2002

# Neutral Principles and the Resegregation Decisions

Robert L. Hayman

# NEUTRAL PRINCIPLES AND THE RESEGREGATION DECISIONS

ROBERT L. HAYMAN, JR.*

## I. INTRODUCTION: NEUTRAL PRINCIPLES AND THE *BROWN* DECISION

The legitimacy of the Supreme Court's decision in *Brown v. Board of Education*[1] was still very much at issue in April 1959, when Columbia professor of law Herbert Wechsler appeared at Harvard Law School to give the prestigious Holmes Lecture in law.[2] In his speech—and in the article that memorialized it in the pages of the Harvard Law Review—Wechsler declared his sympathy with the *Brown* Court's effort, but professed his inability to discern a "neutral principle" that would legitimate the Court's decision.[3] Though he counseled against defiance of the decision,[4] Wechsler's critique had the inevitable effect of bolstering resistance—massive and passive[5]—by lending academic support to the view that the justices of the *Brown* Court had, in the words of the "Southern Manifesto," exercised "naked judicial power and substituted their personal political and social ideas for the established law of the land."[6]

Within the American legal academy, the response to Wechsler's critique developed at two levels. At the more specific level, what followed was an attempt to locate the "neutral principle" that animated *Brown* (or, in some quarters, to negate it).[7] Defenders of *Brown*, of course, sought to explain its legitimacy. Some of their defenses were fairly complex: Alexander Bickel, for example, had argued that the decision comported with the intent of the framers of the Fourteenth Amendment, who, while not able themselves to

---

* Professor of Law, Widener University School of Law. For Norine Sheridan—in loving memory.

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

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

3. *See generally id.*

4. *Id.* at 35.

5. On resistance to the *Brown* decision—including Senator Harry Byrd's call for "massive resistance," see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 150-63 (1974).

6. JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH 622 (1994). The manifesto-which pledged its signatories to "all lawful means to bring about a reversal" of the decision-was endorsed by each senator and congressman from the states of the old confederacy, except the Senate Majority Leader, Lyndon Johnson of Texas, and the two senators from Tennessee, Estes Kefauver and Al Gore, Sr. *Id.* at 622-23.

7. For a thorough and insightful survey of these efforts, see Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997).

explicitly repudiate segregation, nonetheless carefully crafted a constitutional provision that would permit judicial rejection of segregation in a more enlightened age.[8] Some defenses, on the other hand, were astoundingly simple. Charles Black wrote in response to Wechsler:

> [T]he basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the segregation cases. If both these propositions can be supported by the preponderance of argument, the cases were rightly decided.[9]

At a more general level, Wechsler's critique launched something of a counter-revolution in jurisprudence. The Legal Process school of the 1950s sought to provide a corrective to some of the perceived excesses of legal realism.[10] It promoted, above all, the search for processes that would ensure the legitimacy of judicial decisions, processes that reflected and in turn mandated principled decision-making.[11] The governing principles, meanwhile, were to be juridical not political, universal not contextual—in a word, "neutral."[12]

Neither project would long endure. The broader jurisprudential project was doomed from the outset: the realist legacy may not include great programmatic successes, but the realists surely succeeded in embedding in the American legal psyche an enduring skepticism toward the possibility of neutral, determinate rules and processes. The legal process scholars not only had to confront this skepticism, but, by their own designs, had to overcome

---

8. *See generally* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

9. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 421 (1960).

10. *See* ROBERT L. HAYMAN, JR. ET AL., JURISPRUDENCE–CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 161(2002).

11. *Id.*

12. Not all Process jurists shared Professor Wechsler's reservations about the *Brown* decision. In an article written prior to Professor Wechsler's address—indeed, just months after the decision—Professor Albert Sacks discerned in *Brown* the vindication of a clear principle:

> The outstanding feature of the decision lies in the triumph of a principle–a principle which the Court must have found to be so fundamental, so insistent, that it could be neither denied nor compromised. The principle can be easily stated: the Constitution requires equal treatment, regardless of race. Racial segregation in the schools is incompatible with equal treatment. 'Separate but equal' is a self-contradicting phrase.

Albert M. Sacks, *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 96 (1954).

it with a program that conveyed an unappealing indifference to substantive concerns—an indifference, that is to say, to the rightness, justness, or morality of results. In the end, their elaborate institutional schemes failed to deliver either the neutrality the process theorists promised or the substantive justice that other theorists pursued. Within a generation, the attitude toward their efforts was roughly that offered by Laura Kalman: "God forgive them, for they knew not that what they did was essentially, albeit not completely, a waste of time."[13]

The fate of the more narrow project—the effort to rehabilitate *Brown*—is somewhat less clear. It may be that *Brown*'s defenders succeeded; critiques of the decision—academic and otherwise—gradually diminished. But it may also be that the specific controversy was simply mooted by events in the real world. On the one hand, *Brown* became the established law of the land. An edgy Supreme Court vigorously defended the legitimacy of its decision;[14] a reluctant President eventually was moved to use federal troops to enforce it;[15] and a previously ambivalent Congress finally placed its imprimatur on the decision by requiring compliance with desegregation edicts as a condition to the receipt of federal educational funds.[16] There was, then, no point in searching for Brown's justification: as a practical matter, it was no longer necessary.

On the other hand, Brown—in the real world—may have been honored principally in the breach. The Court's compliance decisions were riddled with ambiguities, oxymorons, dichotomies and distinctions; one President ascended to the White House through a "southern strategy" that subtly embraced opposition to integration;[17] a subsequent President condemned the integration effort as a "social experiment" that "failed"[18]; and Congress

---

13. Laura Kalman, *Eating Spaghetti with a Spoon*, 49 STAN. L. REV. 1547, 1566 (1997) (book review).

14. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . ." *Id.* at 18.

15. For an account of the Little Rock crisis, see HENRY HAMPTON ET AL., VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S 35-52 (1990).

16. *See* Civil Rights Act of 1964, 78 Stat. 246, 252, 266 (codified at 42 U.S.C. §§ 2000c *et seq.*, 2000d *et seq.*, 2000h-2).

17. On Richard Nixon's 1968 campaign, see DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 324-70 (1995).

18. In 1984, Ronald Reagan told a Charlotte, North Carolina crowd that Democrats "favor busing that takes innocent children out of the neighborhood school and makes them pawns in a social experiment that nobody wants. And we've found out that it failed." LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 82 (1987) (quoting Francis X. Clines, *White House Aides Minimize Results*, N.Y. TIMES, Oct.

gradually eliminated the principle sources of federal financial support for desegregation,[19] a development rendered almost redundant by the ascendancy of state "neighborhood schools" laws adopted after desegregation was abandoned by the federal courts.[20] There was, in this sense, no point in challenging *Brown*; as a practical matter, the challenge was no longer necessary.

Whatever the particulars, the challenges to *Brown*'s legitimacy disappeared from mainstream discourse. Even conservatives acquiesced in the decision; indeed, conservatives may have developed a unique willingness to embrace the decision, if only to provide a certain insulation on matters of race.[21] *Brown* eventually became—for nearly everyone—the established, and accepted, law of the land, a decision rooted, we now seem satisfied, in "neutral principles."

But recent actions by the Supreme Court may have conspired to resurrect the question of *Brown*'s "neutral principle," at least in an indirect way. Three otherwise largely unrelated developments may be responsible.

The first is the Court's troubled foray into what might once have been characterized as the realm of the "political."[22] The controversy leading up to and culminating in the decision in *Bush v. Gore*[23] was filled with charges and counter-charges of judicial over-reaching, and the decision itself relies

---

9, 1984, at A29). An editorial response to President Reagan in the Charlotte Observer noted the city's pride in its fully integrated schools, and said:

> It would have been quite appropriate and very much appreciated if you had noted that accomplishment, which any president might hold up as a model to the rest of the country. Instead, you said something quite different, an unwelcome reminder of some ugly emotions and unfounded fears that this community confronted and conquered more than a decade ago.

CAPLAN, *supra* note 18, at 83 (quoting *You Were Wrong, Mr. President*, CHARLOTTE OBSERVER, Oct. 9, 1984, at 10A).

19. *See* GARY ORFIELD, ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 13-17 (1996).

20. The desegregation effort for the New Castle County public schools, for example, came to an end with the District Court's decision in *Coalition to Save Our Children v. State Board of Education*, 901 F.Supp. 784 (D.Del. 1995), *aff'd* 90 F.3d 752 (3rd Cir. 1996); the Delaware legislature shortly responded with the Neighborhood Schools Act of 2000, which requires that the governed school districts "shall develop a Neighborhood School Plan for their districts that assigns every student within the district to the grade-appropriate school closest to the student's residence, without regard to any consideration other than geographic distance and the natural boundaries of neighborhoods." DEL. CODE ANN. tit. 14, § 223.

21. *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383 (2000).

22. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

23. 531 U.S. 98 (2000).

exclusively on precedents of oft-questioned legitimacy. *Bush v. Gore*, as a general matter, quite plainly revived the question of neutral principles.[24]

Second are the Court's recent revisions in constitutional doctrine. The Court has now demonstrated an obvious willingness to undo earlier decisions with which it disagrees. Sometimes the reversals are implied,[25] sometimes expressed,[26] but in either event, the unhappy fate afforded constitutional precedents raises questions about the legitimacy of the earlier decision, or the later one, or both, and certainly raises questions about the neutral principle that underlies this Court's conception of *stare decisis*.

Third and finally are the most recent desegregation opinions of the Supreme Court: *Board of Education v. Dowell*,[27] *Freeman v. Pitts*,[28] and the third iteration of the dispute in *Missouri v. Jenkins*.[29] These all pay proper homage to *Brown*, but they depart from, and indeed at times are openly critical of, the efforts to enforce *Brown*. Some readings of *Brown*, in the Court's current view, appear to lack *Brown's* legitimacy; but what neutral principle separates *Brown* from its progeny, what neutral principle is now being vindicated?

This essay is designed to initiate an inquiry into the "neutral principles" of the Court's current desegregation jurisprudence. It takes seriously the claim that the resegregation decisions must be grounded in neutral principles, if only because this Court—or at least the majority of the Court that has dictated the outcome in the resegregation cases—appears to take seriously that claim. Indeed, the majority's critiques of lower court efforts to enforce *Brown* are consistently couched in the language of neutral principles. Thus, Chief Justice Rehnquist asserts the need for "objective limitations" on the judicial enforcement power in desegregation cases;[30] Justice O'Connor warns that federal courts "must always observe their limited judicial role" in the school desegregation context;[31] Justice Scalia urges a return to the "ordinary principles of our law" in the desegregation cases;[32] Justice Kennedy insists that desegregation orders must consist with

---

24. *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) (noting that "[j]urisprudentially speaking, the big winners of the 2000 election were American Legal Realism and Critical Legal Studies."). *Id.* at 1441.

25. *See, e.g.*, U.S. v. Lopez, 514 U.S. 549 (1995) (reviving formalistic, categorical approach to commerce clause disputes, while retaining—rhetorically—the "substantial effects" test).

26. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 202 (1995) (overturning Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990)).

27. 498 U.S. 237 (1991).

28. 503 U.S. 467 (1992).

29. 515 U.S. 70 (1995) [hereinafter *Jenkins III*].

30. *Jenkins III*, 515 U.S. at 98.

31. *Id.* at 113 (O'Connor, J., concurring).

32. *Freeman*, 503 U.S. at 506 (Scalia, J., concurring).

"the basic principles defining judicial power";[33] and Justice Thomas laments the fact that, in the desegregation context, the federal courts "have not permitted constitutional principles such as federalism or the separation of powers to stand in the way of our drive to reform the schools."[34] The resegregation opinions, then, purport to vindicate some neutral principles of adjudication. But what are they?

The aim of this inquiry is thus twofold: first, to assess the neutrality of the principles suggested by the Court as foundations for its resegregation opinions; and second, to compare those principles with those that animate *Brown* and its immediate progeny.

## II. WHAT IS MEANT BY NEUTRAL PRINCIPLES?

"[T]he main constituent of the judicial process[,]" Wechsler insisted, ". . . is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[35] For Wechsler, and the Court which today purports to follow his lead, a "neutral principle" is thus a juridical rule that transcends the instant application, as opposed to a political imperative which might be limited to a particularized context.[36]

Thus understood, a "neutral principle" would seem to be distinguished by two characteristics: it would need to be impartial, and it would need to be precise. Regarding the first, a governing principle must manifest a political impartiality; it must thus be objective at least in this sense: that it is sufficiently divorced from the political context that a reversal of political valences would not change the results of the case. *Bush v. Gore* offers a somewhat simplistic illustration of this component of neutrality. It is indeed the product of neutral principles only if the decision would have been the same were the roles of the parties—the presidential candidates—reversed. As for the second characteristic, the principle must be susceptible of a reasonably precise articulation; it must thus be determinate at least in this sense: that it is largely resistant to manipulation—or outright perversion—in the pursuit of political ends. Again, *Bush v. Gore* may be illustrative. The decision was indeed governed by a neutral principle if its manifest commitment to "the equal dignity owed to each voter" was

---

33. Missouri v. Jenkins, 495 U.S. 33, 58 (Kennedy, J., concurring) [hereinafter *Jenkins II*].

34. *Jenkins III*, 515 U.S. at 123 (Thomas, J., concurring).

35. Wechsler, *supra* note 2, at 15.

36. *See id.* at 16 (emphasizing "the role of reason and of principle in the judicial, as distinguished from the legislative or executive, appraisal of conflicting values . . .").

sufficiently well-defined to allay fears that the principle was born largely of political expediency.[37]

In the context of cases involving racial equality, the first neutrality requirement—the requirement of objectivity—generally may be translated as a requirement of viewpoint or perspectival neutrality: the principle vindicated by a decision must be equally appealing—and its application equally convincing—to majority and minority[38] observers. According to Wechsler, the difficulty with the *Brown* decision was that it was non-neutral in precisely this sense: the decision, he claimed, was partial toward black interests and a black perspective, vindicating "the freedom of association . . . denied by segregation," but failing to recognize that "integration forces an association upon those for whom it is unpleasant or repugnant."[39] His claimed inability to find in *Brown* any principle that would—in the abstract—accommodate the interests and perspectives of pro-segregation whites meant that the decision simply was not neutral. It was pro-black, pro-integration, pro-liberal, and, concomitantly, anti-white, anti-segregation, and anti-conservative.

The determinacy requirement, meanwhile, may be read in the desegregation context as a requirement that the animating principle invigorate the Reconstruction amendments' commitment to racial equality in a meaningfully articulate way, rather than reduce those amendments to "splendid baubles"[40] and the equal protection guarantee to "a formula of empty words."[41] For Wechsler, the problem with *Brown* "inheres strictly in the reasoning of the opinion,"[42] which he finds remarkably under-developed. The opinion manifests what he derides, in another context, as a "poverty of principled articulation[.]"[43] Wechsler deduces that the opinion "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed. . . ."[44] But neither the cited empirical evidence nor the Court's

---

37. *Bush*, 531 U.S. at 104. One may not be much comforted in this regard by the *per curiam* opinion's caution that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.* at 109.

38. The simplistic "black-white" binary approach to matters of racial perspective is almost certainly inappropriate in most contexts. In analyses of school desegregation, however, it has been and remains the dominant approach, both in judicial opinions and in most of the empirical work. With substantial misgivings, this essay generally conforms to that paradigm.

39. Wechsler, *supra* note 2, at 34.

40. Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting).

41. Skinner v. Oklahoma, 316 U.S. 535, 542 (1942).

42. Wechsler, *supra* note 2, at 32.

43. *Id.* at 24.

44. *Id.* at 33.

rhetoric is sufficient to persuade Wechsler that the proposition is valid. If it is "equality" that is compromised by segregation, if separate is inherently "unequal," then it is incumbent upon the Court to explain—with precision—just how, when, and where this is so: absent elaboration, "equality" is simply too open-ended and manipulable to be a "neutral principle."

And so the question becomes, do the Court's recent resegregation decisions rest on a principle that is both impartial and reasonably precise: are they rooted in some "neutral principle?" But before proceeding with that inquiry, one cautionary note is in order. It is far too late in the jurisprudential day, it would seem, to pretend that any principle or any rule could be impartial and determinate—could be "neutral"—in any absolute sense. At the same time, it is equally implausible to maintain that without such principles or rules, judges would be completely unconstrained.[45] The

---

45. Owen Fiss wrote:

> When I read a case like *Brown v. Board of Education*, for example, what I see is not the unconstrained power of the justices to give vent to their desires and interests, but rather public officials situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession. There is more to judging than simply confronting the bare words of the fourteenth amendment commanding that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' The justices start with the amendment's legislative history and a body of cases that has struggled to make sense out of the commitment of the amendment to racial equality. Guided by years of training and experience, they read earlier cases, and sense which way the law is moving. They consider the role of the state, and the place of public education in particular, in the life of the nation and weigh the evidence developed at trial on the impact of segregative practices. They also know what constitutes a good reason for distinguishing *Plessy* or for deciding the case one way or another. In sum, the justices are disciplined in the exercise of their power. They are caught in a network of so-called disciplining rules' which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the justices are part. These disciplining rules provide the standards for determining whether some decision is right (or wrong) and for justifying it (or for contesting it). They constrain, not determine, judgment.

Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 11 (1986). It is fair to ask whether Professor Fiss' "disciplining rules" are really constraining, or whether they are—like all "texts"—open to interpretation, *see generally* Stanley Fish, *Fish v. Fiss*, 36 STAN L. REV. 1325, 1325 (1984); fair to ask too whether the "disciplining rules" are necessary as constraints, or whether the rites of passage in the "interpretive community" provide sufficient constraint, *id.*; fair to ask as well whether "interpretive communities" are viable or necessary as constraints on interpretive autonomy, and so on. *See also* Pierre Schlag, *Fish v. Zapp: The Case*

formalistic critique of *Brown*—that it was rooted not in law but in the "personal political" ideals of the Warren Court[46]—should not be taken too literally. After all, the twin premises of the *Brown* decision—that the Fourteenth Amendment prohibits the invidious imposition of inequality, and that compulsory racial segregation is manifestly such an inequality—are surely supported by more than "personal political" beliefs. The former is at least a plausible reading of the language and purpose of the Fourteenth Amendment, and the latter found (and still finds) support in social science evidence and our common national experience. The case for each claim is, perhaps, not conclusive, but, in constitutional law at least, the conclusive argument is a rare one.

Thus informed, the inquiry is perhaps better reformulated as a comparative one: is the claim that the *Dowell*, *Freeman*, and *Jenkins* decisions are rooted in impartial and determinate principles a more or less compelling claim than the one that might be advanced on behalf of the original *Brown* decision? Or, in other words, is judicially supervised *re*segregation more or less plausibly rooted in "neutral principles" than judicially supervised *de*segregation?

## III. THE NON-NEUTRAL PRINCIPLES OF THE RESEGREGATION DECISIONS

Three animating principles might be urged to explain the logic and rhetoric of the resegregation decisions: a commitment to "local control"; a commitment to economic efficiency; and a commitment to racial neutrality, i.e, to "color-blindness" or "freedom of choice." Are any of these "neutral principles"?

### *A. Local Control*

Throughout the resegregation decisions, no proposition is more faithfully and explicitly advanced than this one: that educational matters are—or should be—subject to local control. "Local control over the education of children[,]" we are told by Chief Justice Rehnquist in *Dowell*, "allows citizens to participate in decisionmaking, and allows innovation[s] . . . that . . . can fit local needs."[47] In *Freeman*, Justice Kennedy advises that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our

---

*of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987). The point, in any event, is that interpretive theorists are in general agreement that the rogue judge freed from the shackles of "neutral principles" is a creature less of jurisprudence than of science fiction.

46. *See supra* note 5 and accompanying text.

47. 498 U.S. at 248 (citing Milliken v. Bradley, 418 U.S. 717, 742 (1974).

governmental system."[48] And in *Jenkins III*, it is again Chief Justice Rehnquist who reminds us that the "end purpose" of desegregation decrees "is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'"[49]

Is the "local control" principle a neutral one? In the abstract, it is conceivable that a preference for state or local control of educational matters could meet the first requirement of neutrality: it may be sufficiently impartial. On the other hand, one might convincingly argue—following no lesser authority than Madison's Federalist No. 10[50]—that a preference for local control inherently places minority interests at greater risk and that central control is preferable for mitigating the danger that a majoritarian faction will use its influence to the detriment both of political minorities (including ones defined by "race") and of the public good. On this understanding, there is nothing neutral about "local control" at all. Balancing the theoretical risks and benefits to minority and majority groups, the decision for local control represents a deliberate preference for majority benefits and minority risks.

But, of course, this assessment need not take place in the abstract. The requirement that a constitutional principle be neutral across *decisional* contexts does not necessitate an absolute indifference to larger *historical* contexts—to those, for example, surrounding the adoption, interpretation, or implementation of constitutional guarantees. After all, the meaning—historical and contemporary—of the asserted principle can only be comprehended in its appropriate context, and it is impossible to know whether the principle is neutral without first knowing what it has meant and what it now means.

"Local control"—examined in its relevant constitutional contexts—hardly has had a neutral meaning. Nullification and secession were fresh in the minds of the framers of the Fourteenth Amendment, and the provisions of that amendment—which explicitly limit the powers of the states while expanding the power of the national government—were proposed and ratified in the face of vigorous objections to a federal "despotism" and corresponding assertions of "states' rights."[51] More immediately, the story

---

48. 503 U.S. at 490; *see also id.* at 506 (Scalia, J., concurring) ("public schooling, even in the South, should be controlled by locally elected authorities").

49. 515 U.S. at 102 (quoting *Freeman*, 503 U.S. at 489); *see also id.* at 113 (O'Connor, J., concurring) ("in the school desegregation context, federal courts are specifically admonished to 'take into account the interests of state and local authorities in managing their own affairs'"); *id. at* 131 (Thomas, J., concurring) ("education is primarily a concern of local authorities").

50. THE FEDERALIST NO. 10 (James Madison).

51. Democratic opposition to the Fourteenth Amendment was uniform. No Democrat

of *Brown* and its implementation is in substantial part a reiteration of the same text: "massive resistance," "nullification," and "interposition" gradually yield to federal authority—judicial, executive, and legislative. A new ending to the story, perhaps, is now being written, and "local control" may prove the ultimate winner, but while that principle may claim victory, it cannot plausibly claim neutrality.

It may be true, then, that local control is, as Justice Scalia suggests in his *Freeman* concurrence, a part of "our educational tradition,"[52] but it is a part of our tradition that has been inextricably intertwined with racial inequality. Indeed, this part of "our" tradition was made for—not by—black Americans, and it was clearly made for their subordination. From Jim Crow schools to publicly-subsidized "private" schools, from "whites-only" school buses to "no more busing," from "separate but equal" to "freedom of choice," "local control" in the desegregation context has nearly always meant, in the memorable phrase of an Alabama governor, "segregation now, segregation

---

in either the Senate or the House of Representatives voted for the measure. And, typically, much of it was expressed in the rhetoric of "state's rights." *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess., 2538 (statement of Rep. Rogers) ("It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of States . . ."); *id.* at 2530 (statement of Rep. Randall) ("there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States."); *id.* at 3147 (statement of Rep. Harding) ("the last section . . . at once transfers all powers from the State governments over the citizens of a State to Congress."); *id.* at 2940 (statement of Sen. Hendricks) the

> last section provides that Congress shall have the power to enforce, by appropriate legislation, the provisions of the article. When these words were used in the amendment abolishing slavery they were thought to be harmless, but during this session there has been claimed for them such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous.

CONG. GLOBE, 39th Cong., 1st Sess., App. 240 (statement of Sen. Davis) (rights guarantees of proposed amendment are "objectionable, because in relation to her own citizens it belongs to each State exclusively, as being of her own reserved sovereignty and rights, to regulate that matter."). Notwithstanding these objections, the proposed fourteenth amendment was approved by the Senate by a vote of 33-11, with 5 Senators not voting. *Id.* at 3042. The House concurred in the Senate's amendments to the proposal by a vote of 120-32-32 and the proposed Fourteenth Amendment was sent to the states for ratification. *Id.* at 3149. "States' rights" objections also figured prominently in the opposition to the Amendment during the ratification debates, but there again, of course, the arguments were unsuccessful. *See* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 133-46 (1984).

52. 503 U.S. at 506 (Scalia, J., concurring).

tomorrow, segregation forever."[53] Even a passing familiarity with this history suffices to make the connection; a more intimate familiarity simply confirms it.

All of which makes puzzling the durability of the suggestion—advanced of late by Raoul Berger—that "state's rights" and "local control" remain the presumptive norm, and the burden is on those who would disrupt this vision of the status quo to make a convincing constitutional case for an expanded federal role.[54] One might have supposed that the Fourteenth Amendment changed all that, and that at least in matters of racial equality, the states were not quite in the same privileged position they may have once enjoyed. As John Bingham, chief architect of the Amendment, once put it: "My honorable friend . . . discussed this question, upon the Constitution as it was and not upon the Constitution as it is."[55] Of course, it might be argued that racial segregation of public schools is beyond the reach of the Fourteenth Amendment, and so remains unaffected by that article's adjustment of the state-federal balance. But one might have supposed, on this score, that *Brown* itself had settled all that.

In the end, the thin claim for the neutrality of the "local control" principle is reduced to this: that while the principle is mandated by neither the text nor tradition of the Fourteenth Amendment, and has in fact been urged and understood in terms antithetical to the aims of the equal protection guarantee throughout the histories of the Amendment generally and of the segregation dispute more specifically, the principle is today sufficiently divorced from those histories and sufficiently removed from the design of the Fourteenth Amendment that it no longer assumes any distinctive significance in the desegregation dispute. It is thus impartial, the argument goes, in that it neither connotes nor denotes a position on desegregation, and serves neither as a proxy for segregationist arguments nor as the major premise of a syllogistic structure in which the acceptance of racial segregation is the inevitable conclusion.

This is not a strong argument, for at least three reasons. It assumes, first, that the connection between "local control" and educational inequity, a connection forged over many generations, has been undone within the span of a few decades or less. But how would this have happened? What events would have triggered this disassociation? None come to mind, and the continued correlation between "local control" arguments and

---

53. STEPHEN LESHER, GEORGE WALLACE: AMERICAN POPULIST 174 (1994) "I can say tonight in no uncertain terms that this state is not going to be big enough for me as the elected sovereign of this state and a bunch of Supreme Court yes-men appointed for life trying to run Alabama's school system. One of us is going to have to go. . . ." *Id.* at 159.

54. *See* Raoul Berger, *The "Original Intent"-As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 276-77 (1996).

55. CONG. GLOBE, 42nd Cong., 1st Sess., App. 81 (1871).

anti-integration efforts both in judicial opinions and in political campaigns would seem to militate against such an outcome. In fact, evidence suggests that "local control" continues to embody a distinctive racial message, one that black Americans and white Americans view very differently.[56] Black Americans remain twice as likely as white Americans to favor federal intervention in securing desegregated schools; white Americans, meanwhile, remain nearly three times more likely than black Americans to favor local control.[57]

These attitudinal differences likely reflect not only the history of local control, but also contemporary social realities. Here is the second reason to be skeptical of the claim to neutrality. Black Americans and white Americans simply do not experience local control in the same way. The demographics and economics of race in America ensure as much. For Americans in resource-rich suburban school districts, local control means one thing. For Americans in under- resourced urban school districts, it means something quite different. Where "local control" is, in practical effect, a benefit afforded to some Americans, but a burden imposed upon others, it becomes difficult to accept the proposition that the principle it expresses is neutral.

Finally, the Supreme Court's erratic experience with "local control" belies the claim to neutrality. Here, the determinacy requirement becomes significant. As a principle, federalism is simply too open-ended and its deployments too inconsistent to support the claim to neutrality. As an articulation of that principle, "local control" is simply too imprecise to ensure any measure of objectivity. Much might be made of the shabby treatment afforded the Florida Supreme Court by the "Federalism Five" in *Bush v. Gore*, but one need not travel that far from the race cases to find inconsistencies: where, after all, was the commitment to "local control" when the Court reviewed the city of Richmond's affirmative action plan?[58] And local control of *educational* matters fared no better when the Court reviewed the affirmative action plan adopted (through a collective

56. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 123-24, 248-49 (Harvard Press 1997) (1985). Three times in the 1990s–in 1990, 1992, and 1994–Americans were asked whether the federal government "should see to it that white and black children go to the same schools, or stay out of this area, as it is not its business." *Id.* at 123. Among white Americans, federal intervention was favored in the three polls by 28%, 29% and 25%, respectively, for an average of 27.3%; among black Americans, federal intervention was favored by 63%, 59%, and 57%, for an average of 59.7%. *Id.* at 124, 249. The percentage of white Americans who thought the federal government should "stay out of this area" was 35%, 39%, and 41%, for an average of 38.3%; the same attitude was expressed by just 15%, 16%, and 13% of black Americans, for an average of 14.6%. *Id.* at 124, 249.

57. *Id.* at 123-24, 248-49.

58. City of Richmond v. Croson, 488 U.S. 469 (1989).

bargaining agreement) by the Jackson, Michigan Board of Education.[59] There might be a principle that explains these cases, but it certainly is not "local control."

And precisely what is meant, in any event, by "local control"? If it means a deference to local expertise in educational issues, then the commitment to "local control" is severely embarrassed by the recent history of federal legislation. If it means a freedom from federal intervention in equality matters, then it is severely embarrassed by a long litany of federal legislative initiatives. And if it implies a more specific preference for local authority in matters of race, then it is simply at odds with the Fourteenth Amendment.

"Local control," then, may be good, or it may be bad, or it may be either good or bad, depending on the context. But in the context of the effort to desegregate public schools, "local control" is neither impartial nor determinate; it is not neutral.

### *B. Economic Efficiency*

The resegregation decisions are also littered with allusions to a second concern: economic efficiency. *Dowell* suggests that contemporary segregation is unobjectionable where it is the product not of *de jure* segregation, but of "private decisionmaking and economics";[60] *Freeman* suggests the futility of "heroic measures" in an effort to counteract "private choices" and "demographic shifts," advising caution "before ordering an impractical, and no doubt massive, expenditure of funds to achieve racial balance"[61]; and *Jenkins III* laments the "massive expenditures" entailed by "the most ambitious and expensive . . . program in the history of school desegregation."[62]

These various invocations of economic concerns might be understood in one of three somewhat related ways. First, they might be expressions of the view that market solutions to the segregation issue are preferable to governmental ones. Second, they might be expressions of the view that the precise governmental solution at issue—desegregation—has been inefficient. Finally, these views might overlap in the suggestion that the desegregation effort has been inefficient in substantial part because of market forces that are—and should be—beyond regulation.

The first view, that market solutions should control the problem of segregation, is simply not tenable. Even the staunchest defender of the free market is moved to concede that talk of market solutions is meaningless

59. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
60. 498 U.S. at 250, n.2.
61. 503 U.S. at 493, 495-96.
62. 515 U.S. at 78-79.

when the resource at issue is largely controlled by the government. Government, Milton Friedman has written, "must make an explicit decision. It must either enforce segregation or enforce integration."[63]

The second view, that federally-enforced desegregation has been inefficient, may well be the view of the Court, but assessment of that claim is seriously hampered by the failure of the opinions to manifest any sustained efficiency analysis. About the most that can be said is that the resegregation opinions collectively reflect a certain crude cost-benefit analysis, and that the costs of desegregation appear to the Court to be substantial, while the benefits appear relatively modest.

But is this analysis—and the efficiency principle that underlies it—neutral? There is no need here to revisit the familiar debate over the neutrality of the efficiency norm. Suffice it to say that compelling arguments have been made that efficiency analyses are notably inhospitable to egalitarian concerns, and may even favor enhanced inequalities in the distribution of resources.[64] What is important here, however, is not a broad critique of efficiency, but a particularized assessment of this specific efficiency analysis: and the crude efficiency principle that emerges from the Court's opinions is decidedly not neutral.

Most telling, in this regard, is not what is present in the Court's opinions, but what is absent. Any fair-minded effort to justify resegregation on efficiency grounds would have to consider the marginal utility of desegregation to black parents and schoolchildren. At a minimum, that would require a marginal analysis of the two most conspicuous utilities: first, the social status of black Americans, the immediate concern reflected in *Brown*'s stigma of inferiority; and second, the educational achievement of black Americans, the consequential concern reflected in discussion of that stigma (though not, perhaps, the ultimate concern, as social status and educational achievement seem—with segregation—to be part of a rather vicious cycle). But these in fact are afforded remarkably little weight in the opinions. Concerns about the stigmatic harm visited on black Americans are, as Justice Marshall noted in his *Dowell* dissent,[65] almost entirely absent from the decree termination analysis. And we are advised by Chief Justice Rehnquist's *Jenkins* opinion that the analysis "should sharply limit, if not dispense with[,]"[66] consideration of minority student achievement. Outside the dissenting opinions, only Justice Thomas, in his *Jenkins* concurrence, bothers to consider the evidence, and this only in a remarkably partial account confined to a perfunctory footnote offered to explain why social

63. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 117 (1982).

64. *See* HAYMAN ET AL., *supra* note 10, at 337-38, 361-62, 397-98.

65. 498 U.S. at 257-60 (Marshall, J., dissenting).

66. 515 U.S. at 101-02.

science evidence is *not* relevant.[67] Is it any wonder that desegregation would in this analysis seem inefficient?[68]

It is the third reading of the efficiency claim that finds the most explicit presentation in the cases: desegregation is inefficient to the extent that it might be employed either to compensate for or control market behavior that is (and must remain) beyond governmental regulation. Thus desegregation cannot and should not be used as a tool either to frustrate "private decision-making and economics" or to alter the landscape created by "demographic changes." While government may control school admissions, the argument goes, it is the market, not government, that should control the various anterior decisions, including the choice of school district, choice of neighborhood, and ultimately, the choice of school. School segregation, then, is the work of the marketplace, and the marketplace is efficient.

The difficulty with this claim is that it is entirely unsubstantiated: the opinions simply rely on an assumption that private markets are efficient. But that assumption is not universally true, and there are compelling reasons to believe that it is not true in the racial segregation context. The embrace of that assumption—without critical assessment and in the face of competing claims—in fact reflects a certain bias: in part, an ideological bias, but also, in part, a segregative bias.

The bias in favor of private market ordering that underlies much of modern law and economics (at least in its "Chicago school" version) is generally traced to the Coase theorem. Ronald Coase offered his theorem as a corrective to what he viewed as the interventionist bias of welfare economists, who were forever justifying market interventions by reference to the "social costs" of private transactions. Such costs, or "externalities,"[69] were to be charged—through governmental regulation—to the parties; the

---

67. *Dowell*, 515 U.S. at 120 n.2 (Thomas, J., concurring).

68. Richard Epstein's "economic" analysis of the *Jenkins III* scenario also leads him to conclude that the desegregation measures ordered by the local judge were inefficient, but he too elides nearly all consideration of the harms—and benefits—visited on black Americans. *See* Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101 (1996). Epstein is at least explicit in his maneuverings, rooting them in a rather limited theory of causation. *Id.* at 1112-14. For more on the view that the harms of contemporary segregation are not the responsibility of the state, see *infra* notes 134-42 and accompanying text.

69. The concept of "social costs" is generally traced to British economist Arthur Pigou, see ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE pt. II (MacMillan & Co. Ltd.1962) (1920); a refined analysis of "externalities"—and perhaps that term—is generally credited to Paul Samuelson. *See* Paul A. Samuelson, *The Pure Theory of Expenditures*, 36 REV. ECON. STAT. 387 (1954).

result was to "internalize" the "externalities" of a transaction, and convert the "social costs" into private ones.[70]

Coase maintained that the regulatory effort was often based on two faulty assumptions: first, that a discrete wrongdoer "caused" the harm; and second, that governmental regulation was needed to minimize the social costs of the harmful action. Regarding the first, Coase insisted on the reciprocal nature of the problem:

> If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating pricing system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties.[71]

And, if left to their own devices, the parties would minimize the costs. Undermining the second assumption, Coase offered his famous theorem: in the absence of transaction costs, the parties themselves would bargain their way to the efficient reallocation of rights.[72] Laws and regulations were of no consequence where the parties could, without cost, bargain them away: "if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production."[73]

---

70. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-8 (1960). Thus Buyer A purchases widgets from Manufacturer B; Manufacturer B, in the course of making its widgets, pollutes the air and water in its immediate environs. The harms of the pollution are felt principally by those who reside near Manufacturer B's plant, or who would use the nearby waters. But those costs are not a part of A and B's transaction; they are external or social. And so the state responds on behalf of those who are external to the bargain—or on behalf of society—and insists by law that the Manufacturer take measures to cease or curtail its pollution. Those measures entail costs to the Manufacturer, and these likely will be reflected in an increase in the price of widgets, and so they will ultimately be borne in part by the Buyer, but in all events, they are now charged to the parties to the transaction; they have been internalized, and are now private.

71. Coase, *supra* note 70, at 13-15. Thus the Manufacturer pollutes the residents' air, but the residents intrude upon the Manufacturer's rights of production.

72. *Id.* at 13-15.

73. *Id.* at 15. Returning to the hypothetical, then, the Coase theorem posits that the Manufacturer and residents will on their own bargain to the optimal reallocation of resources. Suppose that the marginal cost of installing pollution control equipment would be $500. Suppose too that the marginal costs of moving would be $100 each for ten affected residents, for a total of $1000. The most productive, least costly solution to the problem is to install the equipment; and so it will be installed, whether the law requires it or not. But if the marginal costs of installing the equipment would be $2000, then the most productive, least costly solution to the problem is for the residents to move; and if the law requires

The key, Coase insists, lies in recognizing the costs of the proposed intervention: the loss of utility suffered by the object of regulation.[74] "The belief that it is desirable that the business which causes harmful effects should be forced to compensate those who suffer damage . . . is undoubtedly the result of not comparing the total product obtainable with alternative social arrangements."[75] The result, in Coase's view, was that "economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation."[76]

The same logic seems to inform the resegregation opinions. On this reading, desegregation may be understood as an attempt to internalize the social costs of segregative behavior. That behavior may not in itself have been inefficient; employing his own efficiency model, Judge Richard Posner has suggested that compulsory segregation may well be "wealth maximizing."[77] But there are costs to this behavior that transcend the immediate parties—i.e., the segregators and the segregated—and at least some of these costs—in, for example, the United States' political capital in the Cold War effort—may in fact have partly inspired the Court's initial effort to end segregation.[78] Desegregation effectively charged the costs of discriminatory behavior to those who wanted to engage in it:[79] they could continue to provide inferior educations to black Americans, but only if they were willing either to send their own children to the same poor schools, or to pay the costs of private education. The resegregation opinions then emerge as a Coasean corrective to the assumption that this intervention was efficient: forcing these costs on pro-segregation white Americans is inefficient and wrong.

There is, of course, a superficial implausibility to this reading: governmental control of the resource at issue precludes a strict *laissez faire* approach, and compelled to choose between either formal segregation or formal desegregation. The Court is not about to announce its preference for the former. The Court, in other words, cannot now say that formal racial segregation is efficient, and that *Brown* was therefore wrong to order its demise. But it can—and has—communicated the same basic message through two related devices. First, the distinction between *de jure* and *de facto* segregation allows the Court to resurrect the once discredited distinction

---

another result, e.g., installing the equipment, it is simply not efficient.

74. Coase, *supra* note 70, at 40.

75. *Id.* at 40.

76. *Id.* at 18.

77. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUDIES 103, 133-34 (1979).

78. *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1979).

79. *Id.* at 525-33.

between formal desegregation and actual integration: in the current iteration of the old "Parker doctrine,"[80] formal desegregation—an end to segregation laws—is required by the Fourteenth Amendment; actual integration is not. Second, separating issues of school segregation from issues of residential segregation allows the Court to charge racial imbalances in the schools to private markets beyond a school district's control: the schools cannot be held accountable either for "private decision making and economics"[81] or for "natural, if unfortunate, demographic forces."[82] The combined effect of these devices is to allow the Court to maintain, on the one hand, that *Brown* was correct in holding segregation unlawful, but to insist, on the other hand, that the actual attempt to compel the integration of schools is inefficient and wrong.

Ultimately, a Coasean analysis might well support the proposition that judicially enforced integration is inefficient. But it just as well might *not* support that proposition, and that is the critical point. The *assumption* of inefficiency belies the claim to neutrality, and that assumption may be flawed for at least four reasons.

First, any efficiency analysis would have to account for the social costs of segregation. These include, among other things, a political under-investment in—and under-utilization of—human capital, and a depressed faith in the fairness and justice of American institutions,[83] including our system of education. These are not, admittedly, easy costs to quantify, but it seems implausible to contend that they are insubstantial.

Second, the analysis must consider the transaction costs. The precise scope and implications of the Coase theorem remain very much contested, but this much at least is widely accepted: the Coase theorem undermines the efficiency rationale for governmental regulation in those bargaining situations—and only in those bargaining situations—unencumbered by transaction costs.[84] But as Coase himself acknowledged, in the somewhat more realistic situation where bargaining is not costless, the initial allocation of rights is significant and quite often determinative.[85] In those situations, the private market does not guarantee efficiency.

Surely, significant transaction costs attend the "bargaining" situation in the school segregation context.[86] Consider just the immediate costs of the

---

80. *See infra* notes 95-96 and accompanying text.

81. *Dowell*, 498 U.S. at 250 n.2.

82. *Jenkins*, 515 U.S. at 111 (O'Connor, J., concurring).

83. Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 386 (1992); *see generally* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991).

84. *See generally* Coase, *supra* note 70.

85. *Id.*

86. Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old*

efforts to organize and affect a changed bargain: the massive social and political change envisioned by desegregation would require a vast mobilization of legal resources, and, given the hostility to race-specific laws, may in fact require constitutional change. The costs of effectuating such changes would be overwhelming—and perhaps prohibitive.[87]

Third, the assumption is tenable only if parties are in a bargaining situation. But given the racial disparities in material resources—and the obvious fact that desegregation cannot proceed unilaterally, i.e, by just one race—the situation is perhaps more likened to a cartel.[88] One of the attendant difficulties would then be the unwillingness of the majority to bargain, and the inability of the minority to move the parties into a bargaining situation.[89] The problem may ultimately be conceived of as an informational one: the majority's unwillingness to even consider integration is the unfortunate product of imperfect information.[90] But that problem simply becomes another cost of—and barrier to—bargaining, one that may be insurmountable without state intervention.[91] Indeed, one way to understand the original desegregation decisions might be as an attempt to cure the imperfection in information by compelling the parties to learn with—and from—one another.

Fourth, the assumption of efficiency assumes constant preferences by the parties.[92] But a growing literature on the endogeniety of preferences exposes the ways in which preferences are shaped by laws and institutions.[93] One irony of the resegregation cases is that they ignore the extent to which *Brown* and its progeny succeeded in curing the informational deficit, and reshaping attitudes. Today, majorities of both white Americans and black Americans express a preference for integration, both of their neighborhoods and their schools.[94] To be sure, they may differ considerably in the degree of integration they would prefer—white Americans are much less willing than black Americans to place their children in schools where they would be in a racial minority[95]—but the point is that preferences have evolved, and

---

*Injury Arising from Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1158 (1999).

87. *See* William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 975, 985-86 (1998); *cf.* Engel, *supra* note 86, at 1156-58 (costs as deterrent in context of residential segregation).

88. *See* Susan Rose-Ackerman, *The Political Economy of a Racist Housing Market*, 4 J. URB. ECON. 150, 151 (1997).

89. *See id.*

90. *See id.*

91. *Id.* at 162-63.

92. Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 U. CHI. L. REV. 1197 (1997).

93. *Id.* at 1198.

94. *See* SCHUMAN ET AL., *supra* note 56, at 144-49, 240-46.

95. *Id.* at 145.

quite likely have evolved in part due to *Brown*.[96] So significant is the change, in fact, that a growing number of theorists are challenging the view that the persistence of segregation can be explained by white aversion to integration.[97] Game theoretical models are increasingly offered as alternatives, models that accept as genuine the voiced willingness of white Americans to integrate, and explain segregation largely by reference to strategic economic behavior.[98] Law, it bears noting, is critical in shaping this behavior by structuring economic incentives both real and perceived: this understanding, to take just one example, is at the heart of those efforts to promote "desegregative attractiveness" that were nullified by the Court in *Missouri v. Jenkins*. In this sense, the resegregation cases are not so much ironic but simply tragic: they perpetuate the economic incentives and the inter-racial ignorance and stereotypes that create the cycle of segregation.

In summary, the Coase theorem may well have supplied a useful corrective to the assumption that governmental intervention is efficient. But that observation affords no license for an uncritical embrace of the contrary assumption: assuming, without sustained analysis, that judicially enforced desegregation is inefficient is simply to indulge an anti-interventionist bias. And that, of course, is hardly neutral.

### *C. Color-Blindness and the Freedom of Choice*

One final candidate for resegregation's neutral principle is some variation on the theme of "color-blindness": the Court is enforcing nothing more–and nothing less—than the state's obligation to be officially indifferent to matters of race. On the surface, the "color-blind" principle might seem to be neutral almost as a tautology. What can be more neutral than (race) neutrality? But there is much beneath the surface—in our history, in our politics, in our lived experience—too much, in fact, to permit the pretense that color-blindness, in the resegregation context, is a neutral principle at all.

There are, to begin with, two clearly competing visions of equality, of which color-blindness—or race-neutrality—is just one. The color-blind principle might fairly be described as a principle of formal equality.[99] The state, in this vision, is committed to a position of absolute and abstract

---

96. For a summary of the evidence of *Brown*'s impact on attitudes, see Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 717-19 (1993).

97. *Id.*

98. *See generally* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965 (2000).

99. "Formalism" is not infrequently used as a term of reproach, but it need not be, and is not intended to be read that way here. For a detailed defense of formalism as a contemporary jurisprudential approach, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

symmetry in its engagements with race. Thus what the state does for one race—or to one race—it must do for all races, regardless of the context, and if the state chooses to ignore matters of race altogether—again, regardless of the context—well, then, this is the very best kind of racial equality of all. In this view, the problem with state-sponsored segregation is that it was overtly race-conscious. The solution to the problem is simply to elide all official references to race—to treat race, in other words, as if it does not exist.

But there is an alternative vision of equality, one that might be described as a realist vision. The realist vision embraces all aspects of the real-world context that the formalist vision purposefully ignores: whether state actions consist with equality can be assessed only in particularized settings, informed by the lessons of human experience. In this view, the problem with state-sponsored segregation can be fully understood only in its larger context, as part of the official effort to perpetuate racial hierarchy through the systematic isolation and exclusion of the disfavored race. The partial solution—and segregation is understood as part of our much larger problem with race, one requiring coordinated and comprehensive solutions—requires an end to that isolation and exclusion, a real-world disruption of the hierarchical plan.

This is not the occasion to debate the relative merits of the competing visions. It is the occasion to inquire whether one vision commends itself more than the other according to some neutral principle. If, in other words, the Court has indeed embraced the formalist vision, can it fairly claim that the choice is justified by a neutral principle?

The conventional legal principles are of no avail. Neither constitutional text, nor the "intent of the framers," nor precedent would seem to support a preference for the formalist vision. The text, to begin with, requires the "equal protection of the law." There is nothing in the language to suggest that the equality thereby guaranteed is of the abstract variety, and, in fact, the somewhat peculiar syntax suggests less focus on the "law" than on the "protection" it affords. How can the latter be measured but in the real world? An inquiry into the history of the amendment, at least plausibly, supports this more realist reading: the need for the amendment was established by a thorough inquiry into the real-world circumstances affecting black Americans,[100] and the defenders of the amendment consistently denounced the sophistry of its opponents, proclaiming in contrast their commitment to secure real protection.[101]

---

100. 39th Cong., 1st Sess., HOUSE REP. NO. 30, REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (1866) H.R. Rep. No. 30-39 (1866).

101. *See* ROBERT L. HAYMAN, JR., THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW 338-48 (1998).

A century-plus worth of precedents, meanwhile, generates at most a mixed message. The early opinion in *Strauder v. West Virginia*[102] evidences an awareness that, in a context of racial hierarchy, symmetrical and even identical treatment (all defendants, black and white, were tried before the same all-white juries) can produce a practical inequality. But within a few years, this understanding yields to the almost pathologically abstract assertion of the *Civil Rights Cases* that black Americans must "cease[ ] to be the special favorite of the laws[ ]. . . ."[103] Curiously, that assertion is made in the course of a decision invalidating a law that was—on its face—formally neutral:[104] the Civil Rights Act of 1875 did no more than prohibit racial discrimination, by any race and against any race. But there was no secret about its intended beneficiaries. Throughout Reconstruction, it was clear—even to the Supreme Court—that the purpose and practical effect of civil rights measures was to promote the status of black Americans.[105] In any event, the temporary triumph of the formalist vision is completed by the decision in *Plessy v. Ferguson*, which finds equality in segregated rail cars without any inquiry at all into the attending circumstances, and imagines that black Americans perceive in compulsory segregation an assertion of white supremacy—and of their own racial inferiority—only because "the colored race chooses to put that construction upon" the law.[106] That proposition, of course, would be expressly repudiated by the Court in *Brown*, which finds it contrary to modern "psychological knowledge."[107] On this score, *Brown* completes a fairly dramatic jurisprudential revolution initiated by the Court a few years earlier in *Sweatt v. Painter*[108] and *McLaurin v. Oklahoma*.[109] In the real world, it is easy to discern the inequalities—tangible and intangible—both latent and patent in the scheme of racial segregation. As the first Justice Harlan would have put it, "[t]he

---

102. 100 U.S. 303 (1879).

103. 109 U.S. 3, 25 (1883).

104. *See generally* 109 U.S. 3, 25 (1883).

105. *See, e.g.*, Slaughterhouse Cases, 83 U.S. 36, 71 (1873):

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, 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.

*Id.*

106. 163 U.S. 537, 551 (1896).

107. 347 U.S. at 494.

108. 339 U.S. 629 (1950).

109. 339 U.S. 637 (1950).

thin disguise of 'equal' accommodations . . . will not . . . [fool] any one"[110]—not even the Supreme Court.

Ultimately, it seems, the "neutral" justification for formal equality is simply rhetorical. Formalism is by definition indifferent to non-neutral concerns, and race-neutrality is, again by definition, neutral. But beyond the rhetoric, race-neutrality is not neutral, for at least three reasons.

1. A Conservative Bias

First, the rule of neutrality expresses a distinct conservative bias, in the most general political sense. The essence of the rule is that the state properly stands apart from matters of race, that there is to be no intervention in racial affairs, and that, most certainly, the state has no affirmative obligation to promote racial equality or, in the instant context, racial integration. The rule of color-blindness is the racial equivalent of *laissez faire*: the best state action is no state action—just leave it alone.

The conservative position on matters of race is not indefensible: there are tenable arguments on behalf of color-blindness, even if the arguments against it—and in favor of race-consciousness—are ultimately the more persuasive ones.[111] The critical point, however, is that the conservative position is just that—a position, one of two competing political views. And no neutral constitutional principle commands or even commends it. As Justice Holmes put it in another context, "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[112] Whatever the merits of the conservative position, one cannot plausibly claim that it is neutral.

Indeed, there are compelling arguments to be made that the ordinary principles of constitutional adjudication—conformity to text, to the "original meaning," and to precedent—counsel in favor of the progressive view on race, that the Fourteenth Amendment imposes upon the states an affirmative obligation to ensure equality. The record before the Thirty-Ninth Congress was, after all, replete with instances not merely of official and formal acts of discrimination against the freedmen, but of official failures to prevent or remedy "private" acts of oppression, perpetrated under the watch of indifferent state officials, or with their acquiescence or active support.[113] Section One of the Fourteenth Amendment thus commands

---

110. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

111. *See* Robert L. Hayman, Jr., *Re-Cognizing "Race": An Essay in Defense of Race-Consciousness*, 6 WIDENER L. SYMP. J. 37 (2000).

112. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

113. *See, e.g.*, 39th Cong., 1st Sess., SEN. EX. DOC. 2, MESSAGE OF THE PRESIDENT OF THE UNITED STATES COMMUNICATING, IN COMPLIANCE WITH A RESOLUTION OF THE

that no state shall deny "the equal protection of its laws[,]"and "when this equal protection is withheld, when it is not afforded, it is denied. . . ."[114] As a necessary consequence, the clause gives rise to an affirmative duty on the part of the states: they are obliged not merely to refrain from unequal treatment, but they are obliged to provide "equal protection." "A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making laws."[115] Thus when the states regularly fail to protect discrete classes of citizens from acts of oppression or discrimination, they fail to provide the "equal protection of the laws." "If a State fails to

---

SENATE OF THE 12TH INSTANT, INFORMATION IN RELATION TO THE STATES OF THE UNION LATELY IN REBELLION, ACCOMPANIED BY A REPORT OF CARL SCHURZ ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI, AND LOUISIANA; ALSO A REPORT OF LIEUTENANT GENERAL GRANT, ON THE SAME SUBJECT (Report on the Condition of the South) (1866) (describing orchestrated schemes to establish *de facto* slavery); 39th Cong., 1st Sess., HOUSE REPORT 30, REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (1866) (testimony on acts of oppression and official failures to respond); 39th Cong., 1st Sess., HOUSE EX. DOC. 70, LETTER FROM THE SECRETARY OF WAR, IN ANSWER TO A RESOLUTION OF THE HOUSE OF MARCH 8, TRANSMITTING A REPORT, BY THE COMMISSIONER OF THE FREEDMEN'S BUREAU, OF ALL ORDERS ISSUED BY HIM OR ANY ASSISTANT COMMISSIONER (1866) (describing acts of violence and oppression and failure of state governments to secure persons and property); 39th Cong., 1st Sess., HOUSE REPORT 101, MEMPHIS RIOTS AND MASSACRES (1866) (describing complicity or acquiescence of city and county officials in massacre of black Americans).

114. CONG. GLOBE, 42nd Cong., 1st Sess., 505-06 (statement of Sen. Pratt).

115. *Id.* at 501 (statement of Sen. Frelinghuysen). *Accord id.* at App. 182 (statement of Rep. Mercur) (deny means "to refuse, or to persistently neglect or omit to give" equal protection); *id.* at App. 315 (statement of Rep. Burchard)

> [t]he protection must be extended equally to all citizens. This duty must be performed through the legislative, executive, and judicial departments of its government. If the law-making power neglects to provide the necessary statute, or the judicial authorities wrongfully enforce the law so as to neutralize its beneficial provisions, or the executive allows it to be defied and disregarded, has not the State denied the enjoyment of the right?

*Id.* at App. 80 (statement of Rep. Perry) ("The States, however, are not only forbidden to abridge or deprive of those rights by hostile action, but with equal clearness are forbidden to 'deny to any person the equal protection of the laws.' . . . [T]he command is that no State shall fail to afford or withhold the equal protection of the laws."); *id.* at 334 (statement of Rep. Hoar) ("it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection"); *id.* at 368 (statement of Rep. Sheldon) (clause embraces cases where state "refuses or neglects to discharge" its duty); *id.* at 459 (statement of Rep. Coburn) ("Affirmative action or legislation is not the only method of a denial of protection by a State").

secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference. . . ."[116]

Certainly, the Supreme Court has understood the equal protection clause to impose an affirmative obligation on the states in the context of school segregation: the states have an affirmative duty to *de*-segregate their schools. An alternative had been proposed. Judge John Parker had advocated the *laissez faire* approach toward segregation, insisting that under *Brown*, the Constitution "does not require integration. It merely forbids discrimination."[117] But any doubts about the matter were removed in 1968, when the "facile formula"[118] of the "Parker doctrine" was rejected by a unanimous Court. In *Green v. New Kent County School Board*, the Court held that *Brown* charged segregative school districts "with the 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."[119] To be sure, at least one member of the current Court is displeased with the state of the law produced by the *Green* decision,[120] but, with all respect, his displeasure does not supply the missing "neutral principle."

---

116. CONG. GLOBE, 42nd Cong. 1st Sess. at App. 251 (statement of Sen. Morton); *accord id.* at 322 (statement of Rep. Stoughton)

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy.

*Id.* at 375 (statement of Rep. Lowe) ("It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect. . . .What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?"); CONG. REC. 43rd Cong. 1st Sess. 412 (statement of Rep. Lawrence) ("If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself.").

117. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

118. Bowman v. County Sch. Bd. of Charles City County, 382 F.2d 326, 336 (4th Cir. 1967) (Sobeloff, Winters, JJ., concurring).

119. 391 U.S. 430, 437-38 (1968).

120. *See Freeman*, 503 U.S. at 503-07 (Scalia, J., concurring).

2. A Segregative Bias

Second, race-"neutrality" manifests a pro-segregative bias. The color-blind commitment is rooted in a very distinct account of segregation, one in which the state bears very little or no responsibility. That account is premised on the view either that no distinct harm to black Americans attends segregation, or that the state did not cause—and cannot cure—those harms. But neither view is tenable.

*a. The Harms of Segregation*

The first view—that there are no distinctive harms from segregation—is reflected in Wechsler's original critique. For Wechsler, the harm of segregation is not inequality, but a deprivation of the freedom of association, a harm that would fall equally on pro-segregation whites if they are forced to integrate. Integration, then, in Wechsler's view, is just as harmful as segregation.

But no "neutral" assessment of the harms of segregation could plausibly conclude that it was not—and is not—harmful to black Americans in distinctive ways, in ways that far transcend any infringement on associational interests. First, racial segregation inevitably carried connotations of racial superiority and inferiority: it was the intended message, and it was the received message. The *Brown* Court may have overstated the extent to which that message was internalized by black Americans: the studies were and remain more equivocal than the famous footnote 11 would suggest.[121] And the current Court may have abstracted the threat of stigmatic harm to an absurd degree with its somewhat fantastical suggestion that white voters are stigmatized by race-based

121. *Brown*, 347 U.S. at 494. There is some dispute over the importance of the social science evidence to the outcome in *Brown*: that evidence may or may not have assisted the members of the Court in reaching their decision. *Compare* Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 837-38 (1987) (Elman claiming that Kenneth Clark's "doll test" "trivialized the basic truth and opened himself and the NAACP to ridicule") *with* Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1945-46 (1987) (defending use of the doll tests, and noting the Court's apparent acceptance of them). In all likelihood, the evidence simply documented what was already apparent to all, even though no opinion of the Court had yet said as much. The cited sources thus lent an air of authority to a proposition that should not have needed substantiation. *See generally* Sanjay Moody, Brown *Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002), but a proposition that–as at least some members of the Court recognized–was likely to be controversial all the same. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 591-616 (1975).

electoral districting[122]—a claim that, alongside the recent desegregation cases, looks "anomalous, to say the least."[123] But however much these opinions may misconceive the harm of racial exclusion—and it's only slightly in the *Brown* opinion, but quite radically in the redistricting cases—the undeniable truth is that there is a harm. In our context—a context characterized by the vertical ordering of race, of white over black—compulsory segregation reinforced the view that black Americans were inferior to white Americans.[124] Black Americans need not acquiesce in that view—psychologically or otherwise—to be harmed by it. In this regard, the *Plessy v. Ferguson* dictum,[125]—sadly echoed by Wechsler[126]—that black Americans *choose* to feel stigmatized by segregation, is not only malicious and foolish,[127] it is simply irrelevant. Segregation perpetuated the myth of white racial supremacy among white Americans, and that was immediately harmful to black Americans. As one might expect, *de*-segregation has helped to destroy that myth. Throughout the second-half of the twentieth century, the percentage of white Americans who were willing to blame racial inequalities on the innate inferiority of black Americans steadily declined.[128] On the other hand, it is clear that work remains to be done. One in ten

---

122. *See* U.S. v. Hays, 515 U.S. 737, 744 (1995).

123. *See* Miller v. Johnson, 515 U.S. 900, 932 (1995) (Stevens, J., dissenting).

124. 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. COMMENT. 215, 222-23 (1998). As Professor John Hart Ely noted, "the psychic injury . . . alleged [in *Brown*] was not only real but also widespread and, indeed, entirely to be expected." *Id.* at 222. Accordingly, Professor Ely concluded,

> [w]e also can stop looking the other way when someone raises the alleged irrelevance or shortcomings of the sources on which the Court relied. Of course they weren't perfect–I occasionally admit that even about my own work–but it doesn't take an air-tight demonstration [to prove the point]. . . . You will thus be relieved to learn that . . . [the *Brown* court] got it exactly right. You can go back to sleep, and in the morning worry about something else.

*Id.* at 222-23.

125. 163 U.S. 537, 551 (1896).

126. Wechsler, *supra* note 2, at 33. "[I]s there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it?'" *Id.*

127. Black, *supra* note 9, at 422. As Charles Black put it: "The curves of callousness and stupidity intersect at their respective maxima." Black, *supra* note 9, at 422 n.8.

128. In 1942, less than half of the white respondents in a *Scientific American* survey expressed the view that white and black Americans were equal in intelligence, SCHUMAN ET AL., *supra* note 56, at 353. By 1977, just 27% of the white respondents in a National Opinion Research Center poll voiced a belief in the innate inferiority of black Americans, a proportion that dropped to 20% by 1988 and to 10% by 1996. *Id.* at 156-57.

white Americans are still willing to openly declare support for the proposition that black Americans have "less in-born ability."[129]

In addition, racial isolation and exclusion causes social and economic harms in a context of racial hierarchy. By perpetuating the myth of a racial order among white Americans—among, that is to say, America's power-holders and decision-makers—segregation forecloses opportunities for social and economic advancement. The Supreme Court itself recognized this possibility six years before the *Brown* decision, when it ruled that black law students would not receive an equal legal education if they were segregated from their white peers. "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."[130] Modern evidence confirms the hypothesis on a broad social and economic scale. Desegregation, the evidence suggests, partially but significantly restores to black Americans the educational and occupational opportunities lost through generations of segregation.[131]

Finally, segregation increases the likelihood that educational inequities will assume a distinctive racial cast. The disparities in educational opportunities afforded to the children of relatively poor and relatively wealthy parents are well-documented, both empirically and anecdotally.[132] So too is the continuing correlation between race and socio-economic class. Not surprisingly, the under-funded, under-resourced schools and school districts tend to be ones with relatively large proportions of minority students.[133] As long as these schools remain racially identifiable, the inequities—while they persist—will be not only ones of class, but of race. The solution, to be sure, is to eliminate the inequities without regard to race. But until the day comes that such a solution is effected, the inequities will produce—through segregation—a set of distinctive racial harms.

---

129. SCHUMAN ET AL., *supra* note 56, at 154-55.

130. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

131. *See generally* Amy Stuart Wells, *The "Consequences" of School Desegregation: The Mismatch Between the Research and the Rationale*, 28 HASTINGS CONST. L.Q. 771 (2001) (summarizing the studies demonstrating aspirational, educational, and occupational benefits to black Americans). Wells noted that findings suggest that desegregation increases white Americans' "openness to hiring, working with, and being friends with people of different races. . . ." *Id.* at 795.

132. *See* House Comm. on Education and Labor, 101st Cong., 2D SESS., A REPORT ON SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUITY ON THE EDUCATION OF STUDENTS AT RISK 19-24, 44 (Comm. Print 1990) (prepared by William L. Taylor & Diane M. Piche) [hereinafter SHORTCHANGING CHILDREN]. For a work that examines the human dimensions of the House Report, see JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

133. *See* SHORTCHANGING CHILDREN, *supra* note 132, at 19-24.

*b. Responsibility for Segregation.*

The second view that may inform the race-"neutral" account of segregation is that the state is simply not responsible for the harms of segregation, whatever those harms may be. This may be read either as an empirical claim—that the state did not cause the harms—or as a moral proposition—that the state should not be held culpable. Under either reading, the view clearly is not "neutral."

The empirical claim rests on the belief that the passage of time has cured the taint of *de jure* segregation, and that segregation today—and its concomitant harm—is due not to state action, but to some ill-defined combination of private factors. But that case is nowhere made. We are told that it is "absurd to assume" that *de jure* segregation is the cause of current racial separation and racial disparities.[134] But we are given no support for an alternative account. Where is the proof for the claim that modern segregation is due to private-decision-making and economics or to demographic changes unrelated to state action? What beyond the "typical supposition" would support the view that white flight is caused by "desegregation, not *de jure* segregation?"[135] Where is the evidence to substantiate the claim that test score disparities are not products of the history of segregation, but rather are due to—in the wondrously vague language of the *Jenkins III* opinion—"external factors?"[136] State compelled racial segregation existed; it is an historical fact. Schools and neighborhoods remain segregated today, and black Americans continue to be disadvantaged by virtually every social and economic measure. These too are facts. It seems altogether logical to presume a connection between these facts; at the very least, those who would deny the connection would seem to bear the burden of proof. But none is forthcoming.

Ultimately, the empirical claim seems simply to be the expression of an epistemological preference, the preference for individualistic—or naturalistic—accounts of racial discrimination, racial separation and racial inequality. Justice Brown in *Plessy* warned against the futility of legislating against "racial instincts."[137] Integration—or "social equality"—cannot follow from judicial edict, but "must be the result of natural affinities . . . and a voluntary consent of individuals."[138] Presumably, no member of the modern Court would explicitly endorse *Plessy*'s belief in natural segregation. Then again, one struggles to find an alternative interpretation of the "natural, if unfortunate, demographic forces" to which Justice O'Connor

134. *Freeman*, 503 U.S. at 506 (Scalia, J., concurring).
135. *Jenkins III*, 515 U.S. at 95.
136. *Id.* at 102.
137. 163 U.S. at 551.
138. *Id.*

alludes,[139] or, for that matter, to otherwise explain the Court's view that the persistence of segregation and inequality is not due to state action.

The first Justice Harlan, of course, saw it all quite differently. For him, the "seeds of race hate" were planted by the state, and it was compulsory segregation that would "create and perpetuate" racial animosity.[140] There was nothing "natural" about any of it. The point is not that he was right and the *Plessy* majority wrong, although certainly that is the case,[141] rather it is that there are competing visions here, and the preference for the naturalistic account of our racial order is, at least in the absence of supporting evidence, simply the expression of a bias.

And it may be more than an epistemological bias. "Causation" is a notoriously slippery concept, and slippery too is the distinction between the realms of the "public" and the "private." And so, the inquiry whether current racial separation or racial disparities are "caused" by "public" or "private" acts is, put charitably, a challenging one; indeed, no less an authority than Justice Scalia has suggested that determinate answers to such inquiries are virtually unattainable.[142] That is why the question of state responsibility is, perhaps, misconceived when it is presented as an empirical one. The question is not whether the state intentionally caused segregative behavior, demographic changes, or racial disparities in educational achievement. Of course it did *not*, entirely. But of course it *did*, in some respects and to some extent. The question is whether, given the nature of the state participation, the severity of the harm, and the necessity and likelihood of redress, it is right and proper to demand or at least permit remedial action by the state. This is not empirical; it is political. It is maybe even moral. And the answers we have been giving are simply embarrassing. At the very least, they are certainly not neutral.

3. A Racial Bias

Recalling that Justice Bradley in *The Civil Rights Cases* had insisted, within a generation of the Emancipation Proclamation, that the freedmen must "cease[ ] to be the special favorites of the law[ ],"[143] Charles Black wrote:

> This disconnection of present from past (not, I think, formerly regarded as characteristic of 'conservatism') cannot be made to seem successful today, any more than in 1883. American slavery lasted more than two centuries, not too far from twice the time since its abolition. Even abolition was not the end.

139. *Jenkins III*, 515 U.S. at 111 (O'Connor, J., concurring).

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

141. For the arguments, see HAYMAN, *supra* note 101, at 158-66.

142. *Freeman*, 503 U.S. at 501-03 (Scalia, J., concurring).

143. 109 U.S. at 25.

> Quite soon after the Civil War, the national effort to remedy the situation of the newly free was as good as abandoned; in the places where most of them lived they were not even so much as allowed to vote in the only election that counted; *per capita* public expenditures in public schools for their children ran far below–sometimes by a factor of one to ten–expenditure in white schools. The paradox of 'separate but equal,' improvised–like the white primary–with a broad knowing wink, not only imprisoned black children in these schools, but also cut off all black people, children and grown-ups, from any kind of equal participation in the common life of the community. The 'state action' doctrine sealed all the cracks in the wall.[144]

"When we find," Black continued:

> this very same people today in painful distress–as to work, food, medical care, housing, as to police cruelty, as to the administration of the penalty of death, even as to respect–out of all proportion to their numbers, must it not show a lack of grace, a lack of a sense of humor (and these two lacks often go together) for us to publish a general Act of Oblivion? Against all such proclamations, we should give ear to the deathless words of Yogi Berra: 'It ain't over till it's over.' Or, to put the point another way, just when was it that the fat lady was heard to sing?[145]

Here is located the third and final way in which "color-blindness" manifests bias: the commitment to race-"neutrality" in fact manifests a distinctive racial bias. Black Americans know well that the fat lady has not yet sung; it is white Americans, by and large, who imagine that they have heard her voice. The glib dismissal of "race" as a significant factor in shaping opportunities thus reflects a distinctly majoritarian perspective.[146] Color-blindness, after all, is a luxury afforded only to those for whom race is not a barrier to acceptance or success, and even for them, it is fantasy divorced from the lived experience of "race."[147] Moreover, indifference to race too readily translates into indifference to racial disparities. The result is a failure not only to appreciate diverse perspectives—to assume, in fact,

---

144. Charles L. Black, Jr., *"And Our Posterity,"* 102 YALE L.J. 1527, 1529-30 (1993).

145. *Id.* at 1530.

146. *See, e.g.*, SCHUMAN ET AL., *supra* note 56, at 275 (summarizing the survey evidence establishing "large differences in the perspectives of blacks and whites about the causes of black disadvantage").

147. Leland B. Ware, *Setting the Stage for* Brown: *The Development and Implementation of the NAACP's School Desegregation Campaign*, 1930-1950, 52 MERCER L. REV. 631, 673 (2001). As Leland Ware wrote: "A color-blind standard will treat blacks and whites as if they were similarly-situated, but this standard ignores the history of segregation in America and the pervasive vestiges of that system. African-Americans and other people of color do not enjoy the same privileges as whites." *Id.* at 673.

that the white perspective is the "neutral" perspective—but failure as well to recognize the living legacy of racial advantage and disadvantage.[148]

"Freedom of choice," then, may look to be "color-blind" and "race-neutral," but in fact it can be neither of things—not as long as our choices are constrained by racial realities. And the realities are that white Americans have a greater capacity for choice, and that the exercise of their choice—attended or not by any overt racial animus—has the inevitable effect of limiting the choices available to black Americans. "White flight" from integrated public schools, for example, is an exercise of choice, but it is also an exercise of power—one made possible by racial disparities in material resources. And the exercise of that choice—of that power—leaves fewer choices available to black Americans. Black Americans may desire integrated schools, but they cannot freely choose that option unless white Americans make it available.[149] The difficulty is that, on the surface, it can all seem so neutral. The racial disparities in resources, in power, in "choice," can be almost invisible, either because those who have the luxury "choose" to ignore them, or because they are such a constant part of the landscape that we are oblivious to their presence.[150] But racial inequality is a reality,

---

148. *See, e.g.*, SCHUMAN ET AL., *supra* note 56, at 275-76 (noting that black Americans emphasize *present* discrimination as a barrier to equality, while white Americans, to the more limited extent that they perceive discrimination as a barrier, view it more as a part of the past).

149. *See* Paul Gerwirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 745-46 (1986).

150. *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 675-76 (2001). As John A. Powell explained:

> Whites use their power to prioritize their choices as white in a hierarchical relationship to people of color. Institutions and practices such as the drawing of jurisdictional boundaries are used to reflect this power. Part of the power of white preference is to cast this racialized arrangement as neutral and invisible. To challenge this practice would be to challenge the norm, or the status quo, and so preferences are unquestioned and privileged. Institutions and practices in society are designed to be responsive to white preference and to frustrate African American preference. This invisibility allows preferences to persist and be fortified, not simply in their being exercised by whites, but also because it is difficult for those seeking justice to mount an attack against an invisible enemy. These arrangements are not simply the reflections of white power and choices but also produce white choices and power.

*Id. See also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1914 (1994) (concluding that "no political system, including the current one, can remain neutral in the face of the social construction of geography; no system can simply reflect or accommodate 'individual choice' as to residence and geographic association; no system is without some systemic bias. Because a truly neutral system is impossible, we must rewrite the laws to *favor*, rather than to obstruct, racial and

and in a context characterized by that reality, "color-blindness" and "freedom of choice" cannot be "neutral."

## IV. CONCLUSION: *BROWN*'S NEUTRAL PRINCIPLE AND THE RESEGREGATION CASES

In the final analysis, it is hard to dispute Charles Black's suggestion that the principle which underlies *Brown* and its immediate progeny is "awkwardly simple"[151]: racial segregation "is perceptibly a means of ghettoizing the imputedly inferior race,"[152] and, as such, it surely comes within the prohibitions of the equality guarantee of the Fourteenth Amendment. And it would seem that as long as members of "the imputedly inferior race" remains "ghettoized," they will be harmed in ways that offend the Fourteenth Amendment—harmed, that is to say, unequally, on account of their race. That too would seem to be simple enough.

The resegregation decisions suggest otherwise. Racially segregated schools are now tolerable. So, too, are their concomitant harms. All that the Fourteenth Amendment requires is "good faith compliance" with a desegregation decree "for a reasonable period of time." Where this amorphous standard is satisfied, we will now presume that the "vestiges of segregation have been eliminated to the extent practicable." The schools may resegregate. They may never have been *de*-segregated in the first place. It does not matter. Racial inequalities may abound—in the composition of the student bodies, in the composition of the various academic tracks, in the assorted measures of academic progress. It does not matter. What matters is good faith compliance for a reasonable period of time. The fat lady has sung.

These decisions cannot be reconciled with the principle of *Brown*, not unless it can be demonstrated—and it has not and cannot[153]—that racial isolation, racial exclusion, and the ghettoization of black Americans no longer inures to their unequal detriment. And if the principle that underlies *Brown* must now yield to a new, overriding "neutral principle," that new principle has not yet been identified. One can speculate about the motivations for the resegregation decisions; one cannot discern in them a neutral principle to supplant the simple equality command of *Brown*.

---

class desegregation.").

151. Black, *supra* note 9, at 421.

152. *Id.* at 430 n.25.

153. For a tortured and altogether frustrating attempt to explain *Brown* and the harms of segregation on some other basis, see Justice Thomas's concurring opinion in *Jenkins III*, 515 U.S. at 120-22.

Thurgood Marshall saw the writing on the wall fully a quarter-century ago. His remarks were directed at the Court's decision in *Milliken v. Bradley*, but the critique resonates well beyond. He wrote:

> Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.[154]

How can one not regret the death of the integrative ideal? How can one not regret this meek surrender to inequality?

My first and best teacher was my mother. Not long ago, I had the occasion to sit with her—she was very sick at the time—and look through her high school yearbook: Conrad High School, Class of 1954, the year of *Brown v. Board of Education*. I was surprised to discover, among the sea of mostly white faces, the pictures of a handful of African-American students. "You had black kids at Conrad," I said. She looked up at me and nodded. "Yeah," she said, "can you get me something to drink?"

Of course. My mother's family was very poor, but they were, as she put it, "rich in love," and my mother spent all of her life spreading that wealth. And my mother loved people because of, not in spite of, the ways that they might have seemed different from her. Of course there were black kids at Conrad; of course my mother knew that; and of course it was a big deal, and *not* a big deal, simultaneously.

I cannot begin to recount the life's lessons that my mother imparted, but I know that for her, the most important evolved from that richness of love: feel loved, be loving. She was a perfect teacher, I, an imperfect student. But I am determined to pass on her lessons, as best I can.

One of these lessons has to do with exclusion. There are places that I will not take my son—not until he is ready. Places that are racially segregated, places where virtually all the faces he would see would be white. I will take him to those places only when I am sure that he knows, that he understands, that he has learned the lessons that my mother tried to teach me. Then, when he goes to those places, he will know that something is wrong—wrong not with the people who have been excluded, but wrong—terribly

---

154. 418 U.S. 717, 814-15 (1974).

wrong—with the places that did the excluding.

The tragedy is that some of those places—too many of them—are schools.