

## ***Brown, Dominance, and Diversity***

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### I. INTRODUCTION

Professor Griffin asked me to address the legacy of *Brown v. Board of Education*<sup>1</sup> from a “Northern European perspective.” In a number of ways, my assignment has been easier and more straightforward than that given to other conference participants. Issues of race in America, especially as defined by the courts, have always been dominated by the perspective of those with European ancestry. That was true at the time when the nation was founded and in the history we learned through the eyes of Thomas Jefferson rather than Sally Hemmings. It remained true throughout the nineteenth century when the United States Supreme Court addressed issues of race in cases such as *Dred Scott v. Sandford*<sup>2</sup> and *Plessy v. Ferguson*.<sup>3</sup> It was certainly true in the middle of the twentieth century when the Court permitted internment of people of Japanese ancestry because of a threat perceived by those who could not get past the differences in culture and appearance of Asian-Americans.<sup>4</sup> In other words, looking at *Brown* from a European-American perspective involves the task of reporting about the dominant culture. It is the story I have learned about on a continual basis simply by reading reports of the press and viewing pictures that made the cut to appear on the evening news. It is also the story that continues to be told by our nation’s courts, and I am now well into my third decade of teaching about that story.

It would, however, be a mistake to pretend that a monolithic European-American perspective exists. As others have reported prior to this conference and over the course of our proceedings, we all represent layers of consciousness, and multiple ingredients contribute to our individual perspectives.<sup>5</sup> As a result, it may help for me to begin by positioning myself within the realm of those with European ancestry.

Most of my ancestors arrived in the United States in the late nineteenth century. On my father’s side, they came from opposite sides of a mountain in Switzerland, met in Iowa, and settled in Kansas a couple of generations ago. On my mother’s side, the ancestral trail began in Germany and retained a German language and culture even

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

2. 60 U.S. (19 How.) 393 (1857).

3. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

4. *See* *Korematsu v. United States*, 323 U.S. 214 (1944).

5. *See* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN’S RTS. L. REP.* 7 (1989).

after migrating to what is now Ukraine in the late seventeenth century. That group moved from Ukraine to Minnesota in the 1890s; my maternal grandparents made their way to Kansas in the 1920s.

My ancestors who moved from Europe to the middle-west came as part of a larger migration of the Mennonite religious community. For generations, Mennonites retained a separate identity from the larger societies in which they lived. Pacifism was a major element of that separation; Mennonites moved from Germany to Russia to the United States in order to avoid military conscription.<sup>6</sup> The pacifist perspective was based upon a more fundamental principle that individual moral responsibility should not give way to societal norms or governmental decrees. If it was wrong to kill, and if we were to love our enemies, that could not be changed by national declarations of war.

Separateness became a deeply embedded part of Mennonite culture at the time of the Protestant Reformation. Menno Simons shared many of Martin Luther's insights but believed that Luther "sold out" by forming alliances with state governments after leaving the Catholic Church.<sup>7</sup> Refusing to make such alliances, however, meant that thousands of Mennonites were hunted down, tortured, burned at the stake, or sold into slavery because of their status as a dangerous and deviant sect that defied governmental authority.<sup>8</sup>

I still carry that sense of separate identity. It has both positive and negative aspects when I am asked to view an issue from a "Northern European" perspective. On the one hand, critique of social norms comes naturally because I have grown up with that kind of critical perspective. On the other hand, it also limits my perspective because I have never really understood our majoritarian culture. Family stories from World War II involved scraping the yellow paint from my grandfather's furniture store rather than glories or gore of the battlefield. In the 1950s, my cousin went to prison rather than cooperate with the selective service system. In part because of my identification with my grandfather and my cousin, I also found it easier to identify with the African-American children who made their way to the Little Rock schools rather than with the hostile crowds that surrounded them. To this day, I fail to understand the anger of a privileged majority that could not accept people who are perceived as "different."

As a result, as I approach questions about the legacy of *Brown*, I do so as a person of European ancestry with a detached, critical, and

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6. See DAVID A. HAURY, PRAIRIE PEOPLE: A HISTORY OF THE WESTERN DISTRICT CONFERENCE 20 (1981).

7. See CORNELIUS J. DYCK, AN INTRODUCTION TO MENNONITE HISTORY 105 (3d ed. 1993).

8. See HAURY, *supra* note 6, at 8-9.

limited perspective. From that perspective, I intend to identify ways in which the dominant culture influenced the United States Supreme Court decision in *Brown*, then helped to shape the scope of the *Brown* remedies, and finally led us to the constitutional framework that we live with today. It should come as no surprise that I will conclude with critical comments regarding that framework.

## II. BACKGROUND OF *BROWN*

Framers of our Constitution understood oppressive majorities and the importance of minority perspectives. Puritans, Quakers, Unitarians, and Catholics—all had been driven from England in part because of their minority views on issues of religion. New England merchants and southern plantation owners understood their own differences in perspective and took steps to assure that one would not dominate the other. They wrote a constitution to protect the minority positions that they understood, in particular the institution of slavery. While at least some of those who participated as “framers” perceived the evil in slavery,<sup>9</sup> all were willing to compromise on that issue in order to achieve national unity. None of the framers demonstrated recognition of patriarchy, and all willingly gave the southern states their slaves if that is what was needed to establish a strong national government capable of preserving the property and commercial interests of the governing elite.

In the decades leading up to the Civil War, Roger Taney epitomized an exclusively European-American perspective regarding issues of race. In 1832, as United States Attorney General, he authorized South Carolina to defy federal law by blocking nonwhite seamen from entering their ports, writing that

[t]he African race in the United States even when free, are everywhere a degraded class . . . . They were not looked upon as citizens by the contracting parties who formed the Constitution. . . . And were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken.<sup>10</sup>

Twenty-five years later, as Chief Justice of the United States Supreme Court, Taney retained the same perspective and made it the law of the land. In his opinion for the Court in *Dred Scott*, he chronicled a history of racist legislation and judicial action, relying upon that precedent to support his conclusion that “persons of color . . . were not

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9. See, e.g., JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 411 (Adrienne Koch ed., 1966). Gouverneur Morris, in his speech at the Constitutional Convention, described slavery as “the curse of heaven on the States where it prevailed.” *Id.*

10. DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE *DRED SCOTT* CASE IN HISTORICAL PERSPECTIVE 38 (1981).

included in the word citizens”<sup>11</sup> and Congress had no authority to elevate their status.<sup>12</sup>

As Professor Greene has explained, the Fourteenth Amendment Citizenship Clause overturned the holding in *Dred Scott*.<sup>13</sup> In its initial efforts to construe the Fourteenth Amendment, the United States Supreme Court recognized the new constitutional obligation to redress the subordinate status of African-Americans. As Justice Miller noted for the Court, the “one pervading purpose” of that Amendment was to achieve “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>14</sup> Six years later, when ruling that blacks could not be excluded from juries, the Court declared that

it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted.<sup>15</sup>

With those decisions, the United States Supreme Court recognized the racism within society and declared a constitutional goal of countering that perspective.

But violent acts of discrimination continued to characterize the southern states when Reconstruction came to a screeching halt. The decision to end Reconstruction came as a result of compromise; Republican Rutherford B. Hayes became president in exchange for withdrawal of federal troops.<sup>16</sup> Much like the original constitutional compromise, treating slaves as three-fifths of a person in order to gain southern acceptance, the Compromise of 1877 effectively abandoned the promise of civil and political equality for African-Americans.<sup>17</sup> It also reflected northern liberal opinions endorsing white supremacy.<sup>18</sup> In 1883, Justice Bradley, who six years earlier had cast the deciding vote to make Hayes the president,<sup>19</sup> wrote the majority opinion that

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11. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 421 (1857).

12. *Id.* at 452.

13. See Linda S. Greene, Address at the Brown v. Board of Education Revisited: 50th Anniversary Symposium (Nov. 1, 2003).

14. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873).

15. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

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

17. *Id.* at 32-34.

18. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 69-70 (3d rev. ed. 1974).

19. *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 33 (Melvin I. Urofsky ed., 1994).

emasculated the Civil Rights Act of 1875 by eliminating federal power to address private acts of discrimination.<sup>20</sup> In the same year, Justice Field wrote for a unanimous Supreme Court that laws imposing criminal punishment on interracial marriage survived equal protection guarantees on grounds that the “punishment of each offending person, whether white or black, is the same.”<sup>21</sup>

Official endorsement of segregation continued in the decades that followed. *Plessy* illustrates the dominant perspective of the time. Justice Brown’s opinion for the Court explained that “in the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”<sup>22</sup> Justice Harlan’s dissent forewarned 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.”<sup>23</sup> But even while dissenting, he also explained the assumptions of racial superiority on which his opinion was based:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.<sup>24</sup>

Justice Harlan’s forecast of racial dominance proved accurate for the generations that followed, although it was achieved through imposition of power rather than through holding fast to principles of liberty.<sup>25</sup> Racial fears continued to be reflected in racist laws and practices condoned by the United States Supreme Court. In *Berea College v. Kentucky*,<sup>26</sup> the Justices allowed Kentucky to prohibit a private college from teaching both white and black students in the same place and at the same time.<sup>27</sup> In 1927, the Court gave its official blessing to state laws separating “those of pure white or Caucasian race” from attending public schools with “the brown, yellow and black races.”<sup>28</sup>

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20. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

21. *Pace v. Alabama*, 106 U.S. 583, 585 (1883), *overruled in part by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

22. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23. *Id.* at 559 (Harlan, J., dissenting).

24. *Id.* (Harlan, J., dissenting).

25. See Charles Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960) (explaining the prevailing view that it would be “better” for blacks to “accept a position of racial inferiority, at least for the indefinite future”).

26. 211 U.S. 45 (1908).

27. *Id.* at 58 (upholding state authority to regulate corporations in a manner that required racial segregation).

28. *Gong Lum v. Rice*, 275 U.S. 78, 82 (1927).

The segregation sanctioned by the Court was merely the tip of an iceberg of policies and practices that preserved white dominance. Thus, the Court upheld the equal right to serve on juries<sup>29</sup> but nevertheless condoned practices for selecting jury pools and exercising peremptory challenges that eliminated the presence of racial minorities.<sup>30</sup> Similarly, courts prohibited racial exclusion of voters, but numerous other screening devices assured white domination of the political process.<sup>31</sup>

An awakening of sorts began during World War II. Fighting the Nazis generated opposition to Hitler's conception of Aryan superiority. But simultaneous with the rejection of Nazi ideology came the new wave of anti-Japanese racism, and the United States Supreme Court was swept along with the tide. The *Korematsu v. United States*<sup>32</sup> and *Hirabayashi v. United States*<sup>33</sup> cases illustrate limits in the ability of Supreme Court Justices to distance themselves from the prevailing passions of the moment. Writing for the Court, Justice Black asserted that "cast[ing] this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue."<sup>34</sup> But despite references to "strict scrutiny," the Court failed to look behind the hysteria. The majority refused to accept the dissenting views of Justice Murphy that Japanese "exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."<sup>35</sup>

### III. CHANGING PERSPECTIVES AND *BROWN*

In some critical respects, *Brown* was different. A powerful element of the case is that it was presented to the Court by Thurgood Marshall, Robert Carter, Spottswood Robinson, and others who collectively offered the Court an alternative vision. The much maligned reference to "psychological knowledge" contained in the work of

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29. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

30. *See Swain v. Alabama*, 380 U.S. 202, 223 (1965) (limiting challenges to use of race in excluding jurors to cases in which prosecutors excluded blacks "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim"), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

31. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 151 (1965) (invalidating the requirement that voters "give a reasonable interpretation" of a clause of the Louisiana or United States Constitution); *United States v. Mississippi*, 380 U.S. 128, 141-42 (1965) (barring the requirement that voters be of "good moral character"); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959) (upholding the use of literacy tests). In eight states of the Deep South, no more than 2.5% of blacks of voting age participated in the 1940 presidential election. RICHARD KLUGER, *SIMPLE JUSTICE* 218 (1976).

32. 323 U.S. 214 (1944).

33. 320 U.S. 81 (1943).

34. *Korematsu*, 323 U.S. at 223.

35. *Id.* at 233 (Murphy, J., dissenting); *see also Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting writ of *coram nobis* vacating conviction).

Kenneth Clark and others<sup>36</sup> served the primary goal sought by lawyers for the NAACP. It forced the Justices to view the issue from the perspective of the African-American child. Once the case was understood in those terms, the Court was able to “conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>37</sup>

Of course, the task of leading the Court to understand this perspective did not begin with *Brown*. In the years leading up to that decision, lawyers for the NAACP followed a strategy aimed, as much as anything, to resonate with the nine white males who occupied seats on the United States Supreme Court. They began their onslaught with the careful selection of *Missouri ex rel. Gaines v. Canada*,<sup>38</sup> knowing that the Justices could identify with the inequality of a requirement that black law students attend out-of-state law schools. Sending Lloyd Gaines to a law school in Kansas, however grand the schools in this state may have been, still could not have been considered the equivalent to allowing him to attend law school within his own state. Although the state court found that law schools in surrounding states were of “high standing” and capable of providing “‘as sound, comprehensive, valuable legal education’ as in the University of Missouri,”<sup>39</sup> at least seven United States Supreme Court Justices refused to buy that argument. As Chief Justice Hughes explained for the Court,

[T]hese matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies . . . solely upon the ground of color.<sup>40</sup>

In reaching that conclusion, the Justices demonstrated a shift in perspective; a law school case allowed the Justices to identify themselves with the persons seeking law degrees rather than with the white majority.

Twelve years later, lawyers for the NAACP again took advantage of the knowledge that a panel of judges would understand that a hastily assembled, unaccredited school with no independent faculty or library and a student body of twenty-three could not be considered equal to the University of Texas Law School.<sup>41</sup> All of the Justices understood the “intensely practical” nature of a legal education: “Few students and no one who has practiced law would choose to study in

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36. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

37. *Id.* at 495.

38. 305 U.S. 337 (1938).

39. *Id.* at 348.

40. *Id.* at 349.

41. *Sweatt v. Painter*, 339 U.S. 629, 633 (1950).

an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”<sup>42</sup> By appealing to the perspective of the judges as lawyers, the plaintiffs were able to secure unanimous support for their arguments.

*Brown* built upon precedent in a distinct sense. Like the cases that preceded it, the United States Supreme Court decision in *Brown* can best be understood as a response to an alternative perspective that the Justices came to understand. In marked contrast to *Dred Scott*, *Plessy*, or *Korematsu*, Chief Justice Warren’s decision in *Brown* gave credence to a victim’s perspective of discrimination. The Court rejected the myth of equality perpetrated by prior generations.

Much of the early criticism of *Brown* demonstrated an underlying rejection of this perspective. Critical commentary in response to *Brown* has been premised on two assumptions: first, that the meaning of the Fourteenth Amendment should be determined based exclusively upon the intent of those who framed the Amendment; and second, that the views of the framers should be understood in terms of the narrow conceptions of race and education held at the time when the Amendment was ratified and not in terms of a broader perspective on issues of equality.<sup>43</sup> In other words, because only white males participated in the political process in 1867, their views were the only views that mattered when construing the portion of the Constitution framed at that time. Furthermore, because nineteenth-century society accepted assumptions of white supremacy and rejected the very idea of social equality, those views should also be entrenched in perpetuity.

An additional charge was made that the Court erred by failing to base its opinion on “neutral principles,” and by choosing instead an approach protecting “the group that is not dominant politically and, therefore, does not make the choice involved.”<sup>44</sup> The call for neutral principles, however, conflicts with a basic concept that perspective matters. It also ignores the argument that neutrality easily becomes a code word for the perspective of the dominant majority. The critics refused to accept the argument that the Equal Protection Clause should be interpreted from the perspective of an African-American

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42. *Id.* at 634. The shocking element of *Sweatt v. Painter* is the fact that both the trial and appellate courts found that the new school offered “privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas.” *Id.* at 632.

43. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117-33 (1977). Berger notes that “[g]iven the rampant racism in the North of 1866—which still has to loose its grip—it needs to be explained how a North which provided for or mandated segregated schools was brought to vote for desegregation in the Amendment.” *Id.* at 118.

44. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

child. It was acceptance of that perspective that marked the truly radical departure of *Brown* from all of the precedent I have described.

#### IV. IMPLEMENTING *BROWN* AND FORGETTING THE LESSON

*Brown v. Board of Education* taught us that constitutional principles need to be viewed from more than just the dominant perspective of those in power. In *Brown* itself we learned the positive message about viewing the Equal Protection Clause from the perspective of the children. During the years that followed, an underlying question before the Court—as well as within the court of public opinion—was whether we would remember this lesson.

In the immediate aftermath of *Brown*, the United States Supreme Court did its best to avoid this issue. When arguments were heard in *Brown II*, the Court addressed the question of remedies and settled on the phrase “deliberate speed” to characterize the duties imposed upon the school districts.<sup>45</sup> Speed had very little to do with the pace of the changes that followed, and the Court was deliberately slow in assuming the burden of monitoring compliance with its landmark decree.

In Topeka, the will to comply with the Court’s decision preceded the orders to comply. Before the United States Supreme Court met to consider the issue of remedies, the Topeka School Board had already enacted a plan to close one of the black schools and to reconstitute the districts surrounding the other schools. In a significant sense, however, the experience in Topeka was a harbinger of the fact that perspectives of the white majority would determine the course of desegregation, as they had for segregation. It was only the black schools that were to be closed, and at least initially, the teachers in those schools were given notice of termination. In districts surrounding black schools that would remain open, students were given the option of continuing in schools they had attended prior to *Brown*. This use of optional attendance zones was explained as a provision that would give white parents time to move to another school district rather than ever send their children to an integrated school.<sup>46</sup>

Although the Topeka School Board members demonstrated a desire to distance themselves from southern segregationists, they did not seriously consult plaintiffs in *Brown* or members of the black community prior to formulating their response. Assumptions were made that the black schools should be the ones to close, and the black teachers

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

46. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *Brown v. Board of Education of Topeka*, 1952-55, at 342 (Leon Friedman ed., 1969) (reproducing argument of Attorney General Harold Fatzer explaining decisions of the Topeka School Board).

or administrators were the people whose jobs were threatened. The reason more were not fired was clearly because, in years following *Brown*, relatively little changed. Because segregated neighborhoods had grown around the old schools, new districts based upon “neighborhood school” standards sustained much of the segregation of the past. In subsequent years, when new schools were built and attendance boundaries were changed, choices consistently reflected a pattern of “‘lock[ing] the school system into a mold of separation of races.’”<sup>47</sup> “What Topeka did not do is actively strive to dismantle the system that existed.”<sup>48</sup>

In other parts of the nation, the white majority response to *Brown* was even more combative. Southern political leaders rode a wave of anti-desegregation sentiment and gained national notoriety for their efforts. This mean-spirited reaction, however, placed the Supreme Court on the defensive and thereby eventually strengthened the hand of the plaintiffs who continued to challenge segregation in the schools. In 1958, the Court issued its first post-*Brown* order on the issue of school segregation and prohibited the states from using “their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property.”<sup>49</sup> Six years later, the United States Supreme Court responded to the challenge posed by political leaders in Prince Edward County, Virginia, who had chosen to close all of their public schools rather than comply with court orders to desegregate. The Court ruled that the old “deliberate speed” guideline could “no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia.”<sup>50</sup> With these decisions, however, the Court expressed its impatience but still did not detail the parameters of full compliance with a “*Brown* mandate.”

The United States Supreme Court finally broke its silence in 1968, fourteen years after *Brown*, when it held for the first time that school districts owed an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>51</sup> Three years later, the Court held that “[i]f school authorities fail in their affirmative obligations under these holdings, judicial authority may be in-

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47. *Brown v. Bd. of Educ.*, 892 F.2d 851, 865 (10th Cir. 1989) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971)).

48. *Id.* at 886 (concluding that Topeka schools had not achieved a unitary school system).

49. *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

50. *Griffin v. County Sch. Bd.*, 377 U.S. 218, 234 (1964); *see also Goss v. Bd. of Educ.*, 373 U.S. 683, 687 (1963) (striking down a school transfer program based upon race).

51. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968).

voked. Once a right and a violation have been shown, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies."<sup>52</sup> In these decisions, the Court continued to reflect the perspectives of the plaintiffs and the school children they represented.

Recognizing the continuing public dissent, all of the United States Supreme Court opinions to this point were backed by unanimous agreement among the judges. That shell of unanimity began to break two years later when the Court began to look at the application of its rulings to segregated schools in northern cities. Unmistakable shifts in perspective had begun. Justice Powell looked at the issue from his perspective as a former Virginia school board member and objected to the idea that northern and southern school districts should be subject to different standards of review and different obligations to desegregate. In his opinion, "we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application."<sup>53</sup> Justice Powell would have imposed an affirmative duty to integrate on all school systems, explaining that he would not "perpetuate the *de jure/de facto* distinction nor would [he] leave to petitioners the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent.'"<sup>54</sup> Justice Douglas joined Justice Powell, noting the complex ways in which governments contribute to racial segregation, including historically significant restrictive covenants and urban development agencies that "build racial ghettos."<sup>55</sup>

In contrast, Justice Rehnquist became the first member of the Court to argue for more severe constraints on judicial review. Justice Rehnquist challenged the view that proof of 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 without needing to prove additional intent to segregate.<sup>56</sup> In his view, it was a "drastic extension of *Brown*" to "require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines."<sup>57</sup>

Justice Rehnquist's dissenting opinion in 1973 proved to be just the opening salvo in a lengthy subsequent battle over the role of the courts in managing issues of race discrimination. Two aspects of his opinion are of particular note. First, Justice Rehnquist seemed deter-

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52. *Swann*, 402 U.S. at 15.

53. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 219 (1973) (Powell, J., concurring in part and dissenting in part).

54. *Id.* at 224 (Powell, J., concurring in part and dissenting in part).

55. *Id.* at 216 (Douglas, J., concurring).

56. *Id.* at 258 (Rehnquist, J., dissenting).

57. *Id.* (Rehnquist, J., dissenting).

mined to view the issue of when race discrimination triggers judicial intervention in the narrowest possible terms. Second, he emphasized the premium he places on “neutral” government decision-making. These two elements mark a shift in perspective from *Brown* and its early progeny.

In subsequent years, Justice Rehnquist’s views came to dominate the Court. For example, in *Kansas City*, where constitutional violations were traced to both state government and school district intentional discriminatory actions, schools within the city limits had been allowed to deteriorate. White flight to well-funded suburban school districts contributed to this decline. The district court found that the only way to “remedy the vestiges of past segregation” was to order a general uplifting of the urban school district so that white students from outside the city would return.<sup>58</sup> In the majority opinion of Chief Justice Rehnquist, the Court struck down reliance upon “desegregative attractiveness,”<sup>59</sup> ruling that “white flight” resulted from court-ordered desegregation, not from *de jure* segregation, and therefore could not be considered as a factor by the district court.<sup>60</sup> In other words, days of deference to broad remedial authority of the lower courts were gone.

The current United States Supreme Court has also been anxious to terminate ongoing judicial supervision of school districts that have a history of racial segregation. In contrast to holding that all vestiges of segregation be “eliminated root and branch,” the Court now demands an end to judicial oversight when a school board has “complied in good faith with the desegregation decree since it was entered, and . . . the vestiges of past discrimination [have] been eliminated *to the extent practical*.”<sup>61</sup> Lower courts are now directed to engage in partial withdrawal of supervision when elements of a school system, such as pupil assignments or faculty resources, have met constitutionally acceptable standards.<sup>62</sup>

## V. NEUTRALITY AND THE PERPETRATOR PERSPECTIVE

If we think about *Brown* in terms of perspective, what Thurgood Marshall and his colleagues from the NAACP achieved could be described in terms of shifting the perspective of the courts from that of the dominant white majority to that of the black child. The power of Kenneth Clark’s doll study had little to do with the persuasiveness of the scientific evidence. That evidence can be better understood as a

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58. *Missouri v. Jenkins*, 515 U.S. 70, 75 (1995).

59. *Id.* at 100.

60. *Id.* at 95.

61. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (emphasis added).

62. *See Freeman v. Pitts*, 503 U.S. 467, 493 (1992).

successful effort to make a group of old white males on the United States Supreme Court understand and empathize with the message of segregation received by children playing with dolls. The Justices had understood in prior cases that teaching a small group of law students in a make-shift classroom could not be compared to the experience of learning law at the University of Texas; in *Brown*, the Justices learned that forcing Linda Brown to take a bus to a distant segregated school did not match the experience of allowing her to go to school with the other children in her neighborhood.

As described in these terms, *Brown* was built upon an antisubordination principle. The dominant majority violated the Equal Protection Clause when it forced the minority into a position that all perceived as subordinate. This shift from *Plessy* also signaled a return to the original understanding of the Fourteenth Amendment as accounted in the *Slaughter-House Cases* and *Strauder v. West Virginia*.<sup>63</sup>

An antisubordination principle differs in key respects from a color-blind principle. It is a distinction that can be understood in terms of the perspectives of the class of victims of discrimination and the class of perpetrators. As Alan Freeman explained twenty-five years ago, members of the perpetrator class naturally focus upon “fault” and “causation.”<sup>64</sup> Members of that group tend to believe that the most important objective of the courts should be to identify the wrong-doers; to limit government intervention to forcing remedies upon those who have individually engaged in invidious discrimination. Based upon this perspective, members of the perpetrator class who did not participate in unlawful behavior should not bear the burden of providing a remedy.

In contrast to the perpetrator perspective, the victimized class cares about eliminating the “conditions” caused by past discrimination.<sup>65</sup> Charles Lawrence explained this distinction when he asked, “Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her?”<sup>66</sup> If in the years following *Brown* the United States Supreme Court had continued to see the issue of segregated schools through the eyes of the children, then they would have had to confront that question. Justice Powell raised the issue in 1973; Justice Rehnquist rejected it and signaled that in the years to come he would embrace the perpetrator’s perspective.<sup>67</sup>

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63. See *supra* text accompanying notes 14-15.

64. Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978).

65. *Id.* at 1053.

66. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

67. See *supra* text accompanying note 52.

Growing acceptance of the perpetrator's perspective meant both that courts would be asked to focus on the issue of fault and that the judges would readily accept "neutral" explanations for deeply entrenched racial divisions. Thus, as the Court moved away from its focus on the affirmative duty to eliminate segregation, it adopted an alternative principle of enforced government neutrality. The antisubordination principle of *Brown* became displaced by the color-blind principle, constraining any consideration of race regardless of impact on majority or minority.<sup>68</sup> Furthermore, rather than loosening the grip of the formal de jure/de facto distinction as Justices Powell and Douglas had recommended, the Court became increasingly more insistent upon proving intent, presuming that routine government action was benign.<sup>69</sup> Neither consciousness of discriminatory impact nor racist motives of the public have an impact on this burden.<sup>70</sup>

It is difficult in some respects to understand the Court fascination with neutrality in light of the devastating critical commentary regarding that issue.<sup>71</sup> Surely, the United States Supreme Court Justices do not really believe in the myth of neutrality. It seems more likely that they understand and reject the critique, knowing that what passes for neutrality will be a reflection of the values, interests, and preferences of the majority, and suppression of the culture and the political interests of the minority.<sup>72</sup>

The insidious nature of the neutrality standard appears most clearly when viewed in contemporary applications. Government leaders have learned to avoid explicit references to racist views when making decisions that have a negative impact on minorities, and as a result they avoid potential liability. In contrast, however, those who see the positive value of racial diversity expose themselves to the strict scrutiny of the courts. In *Topeka, Kansas*, as soon as the court declared

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68. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

69. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

70. See *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 123 S. Ct. 1389, 1394 (2003) (*United States Reports* pagination not available at time of publication) (rejecting challenges to referendum process prior to housing development in spite of apparent racist influence on public referendum); *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979) (upholding preference for veterans in spite of consciousness of discriminatory impact against women and exception for "traditional women's jobs").

71. See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

72. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). In *Smith*, Justice Scalia rejected protection of minority religious groups from "neutral" criminal laws, explaining, that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

*Id.*

the closure of litigation in *Brown*,<sup>73</sup> members of the school board learned that they acted at their own peril if they continued to consider race as a factor to maintain diversity within the public schools.<sup>74</sup> In broader terms, a neutrality standard impairs government authority to deal with problems of entrenched discrimination.

## VI. *GRUTTER* AND *GRATZ*: ANOTHER NEW BEGINNING?

Application of the neutrality principle illustrates the continued dominant role of a “European-American perspective.” Systematic rules that prevent government from addressing deeply embedded problems of racism end up restoring the standards and strictures of the *Civil Rights Cases* and *Plessy v. Ferguson*. Both of those cases taught that Congress and the courts lacked the power to effectively address racism within society. Today we hear the echoes of 1896. The structure of our equal protection doctrine virtually assures that the Fourteenth Amendment will be used primarily against minority rights and will not be available to address the entrenched causes and consequences of racism.

As of 2003, however, a glimmer of light still shines on an alternative perspective. In the case of *Grutter v. Bollinger*,<sup>75</sup> the United States Supreme Court upheld consideration of race as a factor in admission to the University of Michigan Law School, approving of “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>76</sup> In explaining the opinion of the Court, Justice O’Connor noted the value of diversity in different segments of our society. “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>77</sup> The Court was obviously impressed by arguments that “high ranking retired officers and civilian leaders of the United States military assert that . . . a ‘highly qualified, racially diverse officer corps . . . is essential.’”<sup>78</sup> The Court also found that “nowhere is the importance of such openness more acute than in the context of higher education.”<sup>79</sup>

73. See *Brown v. Unified Sch. Dist. No. 501*, 56 F. Supp. 2d 1212, 1213-14 (D. Kan. 1999).

74. See Heather Hollingsworth, *USD 501 Faces a New Balancing Act*, TOPEKA CAP.-J., Oct. 18, 1999, at 1, available at [http://www.cjonline.com/stories/101899/com\\_usd501.shtml](http://www.cjonline.com/stories/101899/com_usd501.shtml).

75. 123 S. Ct. 2325 (2003) (*United States Reports* pagination not available at time of publication).

76. *Id.* at 2343.

77. *Id.* at 2340.

78. *Id.*

79. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter* (No. 02-241)).

Although the Court's majority embraced diversity, they did not open the door as widely as some had advocated. In *Gratz v. Bollinger*,<sup>80</sup> the majority found that "the University's policy, which automatically distributes 20 points . . . to every single 'under-represented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity."<sup>81</sup> Justice O'Connor explained that "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'"<sup>82</sup> In barring award of fixed numbers to each minority applicant, the Court emphasized "the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education."<sup>83</sup> But in allowing the Law School to seek a "critical mass" of minority students, the Court recognized the evil of racial stereotypes and concluded that "diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."<sup>84</sup>

This challenge to stereotypes is consistent with the explanation of multiple consciousness and European-American perspectives described at the outset of this essay.<sup>85</sup> Although I have European ancestry, my views often diverge from those which dominate American culture. I view those differences as a resource for learning; we serve education by recognizing diversity within groups with European, African, Hispanic, Asian, or Native American ancestry. Justice O'Connor's opinion underscores the significance of diversity measured in these terms.

It would not be accurate to describe the Court's decisions in *Grutter* and *Gratz* as a return to *Brown* or to the embodiment of the perspective of the minority students seeking their place in American society. Justice Ginsburg introduced that alternative perspective. Dissenting in *Gratz*, she explained that "the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."<sup>86</sup> She also explained that "the Constitution is both color blind and color conscious. . . . [A] classification that denies a

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80. 123 S. Ct. 2411 (2003) (*United States Reports* pagination not available at time of publication).

81. *Id.* at 2427-28.

82. *Grutter*, 123 S. Ct. at 2342 (quoting *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)).

83. *Gratz*, 123 S. Ct. at 2428.

84. *Grutter*, 123 S. Ct. at 2341.

85. *See supra* text accompanying notes 5-8.

86. *Gratz*, 123 S. Ct. at 2443 (Ginsburg, J., dissenting).

benefit, causes harm, or imposes a burden must not be based on race. . . . But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.’”<sup>87</sup>

In contrast, the decisive viewpoint on the Court remained attached to the views and values of the majority. Potential swing votes on the Court appear to have been swayed by views of the generals and the leaders of Fortune 500 companies who have come to value diversity itself.<sup>88</sup> While that is less than may have been promised by the legacy of *Brown*, it nevertheless offers a break from our racist past.

Valuing diversity is not a new approach suddenly discovered in the twenty-first century. It pays now to remember the words of the Kansas Supreme Court expressed in the year 1881 when the justices barred the city of Ottawa from segregating its schools without statutory authorization:

At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; there they may learn human nature in all its phases, with all its emotions, passions and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human actions, and the attractions and repulsions, which lead with irresistible force to particular lines of conduct. But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society.<sup>89</sup>

In the year 2003, that perspective remained constitutionally acceptable by a vote of five-to-four on the United States Supreme Court.

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87. *Id.* at 2444 (Ginsburg, J., dissenting) (quoting *United States v. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966)).

88. *See Grutter*, 123 S. Ct. at 2340.

89. *Bd. of Educ. v. Tinnon*, 26 Kan. 1, 11 (1881). Justice Brewer was the one member of the Kansas Supreme Court who dissented from this opinion. He was subsequently selected to serve on the United States Supreme Court, and, although he did not participate in the case, he served on that Court when the ruling in *Plessy v. Ferguson* was handed down in 1896.

