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BETRAYAL OF THE CHILDREN WITH DOLLS: THE BROKEN PROMISE OF CONSTITUTIONAL PROTECTION FOR VICTIMS OF RACE DISCRIMINATION

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INTRODUCTION

Fifty years after the Supreme Court decision in *Brown v. Board of Education*,[1] Dr. Kenneth Clark's "doll study"[2] remains relevant and vital for practitioners and academics alike.[3] The powerful image of children in segregated schools who preferred white dolls to black dolls resonates as one of the lasting symbols of the Court's opinion. During

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1 347 U.S. 483 (1954).

2 Dr. Clark's study was originally published in 1950 as part of a White House conference on the welfare of children. *See* Kenneth B. Clark, The Effect of Prejudice and Discrimination on Personality Development, White House Midcentury Conference on Children and Youth (1950). Clark's findings were later published in 1955. KENNETH B. CLARK, PREJUDICE AND YOUR CHILD (2d ed. 1955) [hereinafter CLARK, PREJUDICE].

3 *See, e.g.*, John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in* Brown v. Board of Education *and* Loving v. Virginia, 15 CONST. COMMENTARY 215, 217 n.9 (1998) (suggesting that the Clark doll study was the most relevant social science citation in the *Brown* decision, in spite of the study's methodological flaws). Over the years, however, the Clark study has been questioned precisely for its methodological accuracy and inferential assumptions. *See* Michael Heise, Brown v. Board of Education, *Footnote 11, and the Multidisciplinarity of Law*, 90 CORNELL L. REV. 279, 293–95 (2004) (discussing the study's problems with causation, methodology, and psychological characterization); Allan Ides, *Tangled Up in* Brown, 47 How. L.J. 3, 12 (2003) (citing criticism of the Clark study for a "lack of scientific rigor and for [the] failure to support the specific thesis that segregation causes feelings of inferiority").

oral argument in one of *Brown*'s consolidated companion cases,[4] Thurgood Marshall referred to Clark's doll study as evidence that "appellants in this very case . . . were injured as a result of this segregation."[5] In response, John W. Davis, the attorney representing South Carolina, belittled the significance of the study,[6] citing evidence that African American children in northern states chose white dolls—and labeled black dolls as "bad"—at even greater rates than children from the segregated south.[7]

Davis's challenge to the reliability of the doll study, however, failed to diminish its powerful imagery. The study not only provided a vehicle for introducing social science evidence, but also reminded the Supreme Court of the victims' unique perspective.[8] In the study, child participants selected white or black dolls in response to a series of questions meant to reveal their racial preferences.[9] At various ages, a majority of the black children expressed a preference for the white dolls.[10] Rejection of the black dolls underscored the children's awareness of racial differences and highlighted the belief that with white dolls they could imagine a better life for themselves.

Robert Carter, who represented the *Brown* plaintiffs at oral argument, recognized the study's potential, calling it "an Aladdin's lamp." Carter, Marshall, and their NAACP colleagues used this study as a vehicle for explaining "white privilege"[11] to the Supreme Court.

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4 Brown v. Bd. of Educ., 344 U.S. 1 (1952) (consolidating *Brown* from four concurrent appeals in Kansas, South Carolina, Virginia, and the District of Columbia federal courts).

5 ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *Brown v. Board of Education of Topeka*, 1952–55, at 38 (Leon Friedman ed., 1969) [hereinafter ARGUMENT].

6 Clark's study has been criticized a great deal over the last fifty years. *See generally* A. James Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 W. RES. L. REV. 621, 623 (1963) (claiming that social science tends "to support racial separation in the schools" (emphasis removed)); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 69 (1960) (accusing Clark of engaging in "pseudo-scientific 'proof'").

7 ARGUMENT, *supra* note 5, at 59. According to Clark's study, 52% of the black children in the South thought the white doll was "nice," while 68% of the northern black children thought the white doll was "nice." Forty-nine percent of the black children in the South thought the black doll was "bad," while 71% of the children in the North thought the black doll was "bad." *Id.* at 58–59.

8 RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 408 (1976).

9 *See* CLARK, PREJUDICE, *supra* note 2, at 22–23. In order to determine racial preferences, the interviewers asked the children the following four questions: (1) give me the doll that you like to play with or the doll you like best; (2) give me the doll that is the nice doll; (3) give me the doll that looks bad; (4) give me the doll that is a nice color. *Id.* at 23.

10 *See* CLARK, PREJUDICE, *supra* note 2, at 23 n.3.

11 *See generally* STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 86–87 (1996) ("To people of color, who are victims of racism/white supremacy, race is a filter through which they see the world. Whites do not look at the world through this filter of racial awareness, even though they always constitute a race."); Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604

The *Brown* decision brought to the forefront many of the unfulfilled constitutional vows made to prior generations. At the time of the nation's independence, the Founders extended declarations of equality to only a select few.[12] Nearly a century later, following the Civil War, a new constitutional promise ensured that victims of slavery would share full rights of citizenship and that racial subordination would become a thing of the past.[13] In *Brown*, the Court acknowledged the failure of prior generations to fulfill this promise.[14]

Half a century later, this Symposium invites us to assess *Brown*'s aftermath and provides an opportunity to ask whether, on this third time around, our generation has kept the promise. Answers to this question should again be assessed from the same perspective as that which resonated with the Justices in *Brown*: the image of children choosing dolls. Claims of formal equality should be challenged if they conflict with the experiences of girls and boys on the playground, in their homes, and in their communities. In other words, *Brown*'s legacy should be judged by asking whether victims of race discrimination now receive genuinely equal treatment.

I
THE ORIGINAL PROMISE

The promise of equality to all citizens of the United States originated with the nation's independence, when Thomas Jefferson declared that "*all* men are created equal."[15] Subsequent constitutional text, however, diluted Jefferson's words. Still, the Articles of Confederation managed to avoid explicit divisions based upon race while lacking Jefferson's egalitarian vision.[16] The Constitution, however, conspicuously failed to deliver a commitment to equality comparable to the promises of the Declaration of Independence.[17] By

(1999) ("White privilege is the pervasive, structural, and generally invisible assumption that white people define a norm and Black people are 'others,' dangerous, and inferior.").

12 *See infra* text accompanying notes 15–20.

13 *See infra* text accompanying notes 27–33.

14 Brown v. Bd. of Educ., 347 U.S. 483, 490 (1954); *see* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1022 (1986) (noting "closer examination shows that the anti-subordination principle dominated the Court's analysis [in *Brown*]").

15 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

16 While drafting the Articles of Confederation, delegates overwhelmingly rejected a motion to amend the text to insert the word "white" so that the citizenship clause of those Articles would have read: "All white freemen of every State, excluding paupers, vagabonds, and so forth, shall be citizens of the United States." *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 9 (1992).

17 *See* Paul Finkleman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 416–17 (2001) (suggesting that the Framers insulated slavery and bypassed many opportunities to constrict it).

counting slaves as three-fifths of a person,[18] southern states secured more representative power in the new government than they would have if slaves, who had no right to vote, had not been counted at all.[19] As predicted by Gouverneur Morris during the Constitutional Convention, slavery became the "curse of heaven."[20]

Decades later, when Chief Justice Taney assessed the congressional authority to prohibit slavery in United States territories in *Dred Scott v. Sandford*,[21] he concluded that the founding generation only promised equality to those with European ancestry.[22] For guidance, Chief Justice Taney looked to the culture and values of the white majority.[23] The Framers "considered [African Americans] as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority."[24] Chief Justice Taney, therefore, concluded that the Constitution embodied the racism of the founding generation.[25] Chief Justice Taney's decision in *Dred Scott* substituted his views of racial superiority for the congressional decision to end slavery in territories of the United States.[26]

After the Civil War, members of the Reconstruction Congress amended the Constitution—not only to abolish slavery, but also to eradicate the racist ideology that Chief Justice Taney relied upon and to offer the victims of past discrimination new constitutional protection.[27] Framers of the Civil War Amendments predicted the threat posed by the dominant class of European Americans towards those of African ancestry.[28] In an 1866 debate, Oregon Senator George Wil-

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18 U.S. CONST. art. 1, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

19 *See* Finkleman, *supra* note 17, at 441–42 (explaining the impact of the Three-Fifths Clause on the electoral college).

20 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 411 (1966).

21 60 U.S. (19 How.) 393 (1856).

22 *Id.* at 406.

23 *Id.* at 404–05.

24 *Id.*

25 *See id.* at 409 ("We refer to these historical facts [of subjugation] for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted.").

26 In fact, throughout the opinion, Chief Justice Taney labeled African Americans as an inferior class or whites as a dominant race twenty-one times. *See* A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1703 (1996).

27 *See* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 309 (2004) (discussing the racist past leading to the Reconstruction Amendments and slow ideological reform that followed).

28 *See generally* Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 306 (1879) (

> At the time when they were incorporated into the Constitution, 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

liams explained that "there is a bitter and cruel prejudice against [those of African descent] everywhere, and a large minority of the people of this country to-day, if they had the power, would deprive them of all political and civil rights and reduce them to a state of abject servitude."[29] Ohio Senator Benjamin Wade added that blacks suffer "under the ban of a hostile race grinding them to powder."[30]

In order to transform such a society, Congress sought the constitutional authority to protect the civil rights of all U.S. citizens. Congressman John Bingham, primary author of the Fourteenth Amendment,[31] focused on the issue of race before declaring: "The spirit, the intent, the purpose of our Constitution is to secure equal and exact justice to all men. That has not been done."[32] Regardless of whether the original Framers promised racial equality in the past, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution made that promise explicit to future generations.[33]

Indeed, when the Supreme Court first considered the scope of the Fourteenth Amendment, a majority of the Justices emphasized the central importance of ending racial discrimination against those who had been enslaved. In the *Slaughter-House Cases*,[34] Justice Miller's majority opinion noted the historical background of the Amendment, explaining that "notwithstanding the formal recognition by those [Confederate] States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before."[35] This assessment led the Court to conclude that:

> [N]o one can fail to be impressed with the one pervading purpose found in [the Civil War Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean 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.[36]

> to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed.

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29 CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866) (debating questions regarding voting rights in Washington, D.C.).

30 *Id.* at 63 (distinguishing the plight of African Americans from that of "ladies of the land" to whom the Senator would not extend voting rights).

31 *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 58 (1993).

32 CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866).

33 U.S. CONST. amends. XIII, XIV, XV.

34 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

35 *Id.* at 70.

36 *Id.* at 71.

In mocking Justice Miller's limited vision of federal power to protect individual rights, critics often denigrate, rather than applaud, Miller's focus on ending racial subordination.[37] Such criticism fails to give credit to Miller's insight that the nation could not simply turn over authority to a dominant group dedicated to racial superiority if it was effectively to reverse *Dred Scott* and all it represented.[38] Furthermore, eradication of racist behavior required an active agenda of protective legislation and federal enforcement.[39]

In *Strauder v. West Virginia*, the Supreme Court again emphasized this understanding.[40] Invalidating a state law that limited jury service to white men, the Court explained the "true spirit and meaning"[41] of the Civil War Amendments:

> At the time when they were incorporated into the Constitution, 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 . . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted.[42]

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37 *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 76 (1997) ("[T]he *Slaughterhouse* case, in its central focus, had nothing to do with race, and the decision could therefore in no way he beneficial to black people."); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1119 (1953) (noting that "[t]he first of the things the Supreme Court has done to the initial section of the Fourteenth Amendment is to make its Privileges and Immunities Clause completely nugatory and useless"); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 627 (1994) (commenting on *Slaughter-House*'s flawed legal conclusions and incorrect judicial interpretations). Critics routinely target the *Slaughter-House* decision for articulating a narrow conception of the Fourteenth Amendment's Privileges and Immunities Clause and blame Justice Miller for the failure to incorporate the Bill of Rights. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 683 (2000) (arguing that the Supreme Court initially recognized the Privileges and Immunities Clause as a source for incorporating the Bill of Rights); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1111–15 (2000) (discussing the role of *Slaughter-House* in textual incorporation). *But see* William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 184 (2002) (challenging these critics for their failure to recognize Justice Miller's coherent framework for Federalism).

38 *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 70 (noting that the States began to impose significant burdens on black Americans, such that their "freedom was of little value," highlighting the need for constitutional protection for "the unfortunate race who had suffered so much").

39 *See* Rich, *supra* note 37, at 209 (citing Justice Miller's insight that a strong federal government is necessary to curtail threats from powerful state governments).

40 100 U.S. (10 Otto) 303 (1879) (holding unconstitutional a West Virginia statute that effectively denied blacks the right to serve as jurors).

41 *Id.* at 306.

42 *Id.*

The authors of the Fourteenth Amendment attempted to craft constitutional protection against such hostility through the Amendment, and the Supreme Court stated in *Strauder* that "[i]f this is the spirit and meaning of the [Fourteenth A]mendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers."[43]

In both the *Slaughter-House Cases* and *Strauder*, the Supreme Court promised the victims of slavery equality—not as viewed from the perspective of a jealous or vindictive majority, but rather as liberally construed by leaders attuued to the spirit of equality.[44] Critics of those opinions may challenge what appears to be the Court's limited scope of the Fourteenth Amendment.[45] In making that challenge, however, critics should not discount the constitutional promises contemporaneously construed by the Supreme Court. In terms consistent with the theme of this Article, the Court's initial interpretations confirmed that equality should be measured based upon the experiences of those who have suffered from past discriminatiou rather than being dictated by the views of an oppressive majority.

II
BREAKING THE PROMISE

Less than a decade after promulgating the Fourteenth Amendment, the federal government broke its commitment to former slaves and their progeny.[46] Through the Compromise of 1877, Republicans gained the presidency by promising to end Reconstruction. As a result, they traded away ongoing supervision of race relations in the southern states.[47] Supreme Court Justice Joseph Bradley cast the de-

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43 *Id.* at 307.

44 *Id.* at 306 (stating 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, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States").

45 In *Slaughter-House*, the Supreme Court expressed doubt that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [section five of the Fourteenth Amendment]." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873); *see* BLACK, *supra* note 37, at 6 (claiming that the Supreme Court "clobbered" the Fourteenth Amendment Privileges and Immunities Clause); Aynes, *supra* note 37, at 686 (arguing that Justice Miller was "hostile" toward the intended meaning of the Fourteenth Amendment); *see also* David S. Bogen, *The Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333 (2003) (summarizing and rejecting alternative critiques of the Supreme Court opinion in *Slaughter-House* and defending a narrower interpretation). *Strauder* repeated that assertion. 100 U.S. (10 Otto) at 307.

46 *See* RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 32–33 (2003).

47 *See id.* at 32; *see also* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 7 (1992) (indicating that the Compromise of 1877 also marked the beginning of the systematic exclusion of black voters from the southern electorate).

ciding vote to sanctify the agreement.[48] In addition, Justice Bradley wrote the 1883 opinion that limited congressional authority to address private acts of race discrimination.[49] That same year, in *Pace v. Alabama*,[50] the Court unanimously upheld laws imposing criminal punishment on interracial marriage, explaining that "punishment of each offending person, whether white or black, is the same" and therefore valid under the Equal Protection Clause.[51] With these opinions, the Court abandoned its resolve to protect former slaves from a domineering majority. Assessing these decisions, even children would have perceived the gap between the formal equality of the law and their experiences of inequality.

In *Plessy v. Ferguson*,[52] the Supreme Court broadened the premise accepted in *Pace*, upholding racial segregation and embedding the doctrine of "equal but separate" into constitutional jurisprudence.[53] According to the Court's opinion, authored by Justice Brown, Homer Plessy possessed an indiscernible "mixture of colored blood"[54] and under Louisiana law he could only ride in railway passenger cars to which, by race, he "belonged."[55] Upholding that law, the Court rejected the argument that "social prejudices may be overcome by legislation,"[56] and deferred "to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[57] The Court acknowledged the issues of racial dominance and inferiority,[58] concluding that "[i]f the civil and 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 Constitution of the United States cannot put them upon the same plane."[59]

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48 Justice Bradley cast the deciding vote as part of the commission certifying the 1876 presidential election of Rutherford B. Hayes. *See* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 33 (Melvin I. Urofsky ed., 1994).

49 The Civil Rights Cases, 109 U.S. 3 (1883).

50 106 U.S. 583 (1883).

51 *Id.* at 585.

52 163 U.S. 537 (1896).

53 *Id.* at 540. Six years earlier, the Supreme Court upheld a Mississippi statute requiring "equal, but separate, accommodations for the white and colored races" as applied solely to intrastate railroad transportation. Louisville, N.O. & Tex. Ry. Co. v. Mississippi, 133 U.S. 587, 588 (1890). Justices Harlan and Bradley dissented on grounds that the statute regulated commerce among the states. *Id.* at 595 (Harlan, J., dissenting).

54 *Plessy*, 163 U.S. at 541.

55 *Id.*

56 *Id.* at 551.

57 *Id.* at 550.

58 *Id.* at 551.

59 *Id.* at 551–52.

In dissent, Justice Harlan accepted the racist assumptions of the Court,[60] but also wrote with candor about the real purpose of the Louisiana law: acting "under the guise of giving equal accommodation for whites and blacks,"[61] the state placed "the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law."[62] Justice Harlan thus exposed the reality underlying the majority's myth of equal treatment.

Justice Harlan also recognized the echoes of *Dred Scott* in the majority's treatment of Homer Plessy.[63] The Supreme Court opinions of *Plessy* and *Dred Scott* share the assumption that courts must reify the views of racial superiority held by the dominant majority.[64] According to those views, the Constitution embodies the Framers' racist assumptions, embracing slavery in 1787 and segregated schools and facilities in 1868.[65]

The *Plessy* decision represents a hroad pattern of collective racial subordination.[66] Additional illustrations exist in the context of public schools, voting booths, and courtrooms. In all three, the government has primary responsibility for protecting and promoting rights of citizenship; yet, in all three, Supreme Court decisions helped cement a structure of white dominance.[67]

In the field of education, segregation also meant inferior treatment. Just three years after *Plessy*, the Supreme Court indicated that equal did not really mean "equal;" Justice Harlan's opinion for a unanimous Court held that "education of people in schools maintained by state taxation is a matter belonging to the respective states."[68] Based on its concern with federal "interference," the Court denied injunctive relief when the county "temporarily and for economic reasons" suspended the only available high school for African-

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60 *See id.* at 559 (Harlan, J., dissenting) ("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.").

61 *Id.* at 557.

62 *Id.* at 562.

63 *Id.* at 559 (noting that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case").

64 *See, e.g.*, R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 864–78 (2004) (analyzing the role of racial stigma in Supreme Court jurisprudence).

65 *See Plessy*, 163 U.S. at 544.

66 *See, e.g.*, Simeon C.R. McIntosh, *Reading* Dred Scott, Plessy, *and* Brown*: Toward a Constitutional Hermeneutics*, 38 HOW. L.J. 53, 70 (1994) ("*Plessy*, like *Dred Scott*, was a case about defining the political community, [the black] collective identity, and the role of the Court in that process.").

67 *See infra* Part IV.

68 Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 545 (1899).

American children.[69] In the subsequent *Berea College* case,[70] ostensibly deferring only to the state authority to regulate corporations, the Court effectively closed the door to private higher education for racial minorities by allowing states to prohibit colleges from simultaneously teaching persons of different races.[71] The Supreme Court became even more explicit in *Gong Lum v. Rice*,[72] upholding the right of states to bar "pure whites" from attending school with "the brown, yellow and black races."[73]

Congress explicitly protected voting rights with the enactment of the Fifteenth Amendment,[74] and African Americans voted in large numbers in the years immediately following the Civil War.[75] After a brief period of significant participation, however, whites engaged in a concerted campaign of violence, fraud, and alternative disenfranchisement schemes that systematically excluded blacks from the southern electorate.[76] In the fifteen years following the Compromise of 1877, the number of southern black voters dwindled by a half.[77]

In *Williams v. Mississippi*, the Supreme Court officially endorsed various devices used to block black voters.[78] At that time, the Mississippi constitution limited voters based upon payment of taxes, criminal history, and a discretionary test of literacy, which required voters to be able to understand or interpret a designated section of the state constitution.[79] An administrative officer had final authority to reject or register "whomsoever he [chose]."[80] Williams's attorney described these provisions as a "scheme . . . to abridge the suffrage of the colored electors in the State of Mississippi,"[81] but the Supreme Court unanimously upheld the law, noting that its reach included "weak and vicious white men as well as weak and vicious black men."[82]

Finally, even in the courtroom, the Supreme Court's initial protective stance in *Strauder* gave way to barriers, assuring that few, if any, minorities would serve on juries. In *Williams*, described above, Mississippi's statutory scheme permitted jury selection from a pool of "quali-

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69 *Id.*

70 Berea College v. Kentucky, 211 U.S. 45 (1908).

71 *Id.* at 58.

72 275 U.S. 78 (1927).

73 *Id.* at 82.

74 U.S. CONST. amend. XV.

75 *See* GROFMAN ET AL., *supra* note 47, at 5 (noting that in 1868, more than 700,000 blacks were registered to vote and a number held public offices).

76 *See id.* at 6–10.

77 *Id.* at 7.

78 170 U.S. 213 (1898).

79 *Id.* at 220–21.

80 *Id.* at 221.

81 *Id.* at 214.

82 *Id.* at 222.

fied" electors, which essentially prohibited African Americans from serving.[83]

Supreme Court decisions of the era that resulted in white domination of education,[84] voting,[85] and the criminal justice system[86] can be explained in terms of a prejudiced conception of "equality." In these cases, the Court justified its decision by reasoning that the laws at issue applied equally to each race. Whites could not attend school (or, for that matter, eat, sleep, or drink from a fountain) with blacks any more than blacks could attend white schools.[87] Literacy tests and morality qualifications for voters ostensibly applied with the same force to every race, just as both prosecutors and defense counsel were free to use peremptory challenges in any manner they chose.[88]

Even the children in segregated areas recognized that these practices conflicted with a sense of fairness and equality. Children living in communities with segregated school systems knew the difference between the "good" schools and "bad" schools, as much as they knew how to distinguish "nice" and "bad" dolls.[89] For instance, in Topeka, Linda Brown had to walk a mile in order to attend the Monroe School when she lived just three and a half blocks from the Sumner School, a school for white children;[90] in a Kansas winter those extra blocks must have seemed long and cold. Children in Mississippi knew that no African American would be elected to public office even where blacks made up a majority of the potential electorate.[91] They would also realize that only whites would be selected to serve on a jury. The Supreme Court's judicial rationalizations and disingenuous arguments that the laws applied equally bore no relationship to the reality experienced by black children at the time.

III
RESTORING THE PROMISE

The separate but equal doctrine embodied many myths of racial equality. Indeed, in order to fully comprehend the fundamental flaws in the doctrine, consider the image of children playing with dolls, for

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83 *Id.* at 214.

84 *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927); Berea College v. Kentucky, 211 U.S. 45 (1908); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

85 *See, e.g.*, Williams v. Mississippi, 170 U.S. 213 (1898).

86 *See, e.g., id.*

87 *See* KLUGER, *supra* note 8, at 88.

88 *See, e.g., Williams*, 170 U.S. at 223.

89 *See supra* text accompanying note 9–10.

90 *See* KLUGER, *supra* note 8, at 408.

91 *See* United States v. Mississippi, 380 U.S. 128, 131–32 (1965) (noting that, although in 1890 blacks made up a majority of qualified voters in Mississippi, various barriers designed to keep blacks from voting "worked so well" that by 1954 "only about 5% of the Negroes of voting age in Mississippi were registered").

whom the damaging effects were painfully clear. The *Brown* Court attempted to restore the promise made to these children decades earlier; instead of looking at the case as a test of the Framers' original intent,[92] the majority relied upon the reality of the racial dominance reflected in the choices made by those little boys and girls.[93]

Under Chief Justice Earl Warren, the Court took an "activist" role,[94] deviating from precedent and rejecting the equality myths.[95] The Court recognized that generations of enforced school segregation could not be corrected through passive reliance on "neighborhood schools" or alternative schemes designed to perpetuate racial identification.[96] Instead, the Court called for desegregation "root and branch,"[97] and authorized broad remedial authority to carry out that pledge.[98]

The new commitment recognized in *Brown* also found its way into the voting booth and the courtroom. Through a combination of constitutional amendment[99] and judicial decree,[100] poll taxes became a thing of the past. Likewise, "interpretation tests" were seen for their true purpose: "not [as] a test but a trap."[101] Eventually, the Court also upheld the congressional authority to end the use of literacy tests.[102]

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92 *See* Brown v. Bd. of Educ., 347 U.S. 483, 489 (concluding that arguments about the Framers' original intent behind the adoption of the Fourteenth Amendment were "inconclusive").

93 *Id.* at 494 n.11 (citing sociological and psychological evidence introduced by the petitioners displaying the detrimental effects of racial segregation).

94 *See* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971) (discussing the need for equitable remedies for state-imposed segregation); Green v. County Sch. Bd., 391 U.S. 430, 438–42 (1968) (stating that the county "freedom of choice" plan did not adequately desegregate and failed to create educational equality).

95 *See Brown*, 347 U.S. at 492 (noting that the Court must consider the effect of segregation on public education itself, not just the "tangible factors" like "buildings, curricula, qualifications and salaries of teachers").

96 *See, e.g., Green*, 391 U.S. at 441 (explaining that the county's "freedom of choice" plan was insufficient to dismantle a segregated school system because no white child had ever enrolled in the predominantly black schools).

97 *See id.* at 438.

98 *See Swann*, 402 U.S. at 15.

99 U.S. CONST. amend. XXIV (barring "any poll tax or other tax" as a prerequisite to voting in federal elections).

100 *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating state poll tax).

101 Louisiana v. United States, 380 U.S. 145, 153 (1965); *see also id.* at 148 (noting that from 1921 until 1944, the percentage of registered black voters never exceeded one percent); United States v. Mississippi, 380 U.S. 128, 132–33, 137–38 (1965) (striking Mississippi tests for "understanding of the duties and obligations of citizenship" and demonstrating "good moral character").

102 *See* Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (upholding congressional prohibition of literacy tests as applied to New York City residents from Puerto Rico); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding the Voting Rights Act of 1965, which suspended state literacy and other voting tests); *see also* Gaston County v. United States, 395 U.S. 285, 293 (1969) (striking literacy tests that had "the effect of deny-

As the breadth of topics in this Symposium clearly indicates, the precedential value of *Brown* extended far beyond the classroom. The Warren Court recognized the need for substantive support to effectuate otherwise dormant legal abstractions.[103] Prior to *Brown*, criminal defendants were ostensibly guaranteed the "right to counsel" and the "privilege against self-incrimination," yet these guarantees were meaningless in light of the systemic reality. The Supreme Court finally infused these abstractions with substance when it ordered states to provide counsel[104] and to inform defendants of their rights.[105] Similarly, a broader perspective of *Brown* recognizes the importance of "fundamental fairness" for those who live with the consequences of unjust government action. *Brown* represented a new promise and a broad commitment to tear down the façade and to produce genuine equality for all persons living in the United States.

IV
RESURRECTING *PLESSY* AND *DRED SCOTT*

Fifty years after the *Brown* decision, it is time to assess whether we have been faithful to that promise. The long tenure of Chief Justice William Rehnquist represents a jurisprudential era of colorblind equality. In Chief Justice Rehnquist's view, judicial intervention should be sharply limited to those cases in which specific and intentional racial discrimination by government officials can be tied to attendance at a particular school.[106] He dissented when other Justices ruled that intentional segregation in a significant portion of a school system gave rise to a presumption that a district should be subject to system-wide remedies.[107] Chief Justice Rehnquist's efforts to narrow the scope of judicial intervention and to emphasize colorblind decisionmaking eventually led to the withdrawal of judicial support for eliminating the effects of segregation.[108]

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ing the right to vote on account of race or color because the State . . . has maintained separate and inferior schools" (internal quotation omitted)).

103 GERALD KURLAND, THE SUPREME COURT UNDER WARREN 3 (D. Steve Rahmas ed., 1973) ("Under Warren, the Supreme Court adopted a policy of judicial activism which stressed the responsibility of the Court to see that the Constitutional guarantees of the Bill of Rights were made binding upon both state and federal governments.").

104 *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (recognizing the right to counsel for criminal defendants).

105 *See* Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (ruling that the police must inform suspects of their rights to remain silent and to be represented by counsel).

106 *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 254–55 (1973) (Rehnquist, J., dissenting).

107 *See id.* at 257–58.

108 *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (holding that courts should eliminate "vestiges of past discrimination . . . to the extent practicable"). The Chief Justice also noted that residential segregation resulted from private decisionmaking and econom-

The Kansas City, Missouri school district provides a vivid example of the growing antagonism towards the goal of achieving racial integration. The inner city schools in Kansas City suffered years of neglect as whites fled to the suburbs and funds for education within the city steadily declined.[109] Drawing upon the principles expressed in *Brown II* that "the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them,"[110] the district court ruled that fears of white flight cannot be used as a factor to justify the refusal to integrate.[111] Indeed, the district court emphasized that white flight "cannot be accepted [as a reason] for achieving anything less than the 'complete uprooting of the dual public school system.'"[112] The Supreme Court, however, rejected that analysis.[113] Demonstrating remarkable antipathy towards *Brown* and its progeny, the majority's decision, written by the Chief Justice, blamed the "white flight" on court-ordered desegregation and barred the district court from taking affirmative steps to reverse the outward flow of students.[114] The five Justices in the majority thus gave their stamp of approval to the convoluted logic that, although intentional segregation necessitated judicial intervention, states engaging in that segregation could not be held accountable for the repercussions of that action.

Assertions of colorblindness by the current Supreme Court suffer from the same basic flaws that characterized the majority opinion in *Plessy*.[115] Examples drawn again from the contexts of schools, voting booths, and courtrooms reveal that courts will no longer scrutinize government action that reinforces private prejudice. In each context, constitutional rulings, initially designed to protect minority rights, ended up being construed in a manner that disadvantaged the victims of past discrimination, thereby violating the spirit of the Equal Protec-

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ics and was therefore "too attenuated to be a vestige of former school segregation." *Id.* at n.2.

109 *See* Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985) (noting that "[s]egregation has caused a system wide *reduction* in student achievement"), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986).

110 Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300 (1955).

111 *Jenkins*, 639 F. Supp. at 37. A similar approach had been applied by the Supreme Court to fears that "white students will flee the school system." Monroe v. Bd. of Comm'rs, 391 U.S. 450, 459 (1968).

112 *Jenkins*, 639 F. Supp. at 37 (quoting United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 491 (1972)).

113 *See* Missouri v. Jenkins, 515 U.S. 70 (1995).

114 *Id.* at 99–100. The Court accepted the "typical supposition" that "'white flight' may result from desegregation, not *de jure* segregation." *Id.* at 95.

115 Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (holding that federal law permits distinctions to be drawn along racial lines because such distinctions do not create a state of "involuntary servitude").

tion Clause and failing the most basic yardstick of fairness and equality—that of a child.

A. Public Education

Twenty-five years ago, groups gathered around the nation to mark the passage of a quarter century since the Supreme Court's ruling in *Brown v. Board of Education*.[116] In Topeka, a small group of lawyers attended the ceremonies and afterwards met to discuss the plight of education in the school system where *Brown* originated.[117] In preceding years, the local school board had thwarted federal attempts to challenge the remaining segregation in Topeka schools.[118] Many seemed to have forgotten the promise of *Brown*.

When the Supreme Court originally agreed to hear arguments in *Brown*, Topeka school officials had abandoned their defense of segregation[119] and took immediate steps toward dismantling their dual school system.[120] Paul Wilson, an attorney with the Kansas Attorney General's office, appeared for the defense only at the request of the Supreme Court;[121] even then, much of his time at oral argument was focused on questions about whether the case had become moot.[122] Affirmative steps to dismantle segregation in Topeka, however, consisted of little more than a phased closure of black schools[123] and assurances of optional attendance zones to white parents.[124]

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116 347 U.S. 483 (1954).

117 Meeting with William J. Rich, Richard Jones, Charles Scott, Jr., and Joseph Johnson in Topeka, Kansas (May 17, 1979).

118 *See* Unified Sch. Dist. No. 501 v. Weinberger, No. 74-160-C5 (D. Kan. 1974) (unpublished decision) (involving an action by successor to the Topeka School Board to enjoin investigation by the Department of Health, Education and Welfare into ongoing allegations of race discrimination).

119 *See* ARGUMENT, *supra* note 5, at 259–60 (noting the Topeka School Board's decision against sending a lawyer to defend its segregated schools and describing the Board's desegregation attempts prior to the *Brown* oral arguments).

120 When the Supreme Court ruled on remedial issues, it noted that Topeka schools had already made "substantial progress" towards desegregation. Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 299 (1955).

121 *See* KLUGER, *supra* note 8, at 548 (noting that the Supreme Court "virtually ordered the attorney general to participate").

122 ARGUMENT, *supra* note 5, at 259–72.

123 *See id.* at 339–43 (providing the Kansas Attorney General's review of actions taken to comply with the Supreme Court's order in *Brown I*); Brown v. Bd. of Educ., 892 F.2d 851, 855–57 (10th Cir. 1989) (providing a brief factual history of elementary school enrollment); Brown v. Bd. of Educ., 671 F. Supp. 1290, 1293 (D. Kan. 1987) (describing phased closure of black elementary schools and adoption of neighborhood school plan); Brown v. Bd. of Educ., 139 F. Supp. 468, 470 (D. Kan. 1955) (describing the initial plans for desegregation as a "good faith effort").

124 These optional attendance zones assured parents that they would have time to move rather than be forced to send their children to an integrated school. *See Brown*, 892 F.2d at 875 (stating that "the school district's use of portable classrooms and optional at-

Experiences in Topeka, though, eventually led to what some could describe as a happy ending. The lawyers gathering in 1979 to commemorate *Brown* decided to take action. With their support, a new group of plaintiffs, whose children attended racially identifiable Topeka schools, successfully intervened in the case of *Brown v. Board of Education*.[125] Intervention led to discovery, trial, an initial ruling in favor of the school district,[126] reversal by the Tenth Circuit,[127] and eventual denial of review by the Supreme Court.[128] After more than forty years of litigation, the courts determined that the Topeka School Board still had not discharged its affirmative duty to desegregate.[129] The district court ordered implementation of a plan that would include the building of three new schools, including two high-tech "magnet" schools designed to attract a diverse student body.[130] One of the schools was even named after the family of Elijah Scott, the lawyer who filed the original complaints in *Brown*.[131] The new schools made a significant contribution to the Topeka community and, at least initially, lived up to the promise of diversity.[132]

After several years of operation, the Topeka School Board went back to court seeking a determination that remnants of the dual school system had been eliminated and that a unitary school system was established in its place.[133] The district court agreed, finally put-

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tendance zones served to maintain segregation by concentrating students of one race at certain schools").

125 Brown v. Bd. of Educ., 84 F.R.D. 383 (D. Kan. 1979). The *Brown* case remained open on the District Court docket in large part because of the school board's attempts to avoid administrative intervention. *See* Richard E. Jones, Brown v. Board of Education: *Concluding Unfinished Business*, 39 WASHBURN L.J. 184, 188 (2000) (discussing the district's attempt to keep *Brown* open on the docket to "use this fact as a defensive shield to the federal government's threat to withhold funds"). In 1974, the United States Department of Health, Education and Welfare (HEW) initiated administrative proceedings and threatened to cut off federal funds for Topeka's failure to desegregate. *Brown*, 84 F.R.D. at 390 (citing Unified Sch. Dist. No. 501 v. Weinberger, No. 74-160-C5, (D. Kan. 1974)). The school board successfully blocked the administrative proceedings and HEW intervention by arguing that the district court, rather than HEW, retained jurisdiction over the *Brown* case. *Id.* at 391.

126 *Brown*, 671 F. Supp. at 1311.

127 *Brown*, 892 F.2d at 889.

128 Unified Sch. Dist. No. 501 v. Smith, 509 U.S. 903 (1993).

129 *See Brown*, 892 F.2d at 889.

130 *See* Jones, *supra* note 125, at 195.

131 *See* Michael Dobbs, *Topeka's Next Challenge*, WASH. POST NAT'L WEEKLY ED., May 17–23, 2004, at 31.

132 *See* GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 12 (2004) (noting that a "high level of integration existed during the decade under study (1991–2001)"), *at* http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf. *But see* Dobbs, *supra* note 131, at 31 (noting that "Topeka schools are among the most racially diverse in the country," but also noting a correlation between race and "very different levels of academic success").

133 Brown v. Unified Sch. Dist. No. 501, 56 F. Supp. 1212, 1213–14 (D. Kan. 1999).

ting to rest the case of *Brown v. Board of Education*,[134] although not without significant costs. Because the school system was now "unitary," race could no longer be considered as a factor in the placement of students in the new magnet schools.[135] Even if the school board helieved that racial diversity added to the quality of education, such considerations were suspect—if not wholly condemned—by the very constitutional provisions that previously obligated the school district to take race into account.[136] Of course, the inhabitants had not moved and their neighborhoods had not suddenly become integrated in the time during which the schools operated under court order. The colorblind principle now threatens the actions that had once been deemed an affirmative constitutional duty.

The Court's notion of colorblindness impairs government authority to deal with problems of entrenched discrimination. For example, when patterns of de facto segregation in housing affect the racial composition of public schools, some court rulings have halted efforts to remedy the resulting segregation.[137] Furthermore, many decisions that appear facially neutral may, in fact, perpetuate educational inequality. In the first three decades following the *Brown I* decision, the district's plans to provide access to schools in certain Topeka "neighborhoods" actually perpetuated racial identification of those schools.[138] In Texas, reliance upon local property taxes for funding ensured that wealthy school districts would be able to provide more resources to their students with lower proportional tax burdens in comparison to poor school districts.[139] Funding formulas that favor teacher longevity and advanced degrees systematically benefit schools with the best resources and most educated faculty.[140] To add insult to injury, the Supreme Court bars explicit efforts to consider such factors when fashioning effective remedies for past intentional discrimination.[141]

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134 *Id.* at 1214.

135 Heather Hollingsworth, *USD 501 Faces a New Balancing Act*, TOPEKA CAP.-J., Oct. 18, 1999, at A1.

136 *See generally* Paul Diller, Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999 (2001) (assessing the constitutionality of various public school diversity efforts).

137 *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 754 (1974) (barring cross-district remedies in response to "white flight" if plaintiffs failed to prove that suburban scbool districts had engaged in intentional discrimination).

138 *See* Brown v. Bd. of Educ., 892 F.2d 851, 856–57 (10th Cir. 1989).

139 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 73–76 (1973) (Marshall, J., dissenting).

140 *See id.* at 79–82 (Marshall, J., dissenting) (explaining that "equalization" formulas often resulted in distribution of more state aid to wealthy school districts than to their poor counterparts).

141 *See* Missouri v. Jenkins, 515 U.S. 70, 98 (1995) (barring pursuit of "desegregative attractiveness").

B. Reapportionment

The Supreme Court has also identified and enforced rules barring racial discrimination in apportionment of legislative districts. District boundaries that do not follow straight lines or traditional political boundaries are suspect and trigger the search for an unlawful racial motive.[142] In practice, this bar almost exclusively affects redistricting efforts *favoring* racial minorities, because a legislature seeking to preserve the majority's electoral domination can do so without deviating from traditional boundaries. That is, when whites make up a substantial majority of a state population, it becomes relatively simple to draw district boundaries so that whites have a majority in each congressional district. Such boundaries appear "normal." Typically, "strange" boundaries emerge only when an effort is made to give the minority group an electoral majority within that district.[143] If this proposition is correct, the only litigants who can effectively challenge redistricting attempts are those in the racial *majority* who question an oddly drawn district that benefits *minorities.*

The Supreme Court rationalizes this decision in "colorblind" terms by explaining that all race discrimination must be monitored by the same stringent standards regardless of whether the minority or majority race benefits.[144] History and experience, however, have a way of intruding upon this pretense of equal treatment. For more than a century, judges permitted legislators to engage in grotesque gerrymandering schemes for political reasons without significant court intervention,[145] and in North Carolina the legislature managed to prevent even a single African American from winning a seat in Congress from the end of Reconstruction until Congress demanded corrective action in the early 1990s.[146] The Supreme Court did not intervene until the state began to facilitate black representation (in a congressional delegation that remained disproportionately white).[147] In such cases, the majority's view of racial block voting collided with

142 *See* Shaw v. Reno, 509 U.S. 630, 658 (1993) (finding that plaintiffs stated a claim by targeting "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race").

143 Reapportionment in North Carolina, which is marked by frequent trips to the Supreme Court, provides an example of this phenomenon. The only strangely shaped districts to attract judicial attention in that state were those in which blacks were in the majority. *See id.* at 635–36.

144 *See id.* at 658 (requiring a "racial gerrymandering" plan to be "narrowly tailored to further a compelling governmental interest").

145 *See* Davis v. Bandemer, 478 U.S. 109, 180–81 & n.21 (1986) (Powell, J., concurring in part and dissenting in part) (describing how gerrymandering was upheld even though intended to benefit one political party over the other).

146 *See Shaw*, 509 U.S. at 659 (White, J., dissenting).

147 *Id.* at 665–66 (White, J., dissenting) (finding no evidence that the majority group had been disadvantaged by the North Carolina redistricting plan).

the fact that in North Carolina racial identification may be more predictive of voting behavior than political party affiliation.[148] Therefore, barring consideration of race as a factor in redistricting appeared to preclude legislative attempts to make decisions based upon traditional predictions of reelection. Faced with this reality, Justice O'Connor agreed with the four more liberal members of the Court that states do not violate the Equal Protection Clause when they reapportion in a manner that reinforces political party strength and incumbency protection, even when those factors may be consciously linked to the creation of racially stratified districts.[149]

In 2004, Justice Scalia, writing for a plurality, concluded that *political* gerrymandering claims pose nonjusticiable political questions.[150] In a concurring opinion, Justice Kennedy argued in favor of leaving the door open to future review of the issue on the grounds that "[a] determination by the Court to deny all hopes of intervention could erode confidence in the courts."[151] The plurality's opinion highlights the inequality lying beneath the surface of decisions governing legislative apportionment. Based upon the Court's current rulings, however, only racial gerrymandering remains subject to constitutional challenge.[152] Under the guise of equality, the Court's approach constrains minority efforts to secure equal representation while virtually eliminating constitutional constraints on a dominant majority. At the same time that public education suffers from a process of resegregation,[153] constitutional assessment of apportionment issues undercuts efforts to equalize minority influence on legislative elections.

C. Peremptory Challenges

Peremptory challenges in the jury selection process may, on the surface, appear unrelated to public education and apportionment issues; nevertheless, they suffer from comparable underlying problems. Historically, peremptory challenges reinforced invidious racial discrimination.[154] Prosecutors routinely used their peremptory challenges to exclude racial minorities from juries—especially when dealing with minority defendants—so as to ensure the most advanta-

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148 *See* Hunt v. Cromartie, 526 U.S. 541, 556 n.2 (1999) (Stevens, J., concurring).

149 Easley v. Cromartie, 532 U.S. 234, 257 (2001) (noting that courts will only intervene when plaintiffs prove that racial considerations are "dominant and controlling" (quoting Miller v. Johnson, 515 U.S. 900, 913 (1995))).

150 Vieth v. Jubelirer, 541 U.S. ___, 124 S. Ct. 1769, 1792 (2004) (plurality opinion) (holding that no judicially discernible and manageable standards exist for adjudicating political gerrymandering claims).

151 *Id.* at 1794–95 (Kennedy, J., concurring).

152 *Id.* at 1781 (applying a "predominant intent" test to racial gerrymandering claims as an "easier and less disruptive" test).

153 *See* discussion *supra* Part I.

154 *See infra* notes 155–58 and accompanying text.

geous jury for the state.[155] Conversely, even if defense counsel for a minority defendant used all of his peremptory challenges in a race-based manner, the result would still be a majority jury.

The Supreme Court addressed this problem in *Batson v. Kentucky*,[156] holding that race could not be used as a factor for excluding jurors.[157] When a pattern of racial challenges develops, the party who uses those challenges must provide a race-neutral explanation for the exclusion.[158] As with public education and apportionment, however, the doctrine supporting this tool for eliminating race as a factor in jury selection has a double edge, potentially of harming racial minorities more than those in the majority. *Batson*'s cruel twist in logic became apparent after the Supreme Court later extended the reasoning to prevent defense counsel as well as prosecutors from using race as a factor in peremptory challenges.[159]

Minority defendants and their lawyers do not face the same degree of risks and rewards as prosecutors. According to Professor John Francis, if both a prosecutor and defense counsel representing a minority defendant use peremptory challenges in a random fashion, it is more likely that defense counsel will be seen as using strikes to eliminate majority jurors than that the prosecutor will be viewed as using strikes to eliminate minority jurors.[160]

As a result of court-created rules, the use of peremptory challenges by a minority defendant for the purpose of securing a diverse jury represents a racial motive even when the jury venire is overwhelm-

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155 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (noting that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant").

156 *Id.* at 97–98.

157 *Id.* at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

158 *Id.* at 98.

159 *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (barring white defendants from excluding black jurors in a case involving allegations of hate crimes against African-American victims). Lower courts have applied the same reasoning to minority defendants who have been barred from using their peremptory challenges to favorably shape the jury's racial composition. *See, e.g.*, State v. Carr, 427 S.E.2d 273 (Ga. 1993); Griffin v. Mississippi, 610 So. 2d 354 (Miss. 1992).

160 *See* John J. Francis, *Peremptory Challenges,* Grutter, *and Critical Mass: Means of Reclaiming the Promise of* Batson, 29 VT. L. REV. ____ (forthcoming January 2005). Statistically, random challenges by both lawyers will target more majority jurors than minority jurors. The greater the majority dominance of the jury, the greater the pattern of exclusion of those jurors, and, therefore, the greater the likelihood of a challenge made on that basis. With few minority jurors, a prosecutor may exclude most, or even all of them while also excluding some majority jurors, thus, avoiding the appearance of a pattern of racial exclusion. In contrast, defense counsel will essentially be required to eliminate at least some of the lesser number of minority jurors in order to avoid patterns of apparent racial exclusion. *Id.*

ingly white.[161] In New Jersey, for example, an appellate court upheld a trial judge's impaneling of an all-white jury after precluding the defense attorney for a black defendant from retaining two black jurors.[162] Indeed, the judges reached this result even though they understood that the ruling contradicted underlying policies of inclusion; they believed that such issues of peremptory challenge were foreclosed by *Batson*.[163] Although the original purpose of *Batson* was to ensure minority participation on juries, "colorblind" application of its rule has had the perverse result of prohibiting efforts to do so.

D. Assessing the Promise

Theories of equality may be used to rationalize each of the examples described. Definitions of equality, however, vary with the context and ideology of the decisionmaker. For example, when the Supreme Court bars lower court judges from addressing inequality driven by private prejudice, it does so with *Plessy*-like reasoning that ends up deferring to government decisions even when those decisions reflect and reinforce social inequality built upon a history of racism.[164] As the *Plessy* Court explained in 1896, "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[165] By refusing to question the majority's ostensibly colorblind decisions, the Court allows the perpetuation of past discrimination.

The current constitutional framework applied to public education, apportionment, and peremptory challenges, however, cannot fully be explained in terms of judicial restraint or majoritarian principles. The voting districts struck down in the North Carolina case had been created by elected representatives.[166] Furthermore, the Supreme Court created the rules that regulate peremptory challenges, while the lower courts created the perverse rulings that began with a genuine aversion to racism, yet now impose heavy burdens on minorities. In those instances, judicial reasoning parallels *Dred Scott* even more than *Plessy*. In *Plessy*, the Court simply acquiesced to the majority's racist scheme. In contrast, the *Dred Scott* Court not only struck down majoritarian rule, but compounded the problem by insisting on

161 *Id.*

162 State v. Johnson, 737 A.2d 1140, 1143 (N.J. Super. Ct. App. Div. 1999), *vacated by* 749 A.2d 367 (N. J. 2000), *aff'd* 766 A.2d 1126 (N.J. 2001), *overruled by* State v. Pagolin, 793 A.2d 638 (N.J. 2002).

163 *Id.*

164 *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 250 & n.2 (1991) (concluding that residential segregation in Oklahoma City could not even be considered a "vestige of former school segregation").

165 Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

166 *See supra* text accompanying notes 147–52.

constitutional principles based on racism.[167] When the current Court blocks the majority from addressing the racism that permeates our society, it returns to the same path.

In 2003, the Supreme Court seemingly backed away from the *Dred Scott* approach. By a one-vote margin, the Court permitted the University of Michigan to consciously address the reality of race discrimination when seeking diversity through its law school admissions process.[168] Recognizing the compelling arguments for including a "critical mass" of minority students in order to dispel racial stereotypes, the Court's majority opinion written by Justice O'Conner, can be read as a refusal to equate colorblindness with blindness.[169] Nonetheless, the opinion seems to have been more influenced by the views of "major American businesses" and "high-ranking retired officers and civilian leaders of the United States military," whose amicus briefs strongly supported the Michigan admissions policy, than with the struggles of the minority applicants.[170]

The Court's decision in the companion case, *Gratz v. Bollinger*,[171] struck down the undergraduate admissions policies, limiting the University's options for achieving diversity.[172] Justice Ginsburg's dissent, however, remains faithful to the promises made in *Brown* to children victimized by a racist history. Justice Ginsburg acknowledges "the effects of centuries of law-sanctioned inequality"[173] and enduring disparities reflecting "[i]rrational prejudice" and "[b]ias both conscious and unconscious."[174] Because remnants of "a system of racial caste" permeate broad aspects of society,[175] constitutional doctrine must remain "both color blind and color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination."[176]

Justice Ginsburg accurately observed that race remains a salient, often destructive force in contemporary American society. Beginning in the 1990s, and in spite of declines in residential segregation, schools have become increasingly resegregated—more now than at any time since 1969. The trend has been directly linked to Supreme

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167 *See supra* text accompanying notes 21–26.

168 Grutter v. Bollinger, 539 U.S. 306 (2003).

169 *Id.* at 311–44.

170 *Id.* at 330–31.

171 Gratz v. Bollinger, 539 U.S. 244 (2003).

172 *Id.*

173 *Id.* at 298 (Ginsburg, J., dissenting).

174 *Id.* at 300–01 (Ginsburg, J., dissenting).

175 *Id.* at 299–300 (Ginsburg, J., dissenting) (citing unemployment, poverty, access to health care, neighborhood schools, job access, earning capacity, real estate markets, and consumer transactions as evidence of continuing disparities).

176 *Id.* at 302 (Ginsburg, J., dissenting) (quoting United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966)).

Court decisions made near the beginning of that decade.[177] Nearly one-third more African American males sit in prisons or jails than attend higher education.[178] When speaking about race, politicians have learned to use code words like "quotas" and "states' rights" to successfully hide their invidious intentions,[179] and judicial sanctions fall heavily on those who explicitly seek to redress racial inequality.[180] Under these circumstances, we should not be surprised if black children choosing dolls fifty years later would still recognize the privilege of being white.

CONCLUSION

Imagine two school board members. One believes in white supremacy and assures that like-minded citizens will be able to send their children to segregated schools by adopting a "colorblind" policy of "neighborbood" schools. The other school board member recognizes the educational advantages of diversity, understands the link between race and diversity, and defines attendance policies in a manner promoting opportunities for racial integration. Yet, fifty years after *Brown*, only the latter faces a serious risk of constitutional challenge. We need to ask ourselves whether this interpretation of the Constitution remains faithful to the promise made to the school children who won the battle of *Brown v. Board of Education.*

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177 *See* ORFIELD & LEE, *supra* note 132, at 18.

178 *See* JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 9–10 (2002), *at* http://www.justicepolicy.org/downloads/cellblocksorclassrooms.pdf.

179 *See* Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 622–35 (2000) (describing how politicians have used seemingly innocuous words to mask racist agendas).

180 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995) (holding that all government-created racial classifications are subject to strict scrutiny); Richmond v. J.A. Croson Co., 488 U.S. 469, 518–19 (1989) (establishing the test of "strict scrutiny" in cases of affirmative action).