artificially inflating their House seats and electoral votes and helping to explain why four of the first five presidents hailed from Virginia.” RON CHERNOW, *ALEXANDER HAMILTON* 239 (2004); see also WILLS, *supra* (arguing that the three-fifths clause had a determinative impact on the outcome of the 1800 presidential election won by Thomas Jefferson); WOOD, *supra* (“Jefferson won the election of 1800 with 82 percent of the electoral vote of the slave states and only 27 percent of the Northern states.”).

²⁸ See generally KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

blacks were genetically and intellectually inferior to whites.²⁹ This white supremacist narrative of black inferiority (a view shared by Francis Scott Key, the author of the “Star Spangled Banner”)³⁰ is found in and endorsed by the Supreme Court’s declaration in *Dred Scott v. Sandford* that African slaves and their descendants were “beings of an inferior order . . . [who] had no rights which the white man was bound to respect.”³¹

Slavery was formally banned in 1865 by the Thirteenth Amendment to the Constitution.³² The lives of the 3.5 million slaves freed at the end of the Civil War, like the approximately 500,000 slaves who escaped slavery during that war, were threatened by disease and sickness.³³ Emancipation was countered by a backlash in the states of the former Confederacy and “a steep rise in white vigilantism and lynching.”³⁴ The “phenomenon of the Ku Klux Klan erupted in much of the former Confederate South”; this paramilitary outfit engaged in a campaign of harassment, intimidation, and murder and attacked and burned black churches and schoolhouses.³⁵ A new slavery of “formally and facially asymmetric” Black

²⁹ See BELL, *supra* note 24, at 156; JOHN HOPE FRANKLIN, RACE AND HISTORY: SELECTED ESSAYS 1938–1988, at 325 (1992); STAMPP, *supra* note 28, at 197–236.

³⁰ See JEFFERSON MORLEY, SNOW-STORM IN AUGUST: WASHINGTON CITY, FRANCIS SCOTT KEY, AND THE FORGOTTEN RACE RIOT OF 1835, at 40 (2012) (“Key shared a general view of the free people of color as shiftless and untrustworthy: a nuisance, if not a menace, to white people. He spoke publicly of Africans in America as ‘a distinct and inferior race of people, which all experience proves to be the greatest evil that afflicts a community.’”). See also KENNEDY, *supra* note 21, at 41–42 (noting that Abraham Lincoln, “[i]mbued with the racism common to his time and region . . . perceived blacks as inassimilable and inferior aliens for much of his adult life” and “evolve[d], and even warmed to the idea that some blacks should be accorded civil and political rights”).

³¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857). For an excellent discussion and analysis of this infamous Court decision, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

³² See U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

³³ JIM DOWNS, SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION 21 (2012).

³⁴ Lenese C. Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 169 (2003); see also PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002).

³⁵ STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 267, 276–80 (2003).

Codes³⁶ was enacted with the intent and purpose of “legislat[ing] the freed slaves into a condition as close to their former one as it was possible to get without actually reinstating slavery.”³⁷ The Black Codes “perpetuated a kind of slavery, described as a twilight zone between slavery and freedom, something that resembled the South Africa apartheid laws,”³⁸ and “practically recreated slavery for African-American agricultural workers by prescribing their labor terms in detail.”³⁹ Consider Louisiana’s Black Code which mandated that “[e]very negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro,” forbade black persons from traveling without permits, and established curfews for black persons.⁴⁰ Texas “required blacks to have a contract if the job they were working on lasted more than a month. Once under contract, laborers were at the mercy of their employers, who could fine them for everything from sickness to ‘idleness.’”⁴¹

³⁶ AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 149 (2012) (“Black Codes were formally and facially asymmetric: They heaped disabilities on blacks but not whites.”).

³⁷ NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 34 (2006); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 108 (2000) (“In the case of race, the Black Codes, Jim Crow, lynchings, and disfranchisement have loomed large.”).

In 1901 Woodrow Wilson opined that the Black Codes were necessary to control the freed slaves who were “unpracticed in liberty, unschooled in self-control; never sobered by the discipline of self-support, never established in any habit of prudence; excited by a freedom they did not understand, exalted by false hopes; bewildered and without leaders, and yet insolent and aggressive; sick of work, covetous of pleasure—a host of dusky children untimely put out of school.” BRUCE BARTLETT, *WRONG ON RACE: THE DEMOCRATIC PARTY’S BURIED PAST* 97 (2008) (quoting Woodrow Wilson, *The Reconstruction of the Southern States*, *ATL. MONTHLY*, Jan. 1901, at 1). For more on the racial/racist views of Wilson (a president of Princeton University and the 28th President of the United States), see A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 *N.Y.U. L. REV.* 479, 576–77 (1990).

³⁸ Eileen Kaufman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1981*, 22 *TOURO L. REV.* 1059, 1074–75 (2007).

³⁹ DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 8 (2001).

⁴⁰ PAUL D. MORENO, *BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY* 19 (2006).

⁴¹ ELLIOT JASPIN, *BURIED IN THE BITTER WATERS: THE HISTORY OF RACIAL CLEANSING IN AMERICA* 36 (2007) (noting that Mississippi’s Black Code criminalized black ownership, rental, or leasing of property outside of towns and cities and required that blacks have proof of lawful employment); see also GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 83 (2006).

Black workers who were unemployed and/or without a labor contract found themselves exposed to the criminal law and prosecutions for vagrancy;⁴² once convicted, they “were fined heavily and could be hired out by the state for a pittance until the fine was paid.”⁴³ In 1866, and for a total fee of \$5, Alabama leased 374 black prisoners to the Alabama and Chattanooga Railroad.⁴⁴ Texas received \$12.50 per month for providing two railroad companies with 250 “convicts.”⁴⁵

Responding to the Black Codes, the United States Congress, overriding the veto of white supremacist and “fervent Negrophobe”⁴⁶ President Andrew Johnson,⁴⁷ enacted the Civil Rights Act of 1866, which provided:

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States and such citizens . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and

⁴² See BARTLETT, *supra* note 37, at 33.

⁴³ *Id.*; see also BERNSTEIN, *supra* note 39, at 10 (noting that the vagrancy laws in North Carolina, Georgia, Virginia and Texas “essentially criminalized unemployment, even temporary employment . . .”).

⁴⁴ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 54 (2008).

⁴⁵ *Id.*

⁴⁶ KENNEDY, *supra* note 21, at 42 (“Lincoln’s successor, Andrew Johnson, . . . was the most fervent Negrophobe ever to occupy the White House.”).

⁴⁷ See ALEXANDER TESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 99 (2008) (discussing Johnson’s veto). On President Johnson’s white supremacist beliefs, see Annette Gordon-Reed, *Andrew Johnson*, in *THE AMERICAN PRESIDENTS* 112 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011), which quotes Johnson, “This is a country for white men, and by God, as long as I am President, it shall be a government for white men.” See also *id.* at 124 (“Everyone would and *must* admit that the white race is superior to the black and that we ought to do our best to bring them . . . up to our present level, that, in doing so, we should, at the same time raise our own intellectual status so that the relative position of the two races would be the same.”).

penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁴⁸

Two years later, a race-conscious United States Congress,⁴⁹ seeking to constitutionalize the 1866 legislation,⁵⁰ proposed the Fourteenth Amendment to the Constitution. That amendment, ratified and officially added to the Constitution in 1868,⁵¹ contains the Equal Protection Clause: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵²

As “equal protection of the laws” is not explicitly defined, and as the text does not specify which or what conduct by a state would violate the constitutional mandate, the operative meaning of the clause has been discerned and applied by the Supreme Court exercising its power “to say what the law is.”⁵³ Not finding it “difficult to give a meaning” to the Equal Protection Clause, in *The Slaughter-House Cases* the Court declared that:

[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a

⁴⁸ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1981 (2006)). See also ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 199–203, 243–45, 454–59 (1988) (examining the Black Codes and the Civil Rights Act of 1866).

⁴⁹ “From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.” Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985); see also Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997).

⁵⁰ See *Neal v. Delaware*, 103 U.S. 370, 386 (1881) (“the Fourteenth Amendment secure[s] to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons”); AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 381 (2005) (in proposing the Fourteenth Amendment Congress “aimed to provide an unimpeachable legal foundation” for the 1866 Civil Rights Act); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 187 (1998) (Section 1 of the Fourteenth Amendment “was consciously designed and widely understood to embrace” the Civil Rights Act of 1866). But see EPPS, *supra* note 41, at 165 (rejecting the view that Section 1 of the Fourteenth Amendment was intended to ratify the Civil Rights Act of 1866).

⁵¹ U.S. CONST. amend. XIV.

⁵² *Id.* § 1.

⁵³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

class, was the evil to be remedied by this clause, and by it such laws are forbidden.⁵⁴

The “one pervading purpose found [in the Civil War Amendments to the Constitution], lying at the foundation of each” is “the freedom of the slave race, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”⁵⁵

Thereafter, in *Strauder v. West Virginia*,⁵⁶ the Court described the “common purpose” of the Equal Protection Clause as “securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”⁵⁷ The clause implies “a positive immunity, or right, most valuable to the colored race,” the Court opined, and “a right to exemption from unfriendly legislation against them distinctively as colored” and “from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.”⁵⁸ As these “mere children . . . especially needed protection against unfriendly action in the States where they were resident,” the Fourteenth Amendment “was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.”⁵⁹ Predicting that there would be resistance to the “true spirit and meaning” of the Fourteenth Amendment, the *Strauder* Court stated that:

it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and

⁵⁴ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

⁵⁵ *Id.* at 71; see also Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 423 (1960) (“[H]istory puts it entirely out of doubt that the chief and all-dominating purpose [of the Equal Protection Clause] was to ensure equal protection for the Negro.”).

⁵⁶ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

⁵⁷ *Id.* at 306.

⁵⁸ *Id.* at 307–08.

⁵⁹ *Id.* at 306.

that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.⁶⁰

The Court's interpretation and construction of the Equal Protection Clause in the years following the adoption of the Fourteenth Amendment did not result in the proscription of all forms of racial subordination and hierarchy. In the *Civil Rights Cases*⁶¹ the Court answered in the negative the question whether the clause prohibited the racially discriminatory actions of private persons; in the Court's view, the Fourteenth Amendment "extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."⁶² Having insulated non-state discrimination from the equal protection command, the Court, writing a mere fifteen years after the adoption of the Fourteenth Amendment, stated: "When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws."⁶³ And in *Pace v. Alabama*⁶⁴ the Court rejected an equal protection challenge to a state anti-adultery and anti-fornication criminal law which punished black-white couples more severely than same-race couples. The Court determined that the law did not violate the Equal Protection Clause because the harsher punishment was "directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."⁶⁵ On that view, equal application of a law grounded in and enforcing a racialist and racist legal regime satisfied the Equal Protection Clause.

B. Plessy v. Ferguson and Constitutional Apartheid

In *Plessy v. Ferguson*,⁶⁶ one of the cases in the American anti-canon,⁶⁷ the Supreme Court considered and rejected Homer Plessy's⁶⁸ equal protection

⁶⁰ *Id.*

⁶¹ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁶² *Id.* at 24.

⁶³ *Id.* at 25.

⁶⁴ *Pace v. Alabama*, 106 U.S. 583 (1883).

⁶⁵ *Id.* at 585.

⁶⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896). For discussions of the Court's *Plessy* decision, see LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903*, at 152-70 (2011); BLAIR L.M. KELLEY, *RIGHT TO RIDE: STREETCAR BOYCOTTS*

challenge to Louisiana's Separate Car Law mandating the "equal but separate accommodations for the white, and the colored races."⁶⁹ Justice Henry Billings Brown's⁷⁰ opinion for the Court determined that the law was "a reasonable regulation," with the "question of reasonableness" answered by the state's "liberty to act with reference to the established usages, customs, and traditions of the

AND AFRICAN AMERICAN CITIZENSHIP IN THE ERA OF *PLESSY v. FERGUSON* 51–85 (2010); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 17–23 (2004); CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987); Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181 (Michael C. Dorf ed., 2004).

⁶⁷ See Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); see also AMAR, *supra* note 36, at 272 (identifying *Plessy* as a "demonized and demonic" "antiprecedent").

⁶⁸ *Plessy* was of "seven-eighths Caucasian and one-eighth African blood," and the "mixture of colored blood was not discernible in him . . ." *Plessy*, 163 U.S. at 541.

⁶⁹ *Id.* at 540 (quoting Louisiana statute). The Separate Car Law provided "that all railway companies carrying passengers in their coaches in this state, shall provide separate but equal accommodations for the white, and the colored races, by providing two or more coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations." *Id.* The statute did not apply to "nurses attending children of the other race." *Id.* at 541.

Racial segregation in railway coach seating assignments was not limited to the South. "The racial segregation of public conveyances in the 1840s was designed to prevent . . . transgressions of the social order. The Jim Crow car was the place to shunt black passengers, a place where the 'uncivilized negro' of white imagination could be prevented from mingling with whites." KELLEY, *supra* note 66, at 17. Frederick Douglass and others challenged segregated railcars in Massachusetts and in New England in the 1840s; Douglass reported that he was "often dragged out of my seat, beaten, and severely bruised, by conductors and brakemen." *Id.* (quoting Douglass). In 1854, in New York City, school teacher and church organist Elizabeth Jennings brought a lawsuit against the Third Avenue Railway Company after she was forcibly ejected from a "white" streetcar as she attempted to travel to her church in Manhattan. Represented in a jury trial by attorney (and later United States President) Chester A. Arthur, Jennings won, was awarded \$225 in damages, and was assured by the company that "respectable blacks would be admitted without discrimination." *Id.* at 20–21; see also *id.* at 22–31 (detailing additional opposition and legal challenges to segregated streetcars in New York).

⁷⁰ One scholar has argued that Justice Brown "was an equal-opportunity bigot. He purchased a substitute to take his place in the Civil War, connived a meeting with Jefferson Davis in 1876, and ascribed the biblical refusal of the Jews to carry out Pharaoh's building commands to an aversion to hard work." Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg Is Now (Or Ever Was) Good Law*, 44 TEX. TECH L. REV. 1, 52 (2011) (footnotes omitted).

people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”⁷¹

Writing that the object of the Fourteenth Amendment “was undoubtedly to enforce the absolute equality of the two races before the law,” Justice Brown opined that “equality” was not “intended to abolish the distinctions based upon color, or to enforce social, as distinguished from political, equality, or to a commingling of the two races upon terms unsatisfactory to either.”⁷² Accordingly, he concluded, laws mandating the separation of blacks and whites did “not necessarily imply the inferiority of either race to the other.”⁷³ Such laws “have been generally, if not universally, recognized as within the competency of state legislatures in the exercise of their police power,” most commonly in “the establishment of separate schools for white and colored children which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”⁷⁴

Justice Brown then posited and rejected three assumptions about Louisiana’s Separate Car Law and regulatory scheme. The first assumption: “that the enforced separation of the two races stamps the colored race with a badge of inferiority.”⁷⁵ That assumption was fallacious, Justice Brown declared, and was “not by reason of anything found in the act, but solely because the colored race chooses to put that

⁷¹ *Plessy*, 163 U.S. at 550; *see also id.* (“[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”); HARVEY FIRESIDE, *SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM* 188 (2004) (noting that Louisiana’s brief to the Supreme Court in *Plessy* argued that the Separate Car Law was a reasonable exercise of the state’s police power, and that “‘thrusting the company of one race upon the other’ would just exacerbate the repulsion between them” (quoting state’s brief)).

⁷² *Plessy*, 163 U.S. at 544.

⁷³ *Id.*

⁷⁴ *Id.* (discussing *Roberts v. City of Boston*, 59 Mass. 198 (1849)). In addition, Justice Brown continued, “[l]aws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom to contract, and yet have been universally recognized as within the police power of the state.” *Id.* at 545. Anti-miscegenation laws were held to be unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁵ *Plessy*, 163 U.S. at 551.

construction upon it.”⁷⁶ As one scholar recently noted, this passage suggests, “that’s their problem; they’ve got an inferiority complex.”⁷⁷

The second assumption: “if the colored race should become the dominant power in the state legislature . . . it would thereby relegate the white race to an inferior position.”⁷⁸ Not so, said Justice Brown: “We imagine that the white race, at least, would not acquiesce in this assumption.”⁷⁹ Thus, the “white race” did not have and was not vulnerable to the posited inferiority complex afflicting the “colored race.”

The third assumption: “social prejudices may be overcome by legislation, and . . . equal rights cannot be secured to the negro except by an enforced commingling of the two races.”⁸⁰ For Justice Brown, the flaw in this assumption was found in the premise that social equality could be achieved by and through law:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.⁸¹

Justice Brown concluded: “If the civil or political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the [C]onstitution of the United States cannot put

⁷⁶ *Id.*

⁷⁷ James E. Fleming, *Rewriting Brown, Resurrecting Plessy*, 52 ST. LOUIS U. L.J. 1141, 1145 (2008); see also Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L.J. 1191, 1203 (2008) (“If you think Louisiana’s segregation of railroad cars is stigmatic, *Plessy* says, that’s your problem—it’s only because you choose to place that construction on it.”); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 551 (2009) (the *Plessy* Court believed that Louisiana’s racial classification was “permissible because there is no damage inflicted by the state”; “[a]ny damage that was suffered by the black passengers was presumptively self-inflicted and in any event was merely psychological injury that was purely unintentional.”).

⁷⁸ *Plessy*, 163 U.S. at 551.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

them upon the same plane.”⁸² This analysis and approach—recognizing three separate and distinct categories of rights (civil,⁸³ political,⁸⁴ and social⁸⁵)—reflects a Reconstruction-era understanding and conception of “rights” in vogue at the time of the adoption of the Fourteenth Amendment.⁸⁶

Only one member of the Court, Justice John Marshall Harlan (a former slave owner who had opposed Emancipation),⁸⁷ dissented from the Court’s validation of the Separate Car Law. He rejected the Court’s assertion that members of the colored race chose to construe the law as placing upon them “a badge of inferiority.”⁸⁸ Harlan, the legal realist, stated that “[e]veryone knows that the statute in question had its origin in the purpose, not so much as to exclude white persons from railroad coaches occupied by or assigned to blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”⁸⁹ The “real meaning” of the Louisiana statute was found in the state-mandated classification and subordination of African Americans deemed to be “so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”⁹⁰

⁸² *Id.* at 551–52.

⁸³ Civil rights included “freedom of contract, property ownership, and court access.” KLARMAN, *supra* note 66, at 19.

⁸⁴ Political rights referred to voting and jury service. *See id.*

⁸⁵ Social rights included the right to marry and attend school. *Id.*

⁸⁶ For more on the categories and understanding of rights at the time of the adoption of the Fourteenth Amendment, see JACK M. BALKIN, *LIVING ORIGINALISM* 222–23 (2011); SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 87 (2007); JOHN BRAEMAN, *BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS* 121 (1988); DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 23 (2002); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 504–08 (2d ed. 1985); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 43 (2005); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Parts*, 26 *CARDOZO L. REV.* 1689, 1690, 1694 (2005); Alexander M. Bickel, *The Original Understanding of the Segregation Decisions*, 69 *HARV. L. REV.* 1, 56 (1955); Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 *YALE L.J.* 2309, 2342 (1995); Rebecca J. Scott, *Social Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 *MICH. L. REV.* 777 (2008).

⁸⁷ KLARMAN, *supra* note 66, at 22.

⁸⁸ *See supra* note 13 and accompanying text.

⁸⁹ *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting); Amar, *supra* note 67, at 84 (Harlan “takes a legal realist tack: He knows it when he sees it, and he knows what this is all about—degrading black people.”).

⁹⁰ *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

Justice Harlan also set out his metaphoric conception of a colorblind Constitution:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.⁹¹

As can be seen, Justice Harlan, speaking only of civil and not social rights,⁹² was in fact acutely conscious of race and racial hierarchy.⁹³ Harlan recognized and

⁹¹ *Id.* at 559. Justice Harlan's dissent also opined that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Id.* at 561. Under the Louisiana statute

a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the state and nation . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

Id.

⁹² See *supra* notes 83, 91 and accompanying text. Given Justice Harlan's focus on civil and not social rights, the notion, expressed by Supreme Court Justice Antonin Scalia and Bryan A. Garner, that Justice Harlan took the position that the Thirteenth and Fourteenth Amendments "can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally" is imprecise. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 126 (2012).

⁹³ See TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 160–62 (1995) (discussing Harlan's race-conscious views); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 *IOWA L. REV.* 151 (1996).

indeed endorsed “white superiority in the very paragraph in which he claimed fealty to colorblindness,”⁹⁴ thereby revealing that he, “like most of his contemporaries . . . believed in the centrality of race and in the legitimacy of racial thinking. . . . Although Harlan was also highly unusual in the courage, integrity, and decency he showed in racial matters, he nonetheless remained a person of his time.”⁹⁵ Confirmation of his situational colorblindness and racial views reflecting the time in which he lived is found in *Pace v. Alabama*,⁹⁶ wherein the justice joined the Court’s decision holding that a state criminal law’s penalty enhancement for adultery and fornication engaged in by black-white couples did not violate the Equal Protection Clause. And in the post-*Plessy* decision in *Cumming v. Richmond County Board of Education*⁹⁷ the Court, in an opinion by Harlan, held that a county school board did not violate the Equal Protection Clause when it closed an all-black high school and continued to operate a high school for whites. As one scholar noted, the *Cumming* Court determined that the school board’s “separate and unequal scheme” was reasonable and therefore constitutional.⁹⁸

Plessy’s constitutionalization of racial apartheid in the context of railway accommodations was an unsurprising development and manifestation of then-extant racial and racist norms and the white supremacist social order.⁹⁹ The Court’s

⁹⁴ Ian Haney Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 993 (2007).

⁹⁵ Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. 1927, 2021 (2003).

⁹⁶ *Pace v. Alabama*, 106 U.S. 583 (1883).

⁹⁷ *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899).

⁹⁸ KLARMAN, *supra* note 66, at 45. See also Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 692–93 (1992) (“To anyone with modern sensibilities, the substantive equality questions posed by *Cumming* seems easy and the result reached by the Court indefensible.”).

⁹⁹ See JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888–1910*, at 155 (1995) (“Although the case was a source of later controversy, *Plessy* attracted little notice at the time. Because the decision embodied popular attitudes, it was not a source of protest.”); KELLEY, *supra* note 66, at 83 (*Plessy* “was not considered a watershed decision in its day. . . . Although *Plessy* has come to symbolize the decisive defeat for inclusion in American society, most African Americans did not see it that way. For most, *Plessy* was simply another bad decision from a court that had done little to ensure the promises of Reconstruction.”); KLARMAN, *supra* note 66, at 21 (“Traditional sources of constitutional interpretation did not dictate a contrary result in *Plessy*, but given the drastic deterioration in racial attitudes and practices by 1896, one wonders whether the Court would have invalidated segregation even had the legal sources better supported that result.”); *id.* at 22 (“*Plessy* simply mirrored the preferences of most white Americans.”); LOFGREN, *supra* note 66, at 197 (*Plessy* was “an untroubled endorsement of racial separation” and “embodied conventional wisdom”); LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE 1789–2000*, at 173 (2009) (“*Plessy* was decided within the

endorsement of Louisiana's so-called separate-but-equal legal regime¹⁰⁰ was grounded in the premise that blacks and whites should not and "would not be forced into a situation of social equality before they were ready."¹⁰¹ The reality that the Separate Car Law was "part of a system to keep blacks in their place was simply ignored"¹⁰² by a Court which declared that any African Americans who believed that state-mandated separation of blacks and whites stamped blacks with a badge of inferiority fallaciously saw that which did not exist.¹⁰³

But it was the Court that did not (or pretended not to) see an obvious and repugnant reality. As Justice Harlan noted, everyone knew that the purpose and real meaning of Louisiana's statute was the forced exclusion of purportedly inferior and tainted African Americans from railway cars occupied by purportedly superior and

existing police power paradigm, and thus sustaining the Louisiana law requiring separate but equal railroad cars was overdetermined. Everyone—except the Negroes—was for it."); Thomas J. Davis, *Race, Identity, and the Law: Plessy v. Ferguson*, in *RACE ON TRIAL: LAW AND JUSTICE IN AMERICAN HISTORY* 72 (Annette Gordon-Reed ed., 2002) ("The immediate response to *Plessy v. Ferguson* recognized that it had routinely affirmed what was already decided. . . . The decision embraced the status quo."); Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867, 869 (2005) ("Given the tenor of the times and the trend of prevailing precedent, it is plausible to argue, as some have, that *Plessy* was not a surprising or earth-shattering case.").

For readers interested in the debate over the question whether *Plessy* was a catalyst for segregationist legislation at the beginning of the twentieth century, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 2002). Or, if interested in whether the Court's decision captured "conventional wisdom" and reflected the widespread *de facto* segregation in existence long before *Plessy*, see LOFGREN, *supra* note 66, at 15–17, 116–47. Noting that critics had "pointed to the existence of substantial racial segregation prior to the period of growth and legislation" he had emphasized in the first and 1974 edition of his book, Woodward accepted their findings and came "to agree that more segregation, both *de facto* and *de jure*, existed earlier in the nineteenth century than [he] had originally allowed." C. Vann Woodward, *Strange Career Critics: Long May They Persevere*, 75 J. AM. HIST. 857, 862 (1988).

¹⁰⁰ Given his experience as a railroad passenger, Booker T. Washington knew that

"separate" never was and never would be "equal." If the Supreme Court allowed whites and blacks to be separated, he wrote, then why not "put all yellow people in one car and all white people, whose skin is sun burnt, in another car . . . [or] all men with bald heads must ride in one car and all with red hair still in another?"

ROBERT J. NORRELL, *UP FROM HISTORY: THE LIFE OF BOOKER T. WASHINGTON* 143 (2009).

¹⁰¹ Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1216 (2008).

¹⁰² *Id.*

¹⁰³ See *supra* notes 75–77 and accompanying text.

untarnished whites.¹⁰⁴ The reality-blind *Plessy* Court thus “stripped the social meaning of group debasement from segregation laws.”¹⁰⁵ In doing so, and in characterizing and treating the separate-but-equal law as racially neutral, the Court “said nothing about the status of Blacks” and the connection of that status to “a legal and social system that perpetuated the stigma of inferiority based on race.”¹⁰⁶ The Court instead deferred to, indeed agreed with, the worldview that blacks and whites were equally protected by an explicitly discriminatory law: just as Homer Plessy could not ride in a railroad car reserved for whites, a white person could not ride in a car reserved for blacks.¹⁰⁷ This “radical formalism of constitutional interpretation in the face of contrary social facts . . . produce[d] a legal absurdity.”¹⁰⁸

The racial segregation constitutionalized by the *Plessy* Court was only one aspect of a rigid, horrifying, virulent, and oppressive system of racial apartheid.¹⁰⁹ Southern segregation “was a cradle-to-grave, unrelenting, systematic oppression of Blacks”¹¹⁰ that extended beyond the public schools. “If born in a hospital, southern Blacks entered the world in a separate hospital; at death they would go to a segregated funeral parlor and then be buried in a segregated cemetery.”¹¹¹ Jails and prisons were segregated;¹¹² in Florida it was unlawful to handcuff or chain together blacks and whites,¹¹³ and textbooks from black and white public high schools were stored in different buildings;¹¹⁴ Texas banned interracial boxing and mandated segregated public libraries;¹¹⁵ churches were segregated by law and/or custom;¹¹⁶

¹⁰⁴ See *supra* note 89 and accompanying text.

¹⁰⁵ Lopez, *supra* note 94, at 1062.

¹⁰⁶ Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 38 (1991).

¹⁰⁷ See Harris, *supra* note 66, at 183.

¹⁰⁸ Goodwin Liu, “*History Will Be Heard*”: *An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL’Y REV. 53, 60–61 (2008).

¹⁰⁹ See Paul Finkelman, *Breaking the Back of Segregation: Why Sweatt Matters*, 36 T. MARSHALL L. REV. 7, 14 (2010).

¹¹⁰ *Id.* at 8–9.

¹¹¹ *Id.* at 14.

¹¹² *Id.* at 16.

¹¹³ *Id.*

¹¹⁴ *Id.* at 20–21.

¹¹⁵ *Id.* at 21–22.

and Jim Crow Bibles were used in courtrooms.¹¹⁷ “Ironically, state schools for the blind were segregated everywhere in the South, even though, presumably, most of the students could not actually see each other.”¹¹⁸ African Americans and other persons of color were not allowed to live in “Sundown Towns” established between the 1890s and the late 1960s.¹¹⁹

C. *Brown v. Board of Education and Unconstitutional Apartheid*

In the decades following the infamous *Plessy* decision the Court interpreted and applied the Equal Protection Clause against a changing backdrop of sociopolitical and legal developments. For instance, a large number of African Americans migrated from southern to northern states.¹²⁰ African Americans benefited from (sometimes racially discriminatory) New Deal programs.¹²¹ The United States fought the Nazis “and their hateful theories of racial superiority”¹²² in World War II, and President Harry S. Truman (who opposed interracial marriages)¹²³ ordered the integration of the armed forces.¹²⁴ African-American soldiers returning from the war “with worldly experience and a confident sense of

¹¹⁶ *Id.* at 20.

¹¹⁷ *Id.* at 13.

¹¹⁸ *Id.* at 18.

¹¹⁹ See JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005). Sundown towns, also known as “sunset towns,” posted “signs that usually said, ‘Nigger, Don’t Let the Sun Go Down on You in ____.’” *Id.* at 3.

¹²⁰ See generally NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991); ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010).

¹²¹ See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD STORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 35 (2005).

¹²² Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 271 (1983).

¹²³ See WILLIAM E. LEUCHTENBURG, *THE WHITE HOUSE LOOKS SOUTH* 223 (2005) (quoting Truman: “I don’t believe in it. What’s that word about four feet long? Miscegenation? The Lord created it that way. You read your Bible, and you’ll find out.”).

¹²⁴ See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). It should be noted that during the American Revolution the Continental Army was racially integrated; black troops comprised between 6 and 12 percent of the army and were not assigned to only segregated units. JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 35 (2007).

their own worth . . . join[ed] the struggle for racial equality.”¹²⁵ The existence and reality of Jim and Jane Crow in the United States had foreign policy implications during the Cold War as the nation engaged in a contest “with Communist countries for the hearts and minds of emerging third world peoples.”¹²⁶ Such implications were referenced by the United States Department of Justice in its *amicus* brief to the Supreme Court in *Brown v. Board of Education*:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government

¹²⁵ See ADAMS & SANDERS, *supra* note 27, at 60; see also Theodore M. Shaw, *Dividing History: Brown as Catalyst for Civil Rights in America*, 34 STETSON L. REV. 475, 479 (2005).

Black veterans receiving the same benefits under the G.I. Bill “as whites began to believe they were entitled to other rights as well.” MICHAEL J. BENNETT, *WHEN DREAMS COME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA* 266 (1996). Unfortunately, “full benefits were enjoyed by proportionately fewer numbers of black veterans than a truly color-blind law should have delivered. And that meant black veterans and their families were denied their fair share of the multigenerational, enriching impact of home ownership and economic security that the G.I. Bill conferred on a majority of white veterans, their children, and their grandchildren.” EDWARD HUMES, *OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM* 221–22 (2006). For more on African-American veterans and the G.I. Bill, see Melissa Murray, *When War is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967 (2008); Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s in a Definition?*, 88 DENV. U. L. REV. 807, 818 (2011).

¹²⁶ Derrick Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). “Progress on the American treatment of African Americans offered a way to deflect Soviet criticism and prevent Communist defections in decolonized nations in Asia and Africa.” RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 41 (2007); see also THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* (2008); MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY* (2008); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000). *But see* Curtis Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475, 1476 (2001) (“[T]o say that Cold War foreign affairs played a role in U.S. civil rights reform does not tell us much about its relative influence as compared with other influences, a difficult if not impossible empirical question. Even in light of substantial evidence . . . suggesting that U.S. government officials linked race relations to Cold War politics, one still might conclude that the influence of the Cold War concerns on civil rights reform was relatively minor when compared with other, domestic influences.”).

yet devised by man. We must set an example by showing firm determination to remove existing flaws in our democracy.¹²⁷

In several higher education cases decided between 1938 and 1950 (cases which were on “the road to *Brown*”)¹²⁸ the Court considered the claims of and ruled in favor of black students who, because of their race, were denied admission to universities.¹²⁹ In *Missouri ex rel. Gaines v. Canada*¹³⁰ the Court noted that the state of Missouri had sought to fulfill its obligation to provide African Americans with higher education opportunities substantially equal to those afforded to white students, “a method the validity of which has been sustained by our decisions” in *Plessy* and other cases.¹³¹ Rather than admit black students to the University of Missouri School of Law, the state arranged and paid for the attendance of black residents at law schools in any state adjacent to Missouri. Concluding that this arrangement violated the Equal Protection Clause, the Court explained that the “basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color.”¹³² In *Sweatt v. Painter*¹³³ the University of Texas School of Law, invoking *Plessy*, denied the application of Heman Marion Sweatt solely because he was black and argued that Sweatt could attend a newly opened law school at the

¹²⁷ Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483, reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 113, 121 (Philip B. Kurland & Gerhard Casper eds., 1975).

¹²⁸ MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER v. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 18 (2012); Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 392 (2005).

¹²⁹ See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (per curiam); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹³⁰ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹³¹ *Id.* at 344.

¹³² *Id.* at 349. Responding to the Court’s decision, “Missouri did not admit blacks to its law school, but instead created a new law school for blacks.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 704 (3d ed. 2009).

¹³³ *Sweatt*, 339 U.S. 629; see GARY L. LAVERGNE, *BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL AND THE LONG ROAD TO JUSTICE* (2010).

Texas State University for Negroes.¹³⁴ Concluding that the University of Texas School of Law was superior,¹³⁵ and for the first time ordering a white institution of higher education to admit a black applicant,¹³⁶ the Court stated: “we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close.”¹³⁷ The Court thus rejected the state’s plea that it was protected by *Plessy*, and also declined to consider Sweatt’s contention that *Plessy* “should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation.”¹³⁸

Plessy was ultimately reexamined in *Brown* wherein the Court addressed the issue of the constitutionality of racial segregation. Before the Court were class actions brought in Kansas, South Carolina, Virginia, and Delaware presenting the common legal question of whether state-imposed and state-sanctioned segregation of public school children on the basis of race violated the Equal Protection Clause.¹³⁹ Interestingly, in November 1951, before the challenge to the lower courts’ rulings in the aforementioned cases were appealed to the Supreme Court, Herbert Wechsler attended a strategy session held by Thurgood Marshall and the NAACP’s legal staff. As reported by Richard Kluger:

Wechsler’s troubling questions dominated the meeting and could not be wished away. The cornerstone of the NAACP’s attack on *Plessy* was that segregation was, on its face, discriminatory and therefore a denial of equal protection. But *Plessy* had a certain nagging “intellectual strength,” Wechsler argued, in its insistence that to segregate two people is not a deprivation of equal protection since each person is equally affected by the action. Why was segregation more discriminatory against blacks than it was against whites? *Plessy* held that there

¹³⁴ See *Sweatt*, 339 U.S. at 632, 633 n.2.

¹³⁵ “In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.” *Id.* at 633–34.

¹³⁶ CHEMERINSKY, *supra* note 132, at 704.

¹³⁷ *Sweatt*, 339 U.S. at 633–34.

¹³⁸ *Id.* at 636.

¹³⁹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954).

was no discrimination if the law imposed reciprocal limitations on the segregated parties. . . .¹⁴⁰

Robert Carter responded that black and white children were not wronged equally by segregation, and “Marshall added that the Court would have to take judicial notice that the reigning political and law-making powers in segregated communities were not Negroes—that segregation was in fact imposed on black people.”¹⁴¹ Wechsler asked whether it was plain that a black child attending a segregated school was worse off than a black child exposed to the “full brunt of white prejudice” attending a non-segregated school.¹⁴² Kenneth Clark asked, “Which is better—to be sick or to be dead? Segregated school is sort of a fatality.”¹⁴³ “But was a black child any more injured in a segregated school, Wechsler persisted, than he was in a completely hostile white school?”¹⁴⁴

In 1952 the Court heard oral argument in the Segregation Cases. When the cases were discussed at the Court’s post-argument conference on December 13, 1952, it was not clear that the Court would end the *Plessy* regime. According to Justice William O. Douglas, “if the cases were to be then decided the vote would be five to four in favor of the constitutionality of segregation in the public schools in the States.”¹⁴⁵ Chief Justice Fred Moore Vinson took the position that “the *Plessy* case was right.”¹⁴⁶ Justice Robert Houghout Jackson stated that he would

¹⁴⁰ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 529 (1975).

¹⁴¹ *Id.* at 532.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* Wechsler’s pre-*Brown* questions and observations regarding *Plessy*’s “intellectual strength” and whether segregation constituted discrimination and harmed black children call into question the view that *Neutral Principles* was a reaction to post-*Brown* developments. See Anders Walker, “*Neutral Principles: Rethinking the Legal History of Civil Rights, 1934–1964*,” 40 LOY. U. CHI. L.J. 385, 416 (2009) (stating that the experiences of the nine black students at Central High School in Little Rock, Arkansas “made it into the *New York Times* and presumably onto Herbert Wechsler’s breakfast table” and raised for Wechsler “the legitimate question of whether the NAACP had been correct in making the argument that integration would cure the harm to black children caused by segregation”).

¹⁴⁵ Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1902 (1991) (quoting Justice Douglas memorandum).

¹⁴⁶ MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 187 (1994). Vinson noted that Justice Harlan’s dissent in *Plessy* was “careful *not* to refer to schools. That has significance, because Harlan was strong on other items and later wrote the

not “be a party to immediate unconstitutionality” but would not object to a holding ending segregation “with a reasonable time element.”¹⁴⁷ Concerned that the Court would issue a split decision, Justice Felix Frankfurter convinced his colleagues that the cases should be set for reargument in the following Term.¹⁴⁸ On September 8, 1953, prior to there argument and in what one scholar calls one of the salient “contingencies of history,”¹⁴⁹ Chief Justice Vinson suffered a fatal heart attack¹⁵⁰ and was replaced on the Court by President Dwight D. Eisenhower’s appointee Earl Warren.¹⁵¹

On May 17, 1954 (a day labeled “Black Monday” by segregationists),¹⁵² a unanimous Court issued its decision in *Brown v. Board of Education*¹⁵³ and held that segregating public school children by race violated the Equal Protection

Cumming case for this Court.” Conference Notes of Chief Justice Fred Vinson, *Brown v. Bd. of Education*, in *THE SUPREME COURT IN CONFERENCE (1940–1985)*, at 646 (Del Dickson ed., 2001).

¹⁴⁷ *THE SUPREME COURT IN CONFERENCE*, *supra* note 146, at 652. In a 1952 conference memorandum to Justice Jackson entitled “A Random Thought on the Segregation Cases,” Jackson’s clerk (and later United States Supreme Court Justice and Chief Justice) William H. Rehnquist wrote: “I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed.” 117 CONG. REC. S44, 880 (1971) (quoting memorandum). According to Rehnquist, this memorandum set forth Justice Jackson’s views and not his own. The veracity of Rehnquist’s account has been called into question. *See, e.g.*, JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 274–84 (2001); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 393–95 (2010); JOHN A. JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST* 37–40 (2012); KLARMAN, *supra* note 66, at 304–09; KLUGER, *supra* note 140, at 605–09; *see also* Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631 (2012) (arguing that a newly discovered 1955 letter from Rehnquist to Justice Frankfurter reveals what Rehnquist thought about Jackson shortly after the Court’s decision in *Brown* and the Justice’s death).

¹⁴⁸ *See* BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 72, 77–78 (1983); TUSHNET, *supra* note 146, at 187.

¹⁴⁹ Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 722 (2005).

¹⁵⁰ It has been reported that Justice Frankfurter, upon learning of Vinson’s death, remarked, “This is the first indication that I have ever had that there is a God.” SCHWARTZ, *supra* note 148, at 72; MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 136 (1991).

¹⁵¹ For discussion of Warren’s appointment to the Court, *see* JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 239–58 (2006).

¹⁵² *See* TOM P. BRADY, *BLACK MONDAY* (1955); JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975*, at 48 (2006).

¹⁵³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Clause. Given the focus of this article, a description of the Court's decision and what the Court actually said is warranted. In his opinion for the Court ("prepared on the theory" that it "should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory"),¹⁵⁴ Chief Justice Warren noted that the Court's initial decisions construing the Fourteenth Amendment "interpreted it as proscribing all state-imposed discriminations against the Negro race,"¹⁵⁵ and specifically referred¹⁵⁶ to two of the Court's pre-*Plessy* cases, *The Slaughter-House Cases*¹⁵⁷ and *Strauder v. West Virginia*.¹⁵⁸ The separate-but-equal doctrine "did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson* . . . involving not education but transportation. American courts have since labored with the doctrine for over half a century."¹⁵⁹

Making clear the Court's view that a backward-looking approach to the school segregation issue was not useful or informative,¹⁶⁰ Chief Justice Warren declared that

¹⁵⁴ KLUGER, *supra* note 140, at 696 (quoting memorandum by Chief Justice Warren accompanying drafts of *Brown* and *Bolling v. Sharpe*).

¹⁵⁵ *Brown*, 347 U.S. at 490.

¹⁵⁶ *See id.* at 490 n.5.

¹⁵⁷ *The Slaughter House Cases*, 83 U.S. 36 (1873). *See also supra* notes 54–55 and accompanying text.

¹⁵⁸ *Strauder v. West Virginia*, 100 U.S. 303 (1880). *See also supra* notes 56–60 and accompanying text.

¹⁵⁹ *Brown*, 347 U.S. at 491.

¹⁶⁰ Chief Justice Warren noted that after the initial 1952 oral argument in the Segregation Cases the Court ordered reargument and asked the parties to address, among other questions, "[w]hat 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) (mem.). In its 1954 decision the Court determined that the "circumstances surrounding the adoption of the Fourteenth Amendment" were "inconclusive" and were "not enough to resolve the problem with which we are faced." *Brown*, 347 U.S. at 489. This determination has been critiqued and questioned. *See, e.g.*, RICHARD A. POSNER, *OVERCOMING LAW* 62 (1995) ("It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the equal protection clause to prevent racially segregated public education."); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 156 (1999) ("the very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia," and supporters of the amendment assured opponents that the amendment would not lead to the racial integration of the schools); Bickel, *supra* note 86, at 64 ("the immediate objectives to which section I of the fourteenth amendment was addressed . . . was not expected in 1866 to apply to segregation").

we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout this Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.¹⁶¹

Focusing on 1954, the Court concluded:

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 it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is 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.¹⁶²

Chief Justice Warren then turned to and answered in the affirmative this specific question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”¹⁶³ Noting the Court’s prior decisions finding unlawful segregation in graduate school settings,¹⁶⁴ the Chief Justice reasoned that the same “considerations apply with added force to children in grade and high schools.”¹⁶⁵ Separating children “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

¹⁶¹ *Brown*, 347 U.S. at 492–93.

¹⁶² *Id.* at 493.

¹⁶³ *Id.*

¹⁶⁴ *See id.*; *see also supra* notes 124, 128–29, 132–33 and accompanying text.

¹⁶⁵ *Brown*, 347 U.S. at 494.

unlikely ever to be undone.”¹⁶⁶ In support of this conclusion Chief Justice Warren quoted a finding made by the lower court in the Kansas case:

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 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 the 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.¹⁶⁷

“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”¹⁶⁸

Having distinguished (but not expressly overruled) *Plessy*,¹⁶⁹ the Court announced “that in the field of public education the doctrine of ‘separate but equal’

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* See also *id.* at 494 n.10 (quoting lower court finding in the Delaware case: “I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white students otherwise similarly situated.”); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 119–20 (1978) (noting the Court’s approval of the Kansas court finding and stating that “[i]f a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation.”).

¹⁶⁸ *Brown*, 347 U.S. at 494–95 (footnote omitted). Accompanying the Court’s reference to “modern authority” was footnote 11 and that note’s citation to several social science studies, including Dr. Kenneth Clark’s doll test and Gunnar Myrdal’s *American Dilemma*. See *id.* at 494 n.11 (citing, among other works, K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth 1950), and GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944)). For discussion and analysis of footnote 11 and the Court’s social science reference, see ANGELO N. ANCHETA, *SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW* 42–58 (2006).

¹⁶⁹ See Hand, *supra* note 5, at 54 (*Plessy* “was not overruled in form anyway; it was distinguished because of the increased importance of education in the fifty-six years that had elapsed since it was decided”); ANDREW KULL, *THE COLOR BLIND CONSTITUTION* 133 (1992) (“*Plessy* has never been overruled”); Torres, *supra* note 77, at 553 (“*Brown* did not overrule *Plessy*”); Amar, *supra* note 37, at 66 (“*Brown*, the doctrinalists’ knight in shining armor, did not apologize for *Plessy* or openly overrule it”); David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1070 (2008)

has no place. Separate educational facilities are inherently unequal.”¹⁷⁰ Accordingly, “the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”¹⁷¹

The Court’s seminal and canonical decision in *Brown* “was the completion of an evolutionary, common law process.”¹⁷² As noted by Professor David Strauss, the Court’s separate-but-equal higher education cases¹⁷³ “had left separate but equal hanging by a thread.”¹⁷⁴ While *Brown* “was not received as merely the inevitable culmination of a common law evolution” at the time it was argued to the Court and “was not dictated by the earlier cases,”¹⁷⁵ the Court’s decision “could rely on the earlier cases to show, in effect, that the formal abandonment of the old doctrine was no revolution but just the final step in a common law development.”¹⁷⁶ In “taking one further step in a well-established progression” the Court acted “not as the interpreter of the views of mid-nineteenth-century politicians, but as a court with

(“*Brown* did not formally overrule *Plessy*” but did squarely address “the claim central to *Plessy*, that segregation did not necessarily denote inferiority.”).

In *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam), the Court affirmed a federal district court judgment striking down statutes and ordinances mandating racial segregation on city buses in Montgomery, Alabama. The district court determined that “*Plessy v. Ferguson* has been impliedly, though not explicitly, overruled, and that . . . there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation.” *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff’d*, 352 U.S. 903 (1956) (per curiam).

¹⁷⁰ *Brown*, 347 U.S. at 495.

¹⁷¹ *Id.* In later *per curiam* decisions the Court extended *Brown*’s desegregation principle to other public places and spaces. See *Watson v. Memphis*, 373 U.S. 526 (1963) (per curiam) (playgrounds); *New Orleans City Park Improvement Assoc. v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Cty. of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor and Cty. Council of Baltimore Cty. v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

Noting that the Court’s 1956 ruling in *Gayle v. Browder* “acted in a two-sentence ruling” in striking down segregation on Alabama buses, Professor Akhil Amar observes, “This was problematic. Judicial doctrine and judicial power require judges to offer carefully reasoned explanations for their rulings.” AMAR, *supra* note 36, at 213.

¹⁷² DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 85 (2010). For a critique, see Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 353–63 (2011).

¹⁷³ See *supra* notes 128–38 and accompanying text.

¹⁷⁴ STRAUSS, *supra* note 172, at 90.

¹⁷⁵ *Id.* at 91–92.

¹⁷⁶ *Id.* at 92.

responsibility for the evolution—in a properly restrained, common law fashion—of the living Constitution.”¹⁷⁷

Negative reactions to *Brown* and obstructionist tactics employed by supporters of the white-supremacist status quo were immediate and intense. In 1956, United States Senators and Representatives from southern states issued the “Southern Manifesto” (drafted by United States Senators Strom Thurmond, Sam Ervin, Harry Byrd, Richard Russell, and others)¹⁷⁸ in which they declared that the “unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.”¹⁷⁹ The manifesto “reaffirmed reliance on the Constitution” and “pledged to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution.”¹⁸⁰ In addition, legislatures in Alabama, Georgia, Mississippi, South Carolina, and Virginia declared that *Brown* was null and void;¹⁸¹ a Georgia law called for the termination of state officers who refused to enforce that state’s segregation statutes,¹⁸² and Virginia resolved to employ “all ‘honorable, legal and constitutional’ means to ‘resist this illegal encroachment on our sovereign powers.’”¹⁸³ Opposition to persons seeking integration and racial justice came in the form of murder, bombings, beatings, and other heinous conduct.¹⁸⁴ In 1957 the Arkansas National Guard, carrying out the orders of Governor Orval Faubus and backed by a mob of angry whites, surrounded Central High School in Little Rock,

¹⁷⁷ *Id.*

¹⁷⁸ See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 785 (2002); DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 86 (2d ed. 2000).

¹⁷⁹ *The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles*, 102 CONG. REC. 4459, 4460 (1956) (Senate); *Deviation from Fundamentals of the Constitution*, 102 CONG. REC. 4515, 4516 (1956) (House of Representatives). The manifesto is discussed in CARO, *supra* note 178, at 785–88; DAVID R. GOLDFIELD, *BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE, 1940 TO THE PRESENT* 84 (1990).

¹⁸⁰ 102 CONG. REC. 4515–16 (1956).

¹⁸¹ See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade after Brown*, 89 NW. U. L. REV. 92 (1994); Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1014 n.93 (1989).

¹⁸² See Kennedy, *supra* note 181, at 1014.

¹⁸³ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 60 (2000) (quoting S.J. Res. 3, 1956 Gen. Assem., Reg. Sess., 1956 Va. Acts 1213, 1215).

¹⁸⁴ See DIANE MCWHORTER, *CARRY ME HOME* (2001); Kennedy, *supra* note 181, at 1015.

Arkansas with the goal of preventing the enrollment of nine black students.¹⁸⁵ President Dwight D. Eisenhower, who had expressed his sympathy for southerners concerned that their “sweet little girls [would] be seated alongside some big black bucks,”¹⁸⁶ dispatched one thousand riot-control soldiers from the 101st Airborne Division to Little Rock to restore order and allow the students to enroll in the school.¹⁸⁷

II. WECHSLER’S *NEUTRAL PRINCIPLES*

A. Neutral Principles?

In *Neutral Principles*¹⁸⁸ Professor Herbert Wechsler addressed the legitimacy of judicial review and “the standards to be followed in interpretation.”¹⁸⁹

¹⁸⁵ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 222 (1988). In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court concluded that the resistance to desegregation in Little Rock was “directly traceable to the actions of legislators and executive officials of the State of Arkansas.” *Id.* at 15. The Court declared that the constitutional right recognized in *Brown* “can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted ingeniously or ingenuously.” *Id.* at 17 (internal quotation marks omitted).

¹⁸⁶ POWE, *supra* note 183, at 36 (quoting Eisenhower). This linkage of school integration and interactions between black males and white girls was on the mind of some opponents of desegregation. See MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* 69 (1997) (“The fear of ‘mongrelization’ permeated white southern thought: it was assumed that if white and African-American children went to school together, they would grow to like each other, date each other, and ultimately some would marry each other.”); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 50 (1998) (“It had long been feared that school desegregation would bring to the surface all the repressed terrors associated with the specter of interracial sex, a specter that had always played a major part in American race relations.”); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 138 (1999) (noting the “moral” argument “that would have carried a lot of weight in the nineteenth century, and for that matter in the American South as late as the 1950s and 1960s”: “that mixing the races in public schools would lead inevitably to intermarriage and to the resulting erasure of racial distinctions that God or nature may, in creating difference races, have ordained for inscrutable reasons”).

¹⁸⁷ See BRANCH, *supra* note 185, at 224.

¹⁸⁸ For discussion and analysis of *Neutral Principles*, see BELL, *supra* note 24; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 265–68 (1992); EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 24–44 (1962); Black, *supra* note 55; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169 (1968); Barry Friedman, *Neutral Principles: A Retrospective*, 50 *VAND. L. REV.* 503 (1997); M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 *COLUM. L. REV.* 35 (1963); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *COLUM. L. REV.* 982 (1978); Robert L. Hayman, Jr., *Neutral Principles and the Resegregation Decisions*, 9 *WIDENER L. SYMP. J.* 129 (2002); Louis Henkin, *Some Reflections on*

Criticizing “*ad hoc* evaluation . . . the deepest problem of our constitutionalism,”¹⁹⁰ he wrote:

The man who simply lets his judgment turn on the immediate result may not . . . realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law. If he may know he disapproves of a decision when all he knows is that it has sustained a claim put forward by a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist—he acquiesces in the proposition that a man of different sympathy but equal information may no less properly conclude that he approves.¹⁹¹

Wechsler “insisted only that the principle in a case—the rule of a case—not differ depending on the identity or interest of the plaintiff.”¹⁹²

Current Constitutional Controversy, 109 U. PA. L. REV. 637 (1962); Kahan, *supra* note 4, at 9–18; Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571 (1960); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988); Louis H. Pollak, *Constitutional Adjudication: Relative or Absolute Neutrality*, 11 J. PUB. L. 48 (1962); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959) [hereinafter Pollak, *Racial Discrimination and Judiciary Integrity*]; Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1489–97 (2004); David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373 (1997).

¹⁸⁹ Wechsler, *supra* note 1, at 10–11.

¹⁹⁰ *Id.* at 12.

¹⁹¹ *Id.*

¹⁹² Friedman, *supra* note 188, at 512; *see also* Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1375 (2012) (“Legal decisions, to be principled, cannot rest on the fact that a judge favors a particular result over another—based on the identity of the parties, for example.”). Professor Pamela Karlan argues

in a wide variety of cases, the identity of the litigant should not matter. It is hard to imagine a justification, for example, for denying compensatory damages to plaintiffs in medical malpractice cases because they are segregationists or Communists. But there is also a wide array of cases in which the identity of a litigant or injured party *does* matter,

Wechsler argued further that courts must act, not as a “naked power organ,”¹⁹³ but as principled decisionmakers, with a “principled decision . . . rest[ing] on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”¹⁹⁴ Courts should not utilize principles “as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time,” Wechsler argued; courts must “decide, or should decide, only the case they have before them.”¹⁹⁵

That a judge should consider and decide a case on the basis of “neutral principles” is, at first glance, an alluring proposition. One can readily agree with and heartily endorse the notion that judges and courts should be evenhanded and impartial in deciding cases,¹⁹⁶ and must be willing “to apply the present case’s rule in the next case as well, regardless whether the beneficiary in the later case was less attractive than the earlier winner in ways not made relevant by the rule itself.”¹⁹⁷ For those who subscribe to such an understanding of “neutral principles” the:

such as the in cases involving the Federal Sentencing Guidelines and federal employment discrimination statutes. Pamela S. Karlan, *What Can Brown® Do For You?; Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1056–57 (2009).

¹⁹³ Wechsler, *supra* note 1, at 12. Recall that the Southern Manifesto declared that *Brown* was “bearing the fruit always produced when men substitute *naked power* for established law.” *The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles*, 102 CONG. REC. 4459, 4460 (1956) (Senate) (emphasis added).

¹⁹⁴ Wechsler, *supra* note 1, at 19. *See also id.* at 15 (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”); *id.* (asking whether cases must be decided “on grounds of adequate neutrality and generality, tested not only by the instant application by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?”); Norman Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 925 (1993) (quoting Wechsler:

The neutral principles idea is . . . a negative test, a test to be applied by a judge, with the essence of the question whether he is being adequately consistent in the process of adjudication, in reaching a particular type of result in a particular type of case. That is to say, essentially he asks himself, “Would I reach the same result if the substantive interests were otherwise?”).

¹⁹⁵ Wechsler, *supra* note 1, at 15.

¹⁹⁶ *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 7 (1998).

¹⁹⁷ Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805 (1983).

requirement is not that the principle itself be neutral (presumably “neutral principle,” if the adjective modifies the noun, is an oxymoron); nor that the process through which the principle is created be neutral (in the sense that none of the creators care what the principle is); but rather that the act of applying the principle to the case at hand be neutral (in the sense that the principle is not altered because the judge does not like the outcome).¹⁹⁸

Was Wechsler speaking of “neutral principles” in the sense of impartiality or disinterestedness? In the introduction of a book published two years after the publication of his *Neutral Principles* article, he wrote that “[a]s to the choice of adjective, my case is simply that I could discover none that better serves my purpose.”¹⁹⁹

Neither “impartial,” nor “disinterestedness,” nor “impersonal,” the main alternatives that I considered, seems to me adequate in its expression; and to rest on “general,” though the idea is certainly included, is to give up overtones that I intend. That those overtones are somewhat enigmatic in their content is not, from my point of view, a real deficiency; this is an enigmatic subject.²⁰⁰

Not “deny[ing] that constitutional provisions are directed to protecting certain special values,” Wechsler argued that the “demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim.”²⁰¹ As Professor Frederick Schauer has noted, while

¹⁹⁸ Stephen L. Carter, *The Morgan “Power” and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 847–48 (1986); see also J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 37 (2012) (“Wechsler’s insight was that justices must decide cases on the basis of principles that they are willing to apply neutrally, regardless of their personal preferences. Neutral application of principles provides a bulwark against political judging.”); Tushnet, *supra* note 197, at 806 (“If neutrality is to serve as a meaningful guide, it must be understood not as a standard for the content of principles, but rather as a constraint on the process by which principles are selected, justified, and applied.”).

¹⁹⁹ HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAWS* xiii (1961).

²⁰⁰ *Id.*; see also Silber & Miller, *supra* note 194, at 926 (Wechsler stating that “maybe ‘neutral’ isn’t the best word to convey the thought I was attempting to convey, but I still don’t know of any better word. ‘Objective,’ ‘disinterested’—these have been suggested. They are, to be sure, less combative.”).

²⁰¹ WECHSLER, *supra* note 199, at xiii–xiv.

Wechsler's use of the "word 'neutral' is unnecessary and distracting . . . the basic idea is that a rule announced in the first case should be one a court is willing to follow in subsequent ones."²⁰² Should there arise a "conflict among values having constitutional protection, calling for their ordering or accommodation," Wechsler reasoned that the "principle of resolution must be neutral in a comparable sense (both in the definition of the individual competing values and in the approach that it entails to value competition").²⁰³

Wechsler's account and argument does not define "neutral" or "neutrality." As one scholar has noted, a dictionary defined "'neutral' as 'not engaged on either side . . . neither one thing nor the other, [also] . . . middling, indifferent.' 'Neutrality' is 'the condition of being uninvolved in contests or controversies between others; a state of refraining from taking part on either side.'"²⁰⁴ "Perhaps the most often accepted synonym for 'neutral' is 'impartial,' though Roget leads off with 'in the middle of the road, on the fence.'"²⁰⁵ Given Wechsler's rejection of "impartial" and "disinterestedness" as alternatives for "neutral," how the latter term should be defined in the context of judging, an enterprise in which jurists must make decisions as they adjudicate and resolve legal disputes between parties operating in an adversarial system, remains a foundational and important question.

An additional query and conceptual difficulty arises when "neutral," understood as taking no sides, modifies the noun "principle." What is (is there such a thing as) a "principle"?²⁰⁶ A "principle," "normally indeterminate in reach,"²⁰⁷

²⁰² Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 900 n.69 (2006).

²⁰³ WECHSLER, *supra* note 199, at xiv.

²⁰⁴ Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599, 600 (1962) (alteration in original) (quoting NEW INTERNATIONAL DICTIONARY 1453 (quarto ed., Merriam ser. 1928)); *see also id.* (noting that the *Oxford English Dictionary* defined "neutral" as meaning "not inclined toward either party, view, etc. . . . having no strongly marked characteristics or features; undefined, indefinite, vague"); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 969 (4th ed. 2002) (defining "neutral" as "not taking part in either side of a dispute or quarrel").

²⁰⁵ Wright, *supra* note 204, at 600 (quoting INTERNATIONAL THESAURUS § 628.3 (new ed. 1946)).

²⁰⁶ Professor Stanley Fish has argued that the "trouble with principle is, first, that it does not exist, and, second, that nowadays many bad things are done in its name." STANLEY FISH, *THE TROUBLE WITH PRINCIPLE 2* (1999).

²⁰⁷ BALKIN, *supra* note 86, at 44. Balkin writes that principles "do not determine the scope of their own extension" and "may apply differently given changing circumstances" and "can be balanced against other competing considerations. Although the persuasive power of principles may originate from how we expect they will apply when we argue for them, their jurisdiction, their scope, their weight, and the kinds of practices they regulate can shift over time." *Id.*

has been defined as “a fundamental truth, law, doctrine, or motivating force, upon which others are based,” and as “a rule of conduct, esp. of right conduct”²⁰⁸ In choosing, articulating, and applying a particular principle the selector unavoidably adopts a substantive position, for “principles and substance come always mixed.”²⁰⁹

Principle and its vocabulary of fairness, equality, and so on are already informed by substantive preferences (were they not, they would be incapable of giving direction), and preferences are always preferences in relation to some notion of the good; they are never naked. In fact, preferences (except for trivial cases like a preference for vanilla ice cream over chocolate) *are* principles (or at least principled)—not principles of the neutral kind but principles of the only kind there really are, strong moral intuitions as to how the world should go combined with a resolve to be faithful to them.²¹⁰

Thus, a principle that takes a side, provides guidance, and selects/adopts and calls for the application of a substantive position, is not and cannot be neutral. If this is correct,

there are no neutral principles, only so-called principles that are already informed by the substantive content to which they are rhetorically opposed. And even if you could come up with a principle that is genuinely neutral—a notion of fairness unattached to any preferred goal or vision of life—it would be unhelpful because it would be empty (that, after all, is the requirement); invoking it would point you in no particular direction, would not tell you where to go or what to do. A real neutral principle, even if it were available, wouldn’t get you anywhere in particular because it would get you anywhere at all.²¹¹

When “neutral” (taking no sides or position) modifies “principle” (taking a side and declaring a substantive position), “neutral principle” (distinguishable from a

²⁰⁸ WEBSTER’S NEW WORLD COLLEGE DICTIONARY, *supra* note 204, at 1142.

²⁰⁹ FISH, *supra* note 206, at 9.

²¹⁰ *Id.*

²¹¹ *Id.* at 4.

principle of neutrality)²¹² is incoherent, indeterminate, and oxymoronic.²¹³ “To put it more bluntly, there simply cannot *be* a neutral principle.”²¹⁴

Wechsler does say, clearly and definitively, that in deciding a case a judge must apply a principle of resolution without regard to the identity or interests of the litigants and even though the judge does not like the outcome.²¹⁵ The fact that the plaintiff is “a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist” should not influence the judge’s selection and application of the operative principle or the rule of the case.²¹⁶ A “neutral principle,” understood and conceptualized in this way, does not and cannot provide substantive content or guidance; it is empty and does not tell a judge “where to go and what to do.”²¹⁷ In addressing and answering the question whether state-mandated racial segregation of public school students violates the Equal Protection Clause, the *Brown* Court, rejecting the segregationist *status quo*, constitutionalized “a principle which the Court must have found to be so fundamental, so insistent, that it could be neither denied nor compromised. The principle can be easily stated: the Constitution requires equal treatment, regardless of race. Racial segregation in schools is incompatible with equal treatment.”²¹⁸ While some may argue that this substantive no-segregation/equal treatment principle is wrong or otherwise inapplicable, that principle can be applied consistently and without regard to the identity of the parties, thereby satisfying Wechsler’s neutrality standard.²¹⁹

²¹² Not taking sides is the substantive position of one who adopts a principle of neutrality. *See, e.g.,* Fridolin M.R. Walther, *The Swiss Legal System: A Guide for Foreign Researchers*, 29 INT’L J. LEG. INF. 1, 3 (2001) (“Since 1815, Swiss foreign policy has been governed by the fundamental principle of neutrality. Switzerland remained neutral during the First as well as the Second World War.”).

²¹³ *See* Carter, *supra* note 198, at 847.

²¹⁴ Frederick Schauer, *Neutrality and Judicial Review*, 22 LAW & PHIL. 217, 234 (2003).

²¹⁵ *See* Wechsler, *supra* note 1, at 19 and accompanying text.

²¹⁶ Wechsler, *supra* note 1, at 12.

²¹⁷ FISH, *supra* note 206, at 4; *see also* RICHARD A. POSNER, HOW JUDGES THINK 307 (2008) (discussing “principles” and arguing that a requirement “that legal rules be general in their application rather than pinpointed on specific individuals or groups . . . does not tell us what the *content* of the rules should be”).

²¹⁸ Albert M. Sacks, *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 96 (1954); *see also* JOHN HARTELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 55 (1980) (“[T]here are neutral principles of every hue. (How about ‘No racial segregation, ever?’”).

²¹⁹ To illustrate the point that an argument concerning the correctness or incorrectness of a principle is separate and distinct from the question whether that principle can be applied in a neutral fashion: “a principle which states that the killing of redheaded people is justified is neutral . . . since one can tell

B. *The “Point in Plessy”*

Turning his attention to *Brown v. Board of Education*,²²⁰ and making clear his opposition to racial segregation,²²¹ Professor Wechsler observed that his critique of the Court’s decision “inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned” and one which “did not declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation, though subsequent *per curiam* decisions may . . . now go that far.”²²² He was not troubled by the Court’s departure from precedent or by the fact that “the Court disturbed the settled patterns of a portion of the country.”²²³ Nor did he consider it problematic that history “[did] not confirm that an agreed purpose of the fourteenth amendment was to forbid separate schools or that there is important evidence that many thought the contrary.”²²⁴ Nor did he question what he believed to be the Court’s miscalculation of “the extent to which its judgment would be honored or accepted” or the fact that the Court did not leave the resolution of the school segregation issue to the United States Congress.²²⁵

Wechsler did question the *Brown* Court’s conclusion that state-mandated racial segregation in public education harmed black children. Referring to witnesses in the Kansas case who testified that “separation harms the Negro children who may be involved” and the contrary view of witnesses in the Virginia case,²²⁶ Wechsler argued that “[m]uch depended on the question that the witness

which people are redheaded and which are not” GERALD DWORKIN, *Non-Neutral Principles, in* READING RAWLS: CRITICAL STUDIES ON RAWLS’ A THEORY OF JUSTICE 124, 126 (Norman Daniels ed., 1989). Objections to this murderous yet neutrally applicable principle are grounded in the moral disagreement with the principle’s substantive content and guidance.

²²⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²²¹ Wechsler, *supra* note 1, at 33.

²²² *Id.* at 32; *see supra* note 165 and accompanying text. Commenting on the Court’s post-*Brown per curiam* decisions, Wechsler wrote: “That these situations present a weaker case against state segregation is not, of course, what I am saying. I am saying that the question whether it is stronger, weaker, or of equal weight appears to me to call for principled decision.” Wechsler, *supra* note 1, at 22.

²²³ Wechsler, *supra* note 1, at 31.

²²⁴ *Id.* at 31–32.

²²⁵ *Id.* at 32. *See also* U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

²²⁶ Wechsler, *supra* note 1, at 32.

had in mind, which rarely was explicit.”²²⁷ Was the black child attending a segregated school being compared to a black child “in an integrated school setting where he was happily accepted and regarded by the whites,” or was the segregated black child being compared to a black child in an integrated school “where the whites were hostile to his presence and found ways to make their feelings known?”²²⁸ “And if the harm that segregation worked was relevant, what of the benefits that it entailed: sense of security, the absence of hostility? Were they irrelevant?”²²⁹ Was it relevant, assuming that “more Negroes in a community preferred separation than opposed it?”²³⁰ And, Wechsler asked, “Would that be relevant to whether they were hurt or aided by segregation as opposed to integration? Their fates would be governed by the change of the system quite as fully as those of the students who complained.”²³¹

²²⁷ *Id.* at 33.

²²⁸ *Id.* This query brings to mind a question posed by Hannah Arendt:

[W]hat would I do if I were a Negro mother? The answer: under no circumstances would I expose a child to conditions which made it appear as though it wanted to push its way into a group where it was not wanted. Psychologically, the situation of being unwanted (a typically social predicament) is more difficult to bear than outright persecution (a political predicament) because personal pride is involved If I were a Negro mother in the South, I would feel that the Supreme Court ruling [in *Cooper v. Aaron*], unwillingly but unavoidably, has put my child into a more humiliating position than it had been in before.

HANNAH ARENDT, *Reflections on Little Rock*, in RESPONSIBILITY AND JUDGMENT 193–94 (Jerome Kohn ed., 2003). Asking “what would [she] do if [she] were a white mother in the South,” Arendt wrote that she:

would try to prevent [her] child’s being dragged into a political battle in the schoolyard. In addition, [she] would feel that [her] consent was necessary for any such drastic changes no matter what [her] opinion of them happened to be. [She] would deny that the government had any right to tell [her] in whose company [her] child received its instruction. The rights of parents to decide such matters for their children until they are grown-ups are challenged only by dictatorships.

Id. at 195.

²²⁹ Wechsler, *supra* note 1, at 33.

²³⁰ *Id.*

²³¹ *Id.* Professor Derrick Bell observed:

[M]uch of Professor Wechsler’s concern seems hard to imagine. To doubt that racial segregation is harmful to blacks, and to suggest that what blacks

Finding “it hard to think that the judgment [in *Brown*] really turned upon the facts,” Wechsler concluded that the Court’s decision

must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved. For many who support the Court’s decision this assuredly is the decisive ground. But this position also presents problems. Does it not involve an inquiry into the motive of the legislature, which is generally foreclosed to the courts? Is it alternatively defensible to make the measure of validity of legislation the way it is interpreted by those who are affected by it?²³²

He then posed more rhetorical questions,²³³ including this startling query/statement: “In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if ‘enforced separation stamps the colored race with a badge of inferiority’ it is solely because its members chose ‘to put that construction upon it’?”²³⁴

really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.

Bell, *supra* note 126, at 522.

²³² Wechsler, *supra* note 1, at 33. Arguing that this aspect of Wechsler’s position fails entirely, Professor Alexander Bickel maintained that the Court did not have to rely on legislative motive or on the subjective feelings of African Americans.

To determine that segregation establishes a relationship of the inferior to the superior race is to take objective notice of a fact of our national life and of experience elsewhere in the world, now and in other times, quite without reference to legislative motives and without reliance on subjective and perhaps idiosyncratic feelings.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 57 (1962).

²³³ As Richard Posner has noted, Wechsler’s “preferred method of argument” in *Neutral Principles* “is the posing of rhetorical questions, of which I count 60 in his 35-page article.” RICHARD A. POSNER, *OVERCOMING LAW* 74 (1995).

²³⁴ Wechsler, *supra* note 1, at 33 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)). Wechsler also asked the following: “Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male? Is a prohibition of miscegenation a discrimination against the colored member of the couple who would like to marry?” *Id.* at 33–34. For Wechsler, the answer to his rhetorical question about the enforced separation of the sexes “was almost surely no.” SERENA MAYERI, *REASONING FROM RACE: FEMINISM*,

Did black persons, purportedly having and suffering from an inferiority complex, wrongly see and experience racial segregation as inequality? In *The Lawfulness of the Segregation Decisions*,²³⁵ Professor Charles Black,²³⁶ commenting on *Neutral Principles* and arguing that “the basic scheme of reasoning on which [*Brown*] can be justified is awkwardly simple”²³⁷ set forth a “simple syllogism”:²³⁸

First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all.²³⁹

The logic of this syllogism is unimpeachable: “The fourteenth amendment commands equality, and segregation as we know it is inequality.”²⁴⁰

What the fourteenth amendment, in its historical setting, must be read to say is that the Negro is to enjoy equal protection of the laws, and that the fact of his being a Negro is not to be taken to be a good enough reason for denying him this equality, however “reasonable” that might seem to some people. All possible arguments, however convincing, for discriminating against the Negro, were finally rejected by the fourteenth amendment.²⁴¹

LAW, AND THE CIVIL RIGHTS REVOLUTION 10 (2011). See also MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 89 ((1995) (Wechsler’s separation of the sexes argument “is intended to serve as a *reductio ad absurdum* of his racial point But we know that people who complain about gender-separation are women who are complaining on account of a political agenda, not on account of reasons that can be articulated in a principled way.”).

²³⁵ See Black, *supra* note 55. For discussions of this important article, see Kendall Thomas, *Reading Charles Black Writing: “The Lawfulness of the Segregation Decisions” Revisited*, 1 COLUM. J. RACE & L. 1 (2011), and Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649 (2004).

²³⁶ Black “was a native of Austin, Texas, where he had been taught to play the harmonica by an aged ex-slave.” KLUGER, *supra* note 140, at 644.

²³⁷ Black, *supra* note 55, at 421.

²³⁸ *Id.* at 428.

²³⁹ *Id.* at 421.

²⁴⁰ *Id.* at 428.

²⁴¹ *Id.* at 423.

Declaring that segregation offends against equality, in a memorable passage Black wrote that:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to that description.²⁴²

For Black, the “social meaning of segregation”²⁴³ was revealed in and evidenced by history. “Segregation in the South comes down in apostolic succession from slavery and the *Dred Scott* case” through the Civil War and the Black Codes and the turn to segregation “as an integral part of the movement to maintain and further ‘white supremacy’ It is now defended very largely on the ground that the Negro as such is not fit to associate with the white.”²⁴⁴

History . . . tells us that segregation was imposed on one race by the other race; consent was not invited or required.²⁴⁵ . . . Segregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory. . . . Then we are solemnly told that segregation is not intended to harm the segregated race, or to stamp it with the mark of inferiority. How long must we keep a straight face?²⁴⁶

As courts may advise themselves of, and make judgments on the basis of, “the background knowledge of educated men who live in the world,”²⁴⁷

²⁴² *Id.* at 424.

²⁴³ *Id.*

²⁴⁴ *Id.* at 424–25.

²⁴⁵ *Id.* at 425.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 426.

it would be *the most unneutral of principles*, improvised *ad hoc*, to require that a court faced with the presented problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings. Southern courts, on the basis of just such a judgment, have held that the placing of a white person in a Negro railroad car is an actionable humiliation; must a court pretend not to know that the Negro’s situation there is humiliating?²⁴⁸

C. Wechsler’s Preferred Principle: Freedom of Association

Having suggested that there was “a point in *Plessy*” that African Americans suffered from an inferiority complex,²⁴⁹ Professor Wechsler contended that the state-mandated segregation of persons by race did not present a question of racial discrimination:

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt he must carry but also in the benefits he is denied.²⁵⁰

Indeed, Wechsler wrote:

In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.²⁵¹

²⁴⁸ *Id.* at 427 (first emphasis added).

²⁴⁹ See Wechsler, *supra* note 1, at 33.

²⁵⁰ *Id.* at 34. See generally FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010).

²⁵¹ Wechsler, *supra* note 1, at 34.

In this paradigm of problematic presumptuousness Wechsler audaciously speaks for Houston (a prominent African-American lawyer)²⁵² and constructs an all-consideration-of-race-is-symmetrical world in which Wechsler is supposedly equally affected and disadvantaged by the white supremacist regime that banned Houston (but not Wechsler).²⁵³ For Wechsler, “the fact that a white man and a black man cannot eat together in a white restaurant involves a symmetrical burden for both, a simple denial of associational freedom.”²⁵⁴ Professor Susan Bandes has observed that “Wechsler cannot see that the inability to eat lunch at the Supreme Court itself might feel very different indeed to Houston; that their experiences are not legally or morally equal. Likewise he cannot see that the stigma of enforced separation is not a matter of idiosyncratic or private interpretation.”²⁵⁵ The lunch incident, as Professor Martha Nussbaum has noted, was

[f]or Wechsler, an inconvenience and . . . a source of guilt; for Houston, a public brand of inferiority. One cannot consider the history of race relations in this country closely and sympathetically . . . without noticing this asymmetry. Wechsler’s claim that the issue is not one of discrimination at all has about it a bizarre sort of Martian neutrality. From his enforced distance from the emotions involved in the experience of oppression, he fails to notice perfectly reasonable and universalizable principles that do include the asymmetrical meaning of segregation and the history of segregation as stigma. These notions are highly

²⁵² For more on Houston, see KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 42–45, 55–57 (2012); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); CHARLES H. HOUSTON: AN INTERDISCIPLINARY STUDY OF CIVIL RIGHTS LEADERSHIP (James L. Conyers, Jr. ed., 2012).

²⁵³ Professor Kendall Thomas observes that

Wechsler clearly has not taken the full measure of the distance that separated his “knowledge” and his “suffering” from that of Charles Hamilton Houston, the celebrated African American lawyer. Wechsler seems oblivious to the different positions he and Houston occupied in the larger landscape of racial segregation.

Thomas, *supra* note 235, at 18.

²⁵⁴ Martha Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 29 (2007).

²⁵⁵ Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 22 (2011).

relevant to the interpretation of the Constitution, and to the formulation of appropriate constitutional, as well as human, principles.²⁵⁶

Elaborating on his preferred freedom-of-association approach (one not formally recognized by the Court until three years after *Brown*),²⁵⁷ Wechsler stated:

But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think that there is, but I must confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.²⁵⁸

Professors Andrew Koppelman and Tobias Barrington Wolff have argued that in this passage Wechsler “resuscitated the old ‘forced association’ justification for legally mandated racial segregation.”²⁵⁹ As they demonstrate, “a legal prohibition against discrimination is as old as the United States” and was an established feature of the common law governing the conduct of any business holding itself out as open to and serving the public.²⁶⁰ During the Civil War period:

²⁵⁶ NUSSBAUM, *supra* note 234, at 89; *see also* Nussbaum, *supra* note 254 (“Besides [Wechsler’s] strange omission of the fact that whites were always perfectly free to visit black restaurants (a fact that the history of jazz clubs in Harlem would have made famous), his account of the example is oddly obtuse, given his passionate opposition to segregation.”).

²⁵⁷ *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Neuborne, *supra* note 70, at 54 n.344.

²⁵⁸ Wechsler, *supra* note 1, at 34; *see also* FISH, *supra* note 205, at 26–27 (discussing Wechsler’s characterization of the state’s choice between those who wish to associate and those who do not; “the two wishes are presented so abstractly, almost algebraically, that any sense of the projects to which they were attached is entirely lost”).

For a response to Wechsler’s statement that he had not yet written an opinion addressing the right of association and the right of nonassociation, and an attempt to draft such an opinion, see Pollak, *Racial Discrimination and Judicial Integrity*, *supra* note 188, at 24–31.

²⁵⁹ KOPPELMAN & WOLFF, *supra* note 14, at 17.

²⁶⁰ *Id.* at 5.

when legal rights were for the first time extended to African Americans . . . courts changed the rule without saying that they were doing so. They held for the first time that most businesses had no common-law duty to serve the public. At the same time, some legislatures specifically abrogated that duty.²⁶¹

Noting earlier decisions by the Iowa and North Carolina Supreme Courts declaring a right to exclude black customers, Koppelman and Wolff declaim that the “libertarian right to exclude, then, is racist at the core. This change in the law had the purpose . . . of permitting businesses to refuse service to African Americans.”²⁶² Thus, the freedom-of-association principle, a principle resistant to antidiscrimination law in general and the Constitution’s equal protection command in particular, “was an innovation of the Civil War period, devised specifically in order to authorize discrimination against African Americans.”²⁶³

Wechsler’s preferred freedom-of-association principle gave primacy of place to those who were displeased by and objected to the *Brown* Court’s interpretation and application of the Equal Protection Clause. His abstractional framing of the issue as one requiring the state to choose between denying the freedom of association to those seeking it or imposing it on those who wished to avoid it²⁶⁴ “[d]eliberately obscured . . . the fact that one wish is born of the desire to escape a history of oppression and exclusion, while the other wish is born of a desire to retain the political and economic advantages that have been produced by that same history.”²⁶⁵ Those conflicting wishes can be seen as equivalent “only if you empty them of their historical and moral content” and believe “that there is no principled way to distinguish between those who want to be free to enter the school door and those who want to be free to keep them out.”²⁶⁶

²⁶¹ *Id.* at 6.

²⁶² *Id.*

²⁶³ *Id.* at 1.

²⁶⁴ See *supra* note 258 and accompanying text.

²⁶⁵ FISH, *supra* note 206, at 27.

²⁶⁶ *Id.* In his concurring opinion in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), Justice Clarence Thomas expressed his belief that there is a moral and constitutional equivalence “between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.” *Adarand Constructors, Inc.*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment). Justice John Paul Stevens saw “no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial

Of course, there is a principled way to make this distinction: recognition of an antisubordination or nonsubordination principle grounded in the reality that racial segregation, as a matter of history and practice and lived experiences, has an asymmetrical legal and social meaning for blacks and whites and does not symmetrically burden those on different sides of the color line.²⁶⁷ An antisubordination or nonsubordination principle prohibiting governmental conduct designating, subordinating, and treating as inferior a raced and racialized group can be applied in a way that meets Wechsler's call for neutrality, *i.e.*, can be applied consistently and without regard to the identity of the parties.²⁶⁸ Wechsler found problematic, not the neutral application aspect of his argument, but the Court's selection and application of an antidiscrimination rather than a freedom-of-association principle. His analysis of *Brown* is thus a substantive critique cloaked in the garb of a posited neutrality; his real objection was to *Brown's* view of the protective scope of the Fourteenth Amendment and the Court's application of the Equal Protection Clause of that amendment to a longstanding practice of excluding black children from public schools attended by white children.

III. PARENTS INVOLVED'S WECHSLERIAN MOMENT

As demonstrated in the preceding section, in *Neutral Principles* Professor Wechsler presented a troubling and quixotic analysis of *Brown*. Notably absent from his abstract theorizing about "neutral principles" is any discussion or recognition of pertinent history and the real social meaning of race and racial segregation leading up to and at the time of the Court's consideration of the *Segregation Cases*.²⁶⁹ And Wechsler's preference for a freedom-of-association

subordination." *Id.* at 243 (Stevens, J., dissenting). He would not "disregard the difference between a 'No Trespassing' sign and a welcome mat." *Id.* at 245.

²⁶⁷ See Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1293 (2011) (stating that antisubordinationist jurists focus on social meaning, "academic proponents of the anti-subordination principle tie it to social meaning," and social status "is the product of the social meaning of acts and institutions"); Nussbaum, *supra* note 254, at 28–29; *supra* note 21 and accompanying text. For more on the antisubordination principle, see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Siegel, *supra* note 188.

²⁶⁸ See Karlan, *supra* note 192, at 1058 ("[A] nonsubordination principle *can* be neutral, even in Wechsler's terms: the government *can* be prohibited from treating *any* racially defined group as subordinate or inferior." (emphasis added)).

²⁶⁹ See *supra* Part I.

principle as the guide to the resolution of equal protection claims wrenched the blatant bigotry and subordinating discrimination challenged in *Brown* out of the context and “realities of power under a system of white supremacy.”²⁷⁰ His approach situated White supremacy and its manifestations in a Bizarro world in which all racial experiences are legally and morally equal and race-conscious exclusion and race-conscious inclusion are legally and morally the same.

While Wechsler’s analysis of *Brown* “has largely been forgotten,”²⁷¹ the abstractional, ahistorical, and acontextual components of his approach have not been discarded and left in the jurisprudential dustbin. In 2007 the Supreme Court issued its decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.²⁷² The Court, by a 5-4 vote, held that voluntary race-conscious pupil assignment plans adopted by elected school boards in Seattle, Washington and Jefferson County, Kentucky violated the Equal Protection Clause.²⁷³ Chief Justice John G. Roberts, Jr., writing for a plurality of the Court, stated:

because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.²⁷⁴

Roberts continued:

²⁷⁰ Penelope Seator, *Judicial Indifference to Pornography’s Harm: American Booksellers v. Hudnut*, 17 GOLDEN GATE U. L. REV. 297, 315 n.105 (1987).

²⁷¹ Karlan, *supra* note 192, at 1050.

²⁷² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

²⁷³ The Court’s decision is examined in Michelle Adams, *Is Integration a Discriminatory Purpose*, 96 IOWA L. REV. 837 (2011); Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007); John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631 (2007–2008); Siegel, *From Colorblindness to Antibalkanization, supra* note 267; Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565 (2007–2008); Ronald Turner, *Plessy 2.0*, 13 LEWIS & CLARK L. REV. 861 (2009); Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251 (2008) [hereinafter Turner, *The Voluntary School Integration Cases*].

²⁷⁴ *Parents Involved*, 551 U.S. at 726 (plurality opinion).

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class. Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors a human being's race will never be achieved.²⁷⁵

Of particular relevance to this project is Chief Justice Roberts' discussion and description of *Brown*. Joined by Justices Antonin Scalia, Clarence Thomas, and Samuel Anthony Alito, Jr., and referencing Justice Harlan's "Our Constitution is color-blind" passage in *Plessy*,²⁷⁶ Roberts opined that

when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education*, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.²⁷⁷

A citation accompanying this passage included this parenthetical and partial quote from *Brown*: "The impact [of segregation] is greater when it has the sanction of the law."²⁷⁸ It is noteworthy, and problematic, that Roberts did not quote the remainder

²⁷⁵ *Id.* at 730–31 (citations, footnote, brackets, and internal quotation marks omitted).

²⁷⁶ *See id.* at 730 n.14; *supra* note 91 and accompanying text. Concurring, Justice Thomas opined that his "view of the Constitution is Justice Harlan's view in *Plessy*: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" *Parents Involved*, 551 U.S. at 772 (Thomas, J., concurring); *see also id.* at 772–73 and citations contained therein. Justice Kennedy expressed his view that Harlan's statement "was most certainly justified in the context of his dissent in *Plessy*. . ." *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment). "[A]s an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle." *Id.*

²⁷⁷ *Parents Involved*, 551 U.S. at 746 (plurality opinion) (citation omitted).

²⁷⁸ *Id.* (alteration in original) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)). *See supra* note 161 and accompanying text.

of that sentence: “for the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group.”²⁷⁹ Nor did he quote the sentence preceding his partial quotation: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children.”²⁸⁰ The not-quoted passages make clear that the *Brown* Court was addressing, not just or only racial classification, but state conduct that specifically subordinated African Americans and harmed black children.²⁸¹

Noting the debate between the parties and their *amici* as to “which side is more faithful to the heritage of *Brown*,”²⁸² Chief Justice Roberts wrote that:

the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” . . . What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?²⁸³

He then quoted a statement made by one of the *Brown* lawyers, Robert Carter, in the 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.²⁸⁴

“There is no ambiguity in that statement,” Roberts declared, and “it was that position that prevailed in this Court”²⁸⁵ Refuting Roberts’ use of and reliance on his *Brown* argument, Carter (who was later appointed to the federal bench by

²⁷⁹ *Brown*, 347 U.S. at 494.

²⁸⁰ *Id.*

²⁸¹ See Karlan, *supra* note 192, at 1063.

²⁸² *Parents Involved*, 551 U.S. at 747 (plurality opinion).

²⁸³ *Id.* (citation omitted).

²⁸⁴ *Id.*

²⁸⁵ *Id.*; see also *id.* at 772 (Thomas, J., concurring) (stating that his view that the Constitution is colorblind “was the rallying cry for the lawyers who litigated *Brown*”).

President Richard M. Nixon) stated: “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.”²⁸⁶ In the years following *Brown*, Carter and his colleagues:

[F]elt the only way for a school board to determine whether its schools were divided into black and white schools was to take a race census. We would then use the results to achieve as many integrated schools as possible. We were met with a great deal of criticism; people argued that if we were trying to build a color-blind society, then to use race as a criterion was moving backwards. Some of these people may have been sincere—but most were hypocrites, with no interest in breaking down existing racial barriers.²⁸⁷

Chief Justice Roberts also opined that the Court’s precedents make clear “that the Equal Protection Clause ‘protect[s] *persons*, not *groups*. . . .’”²⁸⁸ “This fundamental principle goes back, in this context, to *Brown* itself.”²⁸⁹ Interestingly, the citation accompanying this sentence was not to *Brown* but was instead to this quotation from the Court’s 1955 remedial decision in *Brown II*.²⁹⁰ “At stake is the *personal* interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis.”²⁹¹ The ellipsis in the quote omits this language in *Brown II*: “as soon as practicable.”²⁹² Effectuation of the *Brown* plaintiffs’ interest in admission to public schools “as soon as practicable” and “on a nondiscriminatory basis”:

²⁸⁶ Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (quoting senior federal judge Robert Carter); see also *id.* (quoting *Brown* lawyer William T. Coleman that the Court’s decision in *Parents Involved* “is 100 percent wrong” and is “dirty pool”).

²⁸⁷ ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 175 (2005).

²⁸⁸ *Parents Involved*, 551 U.S. at 743 (alteration in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

²⁸⁹ *Id.*

²⁹⁰ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

²⁹¹ *Parents Involved*, 551 U.S. at 743 (plurality opinion) (quoting *Brown II*, 349 U.S. at 300 (emphasis added)).

²⁹² *Brown II*, 349 U.S. at 300.

[M]ay call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.²⁹³

The Court remanded the Segregation Cases to the lower courts for the entry of orders and decrees “as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”²⁹⁴ As can be seen, *Brown II* in no way stands for the proposition suggested by Roberts—that one can find in the Court’s 1954 decision a fundamental principle that the Equal Protection Clause protects only individuals and not groups.

Chief Justice Roberts also stated, astonishingly, that “[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”²⁹⁵ (Recall Wechsler’s observation that he could not go to lunch with Charles Hamilton Houston.)²⁹⁶ “This recasting of *Brown* implies not only a symmetry between blacks and whites in the Jim Crow south under segregation, but that the forced segregation of Linda Brown is somehow equivalent to the measured integration of Joshua McDonald.”²⁹⁷ A dissenting Justice John Paul Stevens responded that Roberts “fails to note that 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 the Court’s most important decisions.”²⁹⁸

²⁹³ *Id.*

²⁹⁴ *Id.* at 301.

²⁹⁵ *Parents Involved*, 551 U.S. at 747 (plurality opinion).

²⁹⁶ *See supra* Part II.D.

²⁹⁷ Powell & Menendian, *supra* note 273, at 672; *see also* Liu, *supra* note 108, at 64 (“the rationale for constitutional parity between Joshua McDonald and Linda Brown lies in Professor Wechsler’s argument” that the question posed by state-mandated segregation is in the denial of the freedom of association).

In the Jefferson County, Kentucky case before the Court Crystal Meredith sought to enroll her son, Joshua McDonald, in a school one mile from her home and filed suit when he was assigned to another school. *See Parents Involved*, 551 U.S. at 717.

²⁹⁸ *Parents Involved*, 551 U.S. at 799 (Stevens, J., dissenting). Justice Stevens noted that in *Brewer v. Quatterman*, 550 U.S. 286 (2007), a dissenting Chief Justice Roberts stated: “It is a familiar adage that history is written by the victors.” *Parents Involved*, 551 U.S. at 799.

Chief Justice Roberts closed his plurality opinion with this tautological observation: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁹⁹ Notably absent from Roberts’ “stop discriminating” platitude is any indication of an understanding that not all “discrimination” or differential treatment is the same, “that it is often desirable and sometimes necessary to treat people differently.”³⁰⁰ To prohibit discrimination “is not to forbid distinguishing between people—differentiation is important and even necessary in some instances.”³⁰¹ In matters of race and racial discrimination social context, culture, and history can be critical to separating wrongful discrimination violative of the principle of racial equality from lawful differential treatment employed in pursuit of that principle.³⁰²

While some may believe that the Chief Justice’s “stop discriminating” statement has a “verbal and intellectual fluency,” his all-consideration-of-race-is-symmetrical equal protection analysis views the issues presented in *Parents Involved* from a “Wechslerian distance” and fails “to attend to the human salience of the distinction between exclusion and inclusion.”³⁰³ Roberts’ formalistic approach reduces the equal-protection mandate to an ahistorical and acontextual prohibition of the classification of people by race in all circumstances,³⁰⁴ and “reduced complex and multifaceted legal, social, and political issues”³⁰⁵ to the abstractional slogan “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³⁰⁶ This conceptualization of “racial neutrality” grounded in a *symmetry premise*—all considerations of race are symmetrical and equally suspect—recognizes no constitutional difference between racial

²⁹⁹ *Parents Involved*, 551 U.S. at 748 (plurality opinion). “This tautology reconstitutes the very concept of discrimination as any antidiscrimination remedy that displaces the expectations of whites with regard to the racial status quo.” Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whiteness Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 117 (2010).

³⁰⁰ DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 2, 4 (2008).

³⁰¹ *Id.* at 172.

³⁰² *See id.* at 28.

³⁰³ Nussbaum, *supra* note 254, at 91.

³⁰⁴ *See* Dorf, *supra* note 267, at 1294.

³⁰⁵ Turner, *Plessy 2.0*, *supra* note 273, at 918.

³⁰⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion). I have argued elsewhere that the Court’s approach in *Parents Involved* is reminiscent of and resurrects certain problematic aspects of *Plessy*’s construction and constriction of the Equal Protection Clause. Turner, *Plessy 2.0*, *supra* note 273.

segregation and the pursuit of racial integration by those who invoke the non-neutral Equal Protection Clause.³⁰⁷ In his concurring opinion in *Parents Involved* Justice Anthony Kennedy argued that Roberts' "stop discriminating" statement "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."³⁰⁸ A dissenting Justice Stephen G. Breyer, noting that he did "not claim to know how best to stop harmful discrimination,"³⁰⁹ wrote that "it is for" the people "to decide . . . whether the best 'way to stop discrimination on the basis of race is to stop discriminating on the basis of race.' . . . That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria."³¹⁰

In sum, the *Parents Involved* plurality, like Wechsler, disregarded this nation's inclusion/exclusion asymmetry in matters of race, choosing an abstractional, ahistorical, and acontextual formalism over the historical analysis set out in Justice Breyer's dissent and his perceptive observation that *Brown* "sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live."³¹¹ How we actually live and, because the "past is never dead,"³¹² have lived, not as a matter of preferred principles or "doctrines . . . espouse[d] as abstract truths"³¹³ but with due regard for and an unflinching recognition of this nation's history and "living memory of institutionalized racism, segregation" and "shameful patterns of discrimination and racial disadvantage."³¹⁴

³⁰⁷ See Karlan, *supra* note 192, at 1058 ("[N]on-neutrality is a product of constitutional choices—most explicitly in the Fifteenth Amendment, but implicitly in the Fourteenth as well—rather than judicial willfulness or will."); Pollak, *Racial Discrimination and Judicial Integrity*, *supra* note 188, at 31 ("[T]he decisive constitutional principles here relevant are in a vital sense not neutral," as the Civil War Amendments "were fashioned to one major end—an end to which we are only now making substantive strides—the full emancipation of the Negro.").

³⁰⁸ *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted).

³⁰⁹ *Id.* at 862 (Breyer, J., dissenting) (citations omitted).

³¹⁰ *Id.* at 862–63 (citations omitted).

³¹¹ *Id.* at 867–68 (Breyer, J., dissenting).

³¹² FAULKNER, *supra* note 3.

³¹³ MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 30 (1964).

³¹⁴ JEREMY WALDRON, THE HARM IN HATE SPEECH 102 (2012).

CONCLUSION

Professor Herbert Wechsler's famous *Neutral Principles* article presented an interesting and important discussion of the legitimacy of judicial review and principled adjudication, as well as several provocative observations regarding the Supreme Court's seminal decision in *Brown v. Board of Education*. His analysis of the issue of the constitutionality of racial segregation in public schools yielded a view of *Brown* as a decision that did not satisfy his neutral principles standard; set forth what he considered to be the "point in *Plessy*"³¹⁵ and questioned *Brown*'s conclusion that state-mandated racial segregation in public schools harmed black children; and sought to reframe the issue before the Court as one of the denial of the freedom of association to those who wished to avoid desegregation and racial integration. Notably absent from his 1959 account was an appreciation of the social meaning of racial segregation and racial isolation, and an acknowledgment of critical aspects of this nation's history and the lived experiences of those subjected to and adversely affected by such subordination and then-extant racialized realities. Interestingly, the posited "racial neutrality" grounded in and flowing from Wechsler's abstractional, ahistorical, and acontextual approach and critique of *Brown* can be seen in *Parents Involved*'s recent characterization of *Brown*.³¹⁶ Thus, "[n]eutral principles the idea, if not *Neutral Principles* the article, seems to be winning the struggle to claim *Brown* for itself."³¹⁷

³¹⁵ Wechsler, *supra* note 1, at 19, 33 and accompanying text.

³¹⁶ See Karlan, *supra* note 192, at 1051.

³¹⁷ *Id.*