

# *Parents Involved* and the Meaning of *Brown*: An Old Debate Renewed

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## I. INTRODUCTION

The debate over the meaning of *Brown v. Board of Education*<sup>1</sup> in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>2</sup> exemplifies the long-running disagreement over the meaning of racial discrimination under the Constitution. One approach, reflected in the *Parents Involved* majority opinion by Chief Justice Roberts and in the concurring opinion by Justice Thomas, endorses colorblindness: the view that race is virtually always and everywhere irrelevant to public policy. Another approach, reflected in the dissenting opinions of Justices Stevens and Breyer, appears to embrace anti-subordination: the view that promoting interracial association is desirable as a matter of principle because it seeks to overcome the stigma that has long attached to people of color in the United States.<sup>3</sup>

This Article examines some of the jurisprudential roots of the racial discrimination debate, tracing the issue back to *Brown* and its immediate aftermath but finding the seeds of the disagreement in the ambiguities of the first Justice Harlan's celebrated dissenting opinion in *Plessy v. Ferguson*.<sup>4</sup> The tensions between the two approaches did not matter in

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1. 347 U.S. 483 (1954).

2. 127 S. Ct. 2738 (2007).

3. These are not the only possible approaches. Indeed, Justice Kennedy, whose opinion concurring in the judgment determined the outcome in *Parents Involved*, attempted to stake out an intermediate position. His basic sympathies clearly lay with the colorblind approach; he was receptive to some consideration of race but rejected the pupil-assignment policies at issue as placing excessive weight on that factor. This Article focuses mainly on the two principal approaches described in the text.

4. 163 U.S. 537 (1896).

*Plessy* because segregation was impermissible under either theory, but the two approaches pointed in opposite directions in *Parents Involved*. Part II offers an overview of the Seattle and Louisville policies that were struck down in *Parents Involved*. Part III examines the various opinions in *Parents Involved* to illuminate the basic theoretical differences that divided the Court. Part IV examines the iconic decision in *Brown* and explores the aftermath of that ruling as lower courts struggled to determine how to remedy unconstitutional school segregation with little guidance from the Supreme Court, which did not grapple with remedial complexities for more than a dozen years after handing down its landmark ruling. Finally, Part V examines the complexities of Justice Harlan's *Plessy* dissent and how those complexities continue to reverberate in the contemporary debate about racial discrimination.

## II. THE STUDENT-ASSIGNMENT POLICIES IN *PARENTS INVOLVED*

The Supreme Court rejected voluntary efforts by public school districts in Seattle and Louisville to promote a more heterogeneous student body by taking race into account in assigning pupils to specific schools.<sup>5</sup> Although the two cities have very different histories, their past racial practices had received attention from the Supreme Court.<sup>6</sup> Perhaps the most obvious difference between the two districts is that the Seattle schools had never been legally segregated,<sup>7</sup> whereas the Louisville schools had been for many decades.<sup>8</sup> In fact, the Louisville schools were declared unitary only a few years before the district adopted the policy that was struck down in *Parents Involved*.<sup>9</sup>

The details of the Seattle and Louisville policies vary, but both districts sought to keep the racial demography of each school relatively close to the overall pattern within the district as a whole. The Seattle policy applied only to the city's ten high schools. The school board tried to keep the white and nonwhite percentages within 10 points of the overall figures for the district, which was 41% white; the permissible variation

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5. Seattle has a city-based school district. Louisville has long had a metropolitan school district: the Jefferson County Public Schools. This difference does not affect any of the legal issues at stake in the *Parents Involved* decision.

6. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (striking down a state initiative that limited the ability of local school boards to promote racially diverse student bodies); *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down a Louisville racial zoning ordinance).

7. *Parents Involved*, 127 S. Ct. at 2747.

8. *Id.* at 2749. The Louisville schools had long been segregated by law when *Brown* was decided. See *Newburg Area Council, Inc. v. Bd. of Educ.*, 489 F.2d 925, 927-28 (6th Cir. 1973), *vacated and remanded on other grounds*, 418 U.S. 918, *on remand*, 510 F.2d 1358 (6th Cir. 1974). Nearly twenty years after *Brown*, the Louisville-Jefferson County schools remained unconstitutionally segregated. *Id.* at 929.

9. *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000).

was later increased to 15 percentage points.<sup>10</sup> The Louisville policy applied to all schools in the Jefferson County school system and sought to keep the African American enrollment in each school between 15 and 50% in a district whose overall enrollment was about 34 percent African American.<sup>11</sup>

Significantly, both school boards adopted their policies to promote integration: to have a more racially diverse student body in each affected school. They based their policies on the notion that promoting integration was legally and morally a worthy goal and that considering race for this beneficent purpose was vastly different from using race as a device to promote segregation.<sup>12</sup> The plaintiffs disagreed; they argued that race was an illegitimate factor in pupil assignment, no matter why that factor was used and no matter how much other factors affected individual assignments.<sup>13</sup>

### III. THE *PARENTS INVOLVED* OPINIONS

Chief Justice Roberts, joined in full by Justices Scalia, Thomas, and Alito, thought that *Parents Involved* was an easy case. Resolving the case required the Court to apply the lesson of *Brown*. Especially in the educational context, the Chief Justice wrote, “history will be heard.”<sup>14</sup> For him, the teaching of history was clear: considering race in assigning children to public schools “accord[s] differential treatment on the basis of race.”<sup>15</sup> Such assignments impermissibly “determine admission to public schools on a racial basis.”<sup>16</sup> Moreover, in Chief Justice Roberts’s view, the solution to our nation’s racial problems was equally simple: “The

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10. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2747 (2007). For a more detailed description, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169–71 (9th Cir. 2005) (en banc), *rev’d*, 127 S. Ct. 2738 (2007). The “nonwhite” student population included slightly more Asians than African Americans; each of those groups made up nearly one-fourth of the pupils. The Seattle schools had a smaller but appreciable proportion of Latinos as well as some Native Americans. Students in those groups were also classified as “nonwhite.” See *Parents Involved*, 127 S. Ct. at 2747 n.2.

11. *Id.* at 2749–50. For a more detailed description, see *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 841–48 (W.D. Ky. 2004), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev’d sub nom. Parents Involved*, 127 S. Ct. 2738.

12. Brief for Respondents at 2, 24–33, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908); Brief for Respondents at 16–29, *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (U.S. Oct. 10, 2006).

13. Brief of Petitioner at 25–27, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (No. 05-908); see also Brief of Petitioner at 6–7, *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (U.S. Aug. 17, 2006) (arguing that the race-conscious plans are generally impermissible).

14. *Parents Involved*, 127 S. Ct. at 2767.

15. *Id.*

16. *Id.* at 2768.

way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>17</sup>

Justice Thomas went even further, suggesting that arguments supporting the Seattle and Louisville programs were “reminiscent of [the position] advocated by the segregationists in *Brown*.”<sup>18</sup> He added that, although “*Brown* decisively rejected” the arguments of the segregationists, anyone who supports those programs “replicates them to a distressing extent.”<sup>19</sup> Thomas denied the premise that the programs were about integration at all. He explained that “outside of the context of remediation for past de jure segregation, ‘integration’ is simply racial balancing” and that “racial imbalance without intentional state action to separate the races does not amount to segregation.”<sup>20</sup> Moreover, he rejected the notion that promoting integration was legitimate, let alone beneficent. In his words, “[E]very time the government uses racial criteria to ‘bring the races together,’ someone gets excluded, and the person excluded suffers an injury solely because of his or her race.”<sup>21</sup>

But history speaks in different voices. Justice Kennedy, although generally sympathetic to opponents of affirmative action in general and of the Seattle and Louisville plans in particular, thought that Chief Justice Roberts had oversimplified the issues. According to Kennedy, “Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution,” as that offered by the Chief Justice: that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>22</sup> Kennedy thought that history teaches a more complicated lesson: “The enduring hope is that race should not matter; the reality is that too often it does.”<sup>23</sup> While the school boards might have had a compelling interest in promoting diversity, he thought that the means they had chosen were not narrowly tailored to achieve that worthy goal.

The dissenters, of course, took a rather different view. Justice Stevens sharply criticized Chief Justice Roberts for oversimplifying what *Brown* was all about. *Brown* did not, according to Stevens, condemn all policies that used race to determine where students could go to school: “The Chief Justice fails to note that it was only black children who were so ordered; indeed, the history books do not tell stories of white children

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17. *Id.*

18. *Id.* (Thomas, J., concurring).

19. *Id.* at 2783.

20. *Id.* at 2769 n.2.

21. *Id.* at 2775 (citation omitted).

22. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *id.* at 2768).

23. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

struggling to attend black schools.”<sup>24</sup> Justice Stevens acerbically concluded that “no Member of the Court that I joined in 1975 [including Roberts’s mentor, then-Justice Rehnquist] would have agreed with today’s decision.”<sup>25</sup>

Justice Breyer, who wrote the principal dissent that was joined by Justices Stevens, Souter, and Ginsburg, went even further. According to Justice Breyer, *Brown* did not reject all governmental consideration of race; rather, it rejected segregation policies that “perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination.”<sup>26</sup> “The lesson of history,” Breyer explained, “is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration.”<sup>27</sup>

The *Parents Involved* Court was ultimately divided between two very different notions of the meaning of racial discrimination under the Constitution. According to one view, race is an impermissible factor in governmental decision-making. According to the other, there is no moral equivalence between public policies that seek to bring persons of different races together and those that aim to keep them apart. Adherents to both views claimed to draw their inspiration from the iconic ruling in *Brown*. A careful look at *Brown* illustrates how the justices in *Parents Involved* could draw such different lessons from a case that is now more than half a century old.

#### IV. THE ENIGMATIC LESSON OF *BROWN*

The debate among the *Parents Involved* justices was about the meaning of *Brown*, but the unanimous ruling in *Brown* concealed a similar debate about what the decision actually meant and how to remedy the constitutional evil of segregation. The opinion in *Brown* contains language that can be read in different ways, and it was indeed read in different ways in *Parents Involved*. This section first explains the ambiguities of the Supreme Court’s opinions in both *Brown* decisions: the 1954 ruling on liability and the 1955 ruling on remedy. Next it explores the generally limited reading that the lower federal courts gave to *Brown*. Finally, this section examines the Supreme Court’s later insistence on integration but notes that this insistence did not resolve the inherent ambiguities in the original *Brown* opinion.

*Brown* did say that the “separate but equal” doctrine had “no place” in public education and that “[s]eparate educational facilities are

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24. *Id.* at 2798 (Stevens, J., dissenting).

25. *Id.* at 2800.

26. *Id.* at 2836 (Breyer, J., dissenting).

27. *Id.* (citation omitted).

inherently unequal.”<sup>28</sup> Moreover, the *Brown* Court stated that “[t]o separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>29</sup> However, these statements do not unequivocally reflect a colorblind view of the Constitution. Before making the statements, the *Brown* Court had phrased “the question presented” in terms that focused only on the effects of segregation on African American children: “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?”<sup>30</sup>

The remedial ruling the following year in *Brown II*<sup>31</sup> was equally ambiguous. The brief opinion in *Brown II* simply reiterated that *Brown I* had articulated “the fundamental principle that racial discrimination in public education is unconstitutional” and that “[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.”<sup>32</sup> The Supreme Court then remanded the cases to the trial courts “to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”<sup>33</sup> This cryptic opinion did not define “racial discrimination” or “racially nondiscriminatory basis,” leaving the resolution of these questions to the lower courts.

Not surprisingly, the Court’s studied ambiguity generated uncertainty and confusion. The ambiguity involved the same issue that lay at the heart of the *Parents Involved* debate: eliminating segregation versus promoting integration. Was the remedy for the constitutional violation that *Brown* had identified simply to strike down all laws and policies mandating segregated schools, or was it to require that children of different races attend school together? If the latter, how many children were to attend which schools, and when should they do so?

One influential approach, assumed to have been written by Chief Judge John Parker of the U.S. Court of Appeals for the Fourth Circuit in the South Carolina case, *Briggs v. Elliott*,<sup>34</sup> took the former view.<sup>35</sup> The

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28. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

29. *Id.* at 494.

30. *Id.* at 493 (emphasis added).

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

32. *Id.* at 298.

33. *Id.* at 301.

34. 132 F. Supp. 776 (E.D.S.C. 1955) (3-judge court) (per curiam).

Supreme Court, he wrote, "has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend."<sup>36</sup> He added: "What [the Court] has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination."<sup>37</sup> That is, the Constitution "merely forbids the use of governmental power to enforce segregation."<sup>38</sup> Many other federal judges in the South relied on the so-called Parker dictum to justify a restrictive reading of *Brown*.<sup>39</sup>

The Supreme Court largely avoided resolving the uncertainty. To be sure, *Cooper v. Aaron*,<sup>40</sup> in an extraordinary opinion signed by all nine justices, reiterated the constitutional principles announced in *Brown*. However, that decision was limited; it responded to extreme defiance led by Governor Orval Faubus of Arkansas which prompted President Eisenhower to dispatch federal troops to Little Rock to enforce a district judge's order desegregating Central High School.<sup>41</sup> Not until 1968, a full thirteen years after *Brown II*, did the justices return to the remedial question in *Green v. County School Board*.<sup>42</sup> By then, both Congress and the executive branch had taken the lead in dismantling the rigid segregation of public schools. The Elementary and Secondary Education Act (ESEA) of 1965<sup>43</sup> made unprecedented amounts of federal financial assistance available to public schools, but Title VI of the Civil Rights Act of 1964<sup>44</sup>

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35. A quarter-century earlier, the Senate rejected Parker's nomination for a seat on the Supreme Court in large measure because of his perceived hostility to civil rights for African Americans. See Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 414 (1993). Nevertheless, Parker was not completely unsympathetic to claims of racial discrimination. See, e.g., *Alston v. Sch. Bd.*, 112 F.2d 992 (4th Cir. 1940) (reversing the district court and declaring unconstitutional a Norfolk, Virginia salary schedule that explicitly discriminated against African American teachers).

36. *Briggs*, 132 F. Supp. at 777.

37. *Id.*

38. *Id.*

39. See JACK W. PELTASON, FIFTY-EIGHT LONELY MEN 22-23 (1961).

40. 358 U.S. 1 (1958).

41. See generally TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION (1984); IRVING J. SPITZBERG, RACIAL POLITICS IN LITTLE ROCK, 1954-1964 (1987); Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997). For the perspective of one of the Little Rock Nine, see MELBA PATTILLO BEALS, WARRIORS DON'T CRY (1994). For the perspective of one of the local NAACP leaders who supported the students who desegregated Central High School, see DAISY BATES, THE LONG SHADOW OF LITTLE ROCK (1962).

42. 391 U.S. 430 (1968).

43. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941 (2000 & Supp. IV 2004)).

44. Pub. L. No. 88-352, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4 (2000 & Supp. IV 2004)).

prohibited recipients of federal money from engaging in racial discrimination. Many southern school districts chose to desegregate in order to retain their eligibility for ESEA funds.<sup>45</sup>

In *Green*, which addressed the question of remedy a full thirteen years after the cryptic opinion in *Brown II*, the Court stated: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."<sup>46</sup> In referring to a "plan" that must "work," the Court clearly meant that students of different races must actually be attending school with each other. The school board had been using a "freedom of choice" plan under which children could choose which school they would attend.<sup>47</sup> The Court determined, however, that the "freedom of choice" plan was insufficient:

In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.<sup>48</sup>

However adequate a freedom of choice plan might have been as an immediate response to the school segregation cases, the Court found it "relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.'"<sup>49</sup> It was too late in the day to temporize about desegregation: "The time for mere 'deliberate speed' has run out."<sup>50</sup> Rejecting the school board's argument that the plaintiffs were seeking "compulsory integration,"<sup>51</sup> the Court pointed out that "not a single white child has chosen to attend the [previously all-African American] school" and that 85% of the African American children continued to attend that school.<sup>52</sup> In short, the test for whether a plan worked was whether it resulted in a racially mixed student body.

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45. See generally GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* (1969).

46. 391 U.S. at 439.

47. *Id.* at 433-34. The board adopted the freedom of choice plan in 1965 to remain eligible for federal financial assistance. For the previous decade, students in New Kent County and elsewhere in Virginia were assigned to schools by a state pupil-placement agency that was established as part of the commonwealth's Massive Resistance to *Brown*. See *id.* at 433; see generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* 108-18, 126-34 (1969); JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA* 30-107 (1976).

48. *Green*, 391 U.S. at 437.

49. *Id.* at 438.

50. *Id.* at 438 (quoting *Griffin v. County Sch. Bd.*, 377 U.S. 218, 234 (1964)).

51. *Id.* at 437.

52. *Id.* at 441.



Although the *Green* Court rejected purely formal desegregation (under which laws and policies requiring separate schools were overturned while children of different races continued to attend different schools) and endorsed substantive desegregation (under which students of different races attended school together), there are at least two reasons for not reading too much into the decision. First, the New Kent County school district was located in a rural area with little or no residential segregation, a roughly equal population of African Americans and whites, and only two schools, one of which was open only to white children and the other to African Americans.<sup>53</sup> Getting children of both races into the same schools therefore would pose few logistical challenges. Second, the district had de jure segregation under the laws of Virginia, the birthplace of Massive Resistance to *Brown*.<sup>54</sup>

Accordingly, *Green* did not address situations like those in Seattle and Louisville. Neither of those school districts had legally segregated schools when they adopted the plans at issue in *Parents Involved*. The issue in *Parents Involved* was whether school boards in districts that were not legally segregated had either the discretion or the duty to promote integration. Moreover, post-*Green* decisions such as *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>55</sup> which required racially mixed student bodies in large urban school districts, also failed to address the issues presented in *Parents Involved* because they involved school districts that previously had been segregated by law. On the other hand, some of the reasoning in *Milliken v. Bradley*,<sup>56</sup> which exempted suburban school districts from the remedial provisions for unconstitutionally segregated central-city school districts unless the suburban districts also practiced unconstitutional segregation, suggested some limits on the extent of any proactive duty to maximize integration.

Neither *Brown* nor *Green* entirely resolved whether segregation was impermissible (1) because the Constitution is colorblind, as maintained by the majority in *Parents Involved*, or (2) because the Constitution embodied special solicitude for the rights and interests of African Americans under an anti-subordination theory, as suggested by the dissenters. This ambiguity did not begin in 1954, and it did not matter in *Brown* because segregation would have been unconstitutional under either approach. In fact, the debate over the meaning of racial discrimination can be traced back to perhaps the most celebrated dissenting opinion

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53. *Id.* at 432.

54. See generally BARTLEY, *supra* note 47.

55. 402 U.S. 1 (1971).

56. 418 U.S. 717 (1974).

in the history of the Supreme Court, that of Justice Harlan in the notorious *Plessy* case.

#### V. THE AMBIGUOUS *PLESSY* DISSENT

In his *Plessy* dissent, Justice Harlan famously wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>57</sup> This sentence appeared several times in the *Parents Involved* opinions, and it served as a brooding omnipresence even when it was not quoted. In fact, Justice Harlan's views were much more complex than any of the *Parents Involved* opinions recognized. A careful look at those opinions will demonstrate that colorblindness was only one aspect of Harlan's approach.

Justices Thomas and Kennedy specifically refer to Justice Harlan's color-blind language in *Parents Involved*, although Chief Justice Roberts did not. Much of the Roberts opinion draws on the color-blind theory without quoting or alluding to Harlan's language. That is, of course, the clear import of the epigram in the last substantive sentence of that opinion—that "to stop discrimination on the basis of race [we should] stop discriminating on the basis of race."<sup>58</sup> On the other hand, Justice Kennedy quoted only the first clause of the sentence, the one noting that the Constitution is color-blind.<sup>59</sup> He did so to note that "as 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."<sup>60</sup> Finally, Justice Thomas, on the other hand, quoted the entire sentence three times and made it the linchpin of his argument.<sup>61</sup>

In reality, Justice Harlan's opinion in *Plessy* is more complicated than this single sentence might suggest. This important fact was never mentioned by the *Parents Involved* dissenters nor recognized by those justices who invoked Justice Harlan's language. A careful reading of Harlan's opinion reveals support for both the color-blind approach and the anti-subordination theory. In addition to the famous and frequently quoted sentence discussed in the previous paragraphs, Justice Harlan also said: "I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are

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57. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

58. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

59. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy has quoted the second clause of the sentence elsewhere. See *Romer v. Evans*, 517 U.S. 620, 623 (1996) (beginning his opinion for the Court in a gay rights case as follows: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'").

60. *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

61. *Parents Involved*, 127 S. Ct. at 2782, 2787, 2788 (Thomas, J., concurring).

involved.”<sup>62</sup> If that were all he wrote, we could have more confidence that Justice Harlan really believed that “[o]ur Constitution is color-blind” and that governments could never consider race in formulating public policy. But that is not all he said in *Plessy*.

Other passages in Justice Harlan’s dissent make clear that he understood segregation to be a form of invidious treatment of African Americans. Discussing the Louisiana statute that required “equal but separate” railroad accommodations to separate white riders from passengers of color, Harlan remarked: “Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”<sup>63</sup> Two sentences later, he underscored the point to make sure that everyone got the message: “The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.”<sup>64</sup> Moreover, on the page after the reference to the color-blind Constitution, Harlan queried: “What can more certainly arouse race hate, what [can] more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?”<sup>65</sup>

Adding to the complexity of deciphering Harlan’s meaning is a jarring passage about the legal and constitutional status of Chinese in America.<sup>66</sup> He refers to persons from China as “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.”<sup>67</sup> What particularly exercises Harlan in this part of his opinion is that, in his view, a “Chinaman” of marginal legal status could ride in a white coach, whereas an African American who might have risked his life on behalf of the Union during the Civil War could not ride with whites who deemed themselves superior.<sup>68</sup> It is

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62. *Plessy v. Ferguson*, 163 U.S. 537, 554–55 (1896) (Harlan, J., dissenting).

63. *Id.* at 557.

64. *Id.*

65. *Id.* at 560.

66. Most leading discussions of *Plessy* do not mention this part of Harlan’s dissent. See, e.g., HARVEY FIRESIDE, *SEPARATE AND UNEQUAL* 215–19 (2004); RICHARD KLUGER, *SIMPLE JUSTICE* 81–83 (1975); CHARLES A. LOFGREN, *THE PLESSY CASE* 191–95 (1987); Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 *YALE L.J.* 637, 691–93 (1957).

67. *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

68. *Id.*

unclear whether Harlan's assessment was accurate. Three decades later, Mississippi classified Chinese residents as legally black under its school segregation laws.<sup>69</sup> In any event, Harlan's disparagement of the Chinese in *Plessy* was hardly unusual. He consistently displayed hostility toward them and regularly voted against claims asserted on their behalf.<sup>70</sup>

Putting aside the discussion of the Chinese, the other contrasting passages in the *Plessy* dissent suggest that Harlan viewed the Louisiana segregation law as invalid on either of two grounds: that it assigned railroad passengers to seats on the basis of their race, or that it treated African American people as subhuman and unfit for membership in civil society. As in *Brown*, resolving the tension between these theories was not important. Segregation laws were unconstitutional under either view. What matters is that Harlan's opinion—with or without the language about the Chinese—reflects his own ambivalence on the subject of race. This is hardly surprising in light of his inconsistent views about African Americans. After all, he had owned slaves and opposed both the Emancipation Proclamation and the Reconstruction amendments to the Constitution.<sup>71</sup> More to the point, Harlan's opinion does not unequivocally endorse the color-blind theory of the Constitution. An important strand of his argument reflects the anti-subordination approach that views discrimination against African Americans as more problematic than discrimination against whites, which in turn might suggest that efforts to promote integration are less objectionable than are efforts to promote segregation.

The same apparent inconsistencies in Harlan's *Plessy* dissent can be seen in other early cases construing the Fourteenth Amendment. For example, in the *Slaughter-House Cases*,<sup>72</sup> the Court's first foray into that provision, Justice Miller emphasized that "the one pervading purpose" of the amendment, "without which it would not have been even suggested," was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>73</sup> Seven years later, in *Strauder v. West Virginia*,<sup>74</sup>

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69. See *Gong Lum v. Rice*, 275 U.S. 78 (1927). On the other hand, within less than two decades of that ruling and before the end of the Second World War, Mississippi school districts voluntarily admitted Chinese students to white schools. See JAMES W. LOEWEN, *THE MISSISSIPPI CHINESE* 65–70, 93–96 (2d ed. 1988).

70. See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157–66 (1996) (summarizing Harlan's opinions in cases involving Chinese claimants); see also LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 121–22 (1999) (discussing Harlan's view of the Chinese as illuminating the nature of his racial attitudes).

71. See generally PRZYBYSZEWSKI, *supra* note 70; Westin, *supra* note 66.

72. 83 U.S. (16 Wall.) 36 (1873).

73. *Id.* at 71.

Justice Strong declared that it was "the colored race, for whose protection the amendment was primarily designed."<sup>75</sup> The Court in both of these cases, however, recognized that the Equal Protection Clause applies to all persons, not only African Americans, and contained language that at least implicitly condemned any form of racial discrimination.<sup>76</sup> In other words, Justice Harlan was hardly alone when he suggested that there might be more than one way to understand the Equal Protection Clause when it comes to race.

## VI. CONCLUSION

Two important points suggest that the debate over *Brown* will not end any time soon, and indeed, that the debate did not even begin in 1954 with the original decision in that case. The first relates to the NAACP's position in *Brown*, which Chief Justice Roberts invoked in *Parents Involved* as support for the color-blind approach.<sup>77</sup> The NAACP was not of one mind about its approach to segregated schools. For many years the organization inconclusively debated two different strategies for improving educational opportunities for African Americans: an equalization strategy that sought to rely on the separate-but-equal doctrine to force improvements in African American schools, and a direct-attack strategy that would seek to have *Plessy* overruled and replaced by a mandate to desegregate public education.<sup>78</sup> Only after winning several cases involving graduate and professional education did the NAACP turn to elementary and secondary schools.<sup>79</sup> At this point the organization turned decisively toward the direct attack.<sup>80</sup> In at least a rhetorical sense, these

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74. 100 U.S. 303 (1880).

75. *Id.* at 307. *See also id.* at 306 (providing that 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").

76. *See id.* at 307 ("What is this but declaring that the law in the States shall be the same for the black as for the white . . . ?"); *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72 (disclaiming the notion that "no one else but the negro [sic] can share in [the] protection" of the Fourteenth Amendment and that the amendment prevents states from violating rights that "properly and necessarily fall within [its terms], though the party interested may not be of African descent").

77. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767–68 (2007) (quoting NAACP Brief on Reargument and Transcript of Oral Argument in *Brown I*).

78. *See generally* MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED SCHOOLS, 1925–50* (1987); *see also* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 146–52, 160–62, 204–12, 253–61 (2004); KLUGER, *supra* note 66, at 126–284; MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* 116–49 (1994) [hereinafter TUSHNET, *MAKING CIVIL RIGHTS LAW*].

79. *See, e.g.*, *McLaurin v. Okla. St. Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

80. The earlier cases, which challenged the complete absence of advanced higher educational opportunities for people of color in the South and border states, typically sought the admission of qualified black applicants to law schools and other advanced-degree programs. Even if courts did not

background facts are irrelevant. Some of the NAACP's arguments in *Brown* professed support for the color-blind Constitution. Perhaps, however, those arguments could be understood as part of a broader attack on the systematic exclusion of African Americans from mainstream society. Justice Breyer alluded to this possibility in his dissenting opinion when he referred to "the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation" before *Brown* was decided.<sup>81</sup>

The second point relates to this nation's changing demographics. The world in which we live and in which *Parents Involved* was decided differs in important respects from the world in which *Brown* was litigated. That was a world of black and white; there were, of course, other racial and ethnic groups in the United States half a century ago, but in most communities those groups were much less numerous and less recognized socially, culturally, and politically. Today this country is more racially and ethnically diverse and so are our public schools. The Seattle public schools were only 41% white when the *Parents Involved* lawsuit was filed, and they contained more Asian American students than African Americans.<sup>82</sup> Moreover, thinking about race is more complicated in a time when we can designate ourselves as multi-racial instead of having a census enumerator assign us to a single racial category.

In short, the *Brown* debate is far from over. Chief Justice Warren's quest for unanimity in *Brown* meant that the single opinion papered over differences within the Supreme Court, and the subsequent remand order provided only minimal guidance about how to remedy the unconstitutionality of segregated schools. If the debate neither began nor ended with *Brown*, it assuredly will not end with *Parents Involved*.

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order the applicants admitted to previously all-white schools, the relief typically would require at least that the state create new programs for blacks on a separate-but-equal basis, which provided further opportunities to contest the equality of the separate arrangements. In this sense, these cases were consistent either with direct attack or equalization. See Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3 (1986).

81. *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting). The NAACP focused not only on inferior schools but also on a wide range of racial discrimination in housing, voting, and the criminal justice system. See generally JACK GREENBERG, CRUSADERS IN THE COURTS (1994); KLARMAN, *supra* note 78; TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 78.

82. See *Parents Involved*, 127 S. Ct. at 2747.