

# (The Limits of) Judicial Resegregation

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David Schraub\*

*The past several decades have seen courts sharply turn against race-conscious integration measures. Doctrinally, this hostility has emerged through the ideology of color-blindness, which posits that—to the greatest extent possible—law should pay no heed to racial categories. Under this view, race-conscious efforts to integrate schools are morally and legally identical to race-conscious efforts to segregate schools—a position I term the colorblind equivalency principle. One narrow carveout to this principle permits race-conscious integration measures in response to prior racial discrimination. For the current Court, however, this sop to color-consciousness is not justified as a means of pursuing racial integration per se. Instead, color-consciousness is justified only to restore the racial state of affairs to that which would have existed prior to the racially discriminatory violation. I term this the colorblind restoration principle. Together, these principles demarcate the core of contemporary equal protection jurisprudence on matters of racial discrimination.*

*However, combining the colorblind equivalency and restoration principles raises the alarming prospect that current Fourteenth Amendment doctrine may allow for or even demand judicially-mandated resegregation, as a parallel to earlier judicial decrees imposing judicially-mandated desegregation. Put simply, if the Supreme Court is correct in viewing all race-conscious measures as morally and legally equivalent, then the post-Brown race-conscious desegregation decrees also, as a conceptual matter, license race-conscious resegregation measures under certain circumstances—primarily, as a means of “remedying” the racially integrative effects of racial affirmative action and other like programs deemed unlawful under current doctrine.*

*From this disconcerting possibility I draw two conclusions. The first is conceptual and doctrinal: the current Fourteenth Amendment jurisprudence cannot both affirm the propriety of the post-Brown color-conscious desegregation cases while also disavowing the prospect of judicial resegregation. The unwillingness to jettison either of these positions, in turn, falsifies the colorblind equivalency principle. The insistence on affirming the validity of race-conscious desegregation in the aftermath of Brown while disclaiming the legitimacy of judicial resegregation stems precisely from what the equivalency principle denies: the manifest, even obvious, distinction between using race to integrate and using race to segregate. The second conclusion is normative and prescriptive: the likely unwillingness of courts to endorse judicial resegregation is reflective of practical limits on the judiciary in seeking to impose its preferences on the public. The story of how segregationists historically “resisted” integration decrees by leveraging functional, doctrinal, and political limitations on judicial power is a well-told tale. Integrationists today, however, can draw on these same lessons to circumvent a hostile judiciary which nonetheless remains subject to institutional constraints limiting its ability to counteract sustained, creative resistance to its decrees from the political branches.*

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\* Assistant Professor of Law, Lewis & Clark Law School. Thanks to participants at the Loyola University Constitutional Law Colloquium and the University of Chicago Constitutional Law Institute’s conference on the Reconstruction Amendments, as well as Adam Davidson, Earl Maltz, Jim Oleske, Farah Peterson, Laura Portuondo, and David Upham for their helpful feedback.

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### INTRODUCTION

In *Teague v. Arkansas Board of Education*,<sup>1</sup> a federal district court concluded that Arkansas's explicitly race-based school transfer policy, in place for a quarter-century, had encoded racial discrimination into law. The court consequently struck down the statute as a violation of the Fourteenth Amendment's Equal Protection Clause—and did nothing else.<sup>2</sup> It did not order busing. It did not insist on ongoing judicial monitoring. It did not impose a burdensome consent decree. In fact, it did not implement any of the more intrusive judicial remedies that federal courts had historically relied upon when dealing with Arkansas' long-standing reluctance to operate schools on a race-neutral basis.<sup>3</sup> The district court was content to invalidate the statute and call it a day.

Why was the court so modest? Why did it not even consider taking affirmative steps to undo Arkansas's unlawful conduct? The answer is straightforward: the program challenged in *Teague* sought to integrate (or keep integrated) Arkansas' public schools, not to segregate them. It functioned similarly to the Seattle program the Supreme Court struck down in *Parents Involved v. Seattle School District No. 1*<sup>4</sup>: Arkansas had an open

<sup>1</sup> *Teague ex rel. T.T. v. Arkansas Bd. of Educ.*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012), vacated by *Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013).

<sup>2</sup> *Id.* at 1069.

<sup>3</sup> See, e.g., *Kelley v. Altheimer*, Arkansas Public School Dist. No. 22, 378 F.2d 483, 498 (8th Cir. 1967) (ordering a school district to “when possible” hire white teachers to teach at a previously all-Black school, and Black teachers to teach at a previously all-white school); *Morrilton Sch. Dist. No. 32 v. United States*, 606 F.2d 222, 230 (8th Cir. 1979) (affirming a district court order consolidating several school districts whose boundaries were set to further racial segregation, and permitting a requirement that the district boundaries at least initially preserve a racially-integrated student body); *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch.*, 778 F.2d 404, 436 (8th Cir. 1985) (en banc) (ordering the state of Arkansas to “encourage” “intra- or interdistrict majority-to-minority transfers . . . with the State of Arkansas being required to fund the cost of transporting students opting for interdistrict transfers”).

<sup>4</sup> 551 U.S. 701, 711–13 (2007).

transfer policy, but the statute at issue in *Teague* prevented students from transferring between schools in a way that would exacerbate racial imbalances among schools.<sup>5</sup> In effect, a white student could not transfer from a largely Black school to a predominantly white one, and vice versa. Following *Parents Involved*, white parents who wanted to transfer their child from a more racially-integrated school to a predominantly white institution sued, generating the *Teague* litigation.

*Teague* had a somewhat unsatisfactory ending: the Arkansas legislature repealed the statute while the case was on appeal, so the Eighth Circuit dismissed the challenge as moot.<sup>6</sup> But the case raises a troublesome question: could courts use the broader “toolkit” of affirmative remedies developed to undo segregation in the mid-20th century in order to reverse racial integration in the 21st? In other words: under current doctrine, can the judiciary order race-conscious *resegregation*?

Liberal commentators have regularly used the term “resegregation” to describe social trends where schools that had been subject to race-conscious integration measures have, once those measures were lifted, slid back towards racial separation.<sup>7</sup> Conservatives, however, deny that these trends are constitutive of resegregation because they do not emanate from “intentional state action to separate the races.”<sup>8</sup> Resegregation would only consist of de jure state action that “reestablished a dual school system that separates students on the basis of race.”<sup>9</sup> For purposes of this article, I accept this latter definition of resegregation. The “judicial resegregation” I speak of is precisely the prospect of judicial actors issuing remedial orders that explicitly use race to encourage greater racial separation in a given community or school district.

The idea of affirmative, race-conscious judicial intervention to *resegregate* schools—that is, utilizing busing programs, racialized attendance zones, directed funding initiatives, or other like remedies to intentionally *im*balance the racial demographics of public schools—is instinctively repulsive. Moreover, unlike the removal of affirmative action programs or extant desegregation decrees, judicial resegregation is not overtly desired by mainstream legal actors of any ideological persuasion. Judicial resegregation thus may seem like an outlandish possibility. But I argue that as a legal concept and

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<sup>5</sup> See *T.T.*, 873 F. Supp. 2d at 1059. Compare *Parents Involved*, 551 U.S. at 711–13 (describing Seattle’s “tiebreaker” system for assigning students to oversubscribed schools, where students who will help further racially integrate schools are given priority over those who would not).

<sup>6</sup> See *Cooper*, 720 F.3d at 978–79.

<sup>7</sup> See, e.g., Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Segregation and Resegregation in North Carolina’s Public School Classrooms*, 81 N.C. L. REV. 1463 (2003); Danielle R. Holley, *Is Brown Dying?: Exploring the Resegregation Trend in Our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085, 1086 (2005); GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* (2001).

<sup>8</sup> *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring).

<sup>9</sup> *Id.* (arguing there is “no danger” of such official, state-sponsored “resegregation”).

possibility, judicial resegregation operates at the confluence of two principles that are well-entrenched in the Supreme Court's colorblind equal protection jurisprudence:

(1) The view that there is no distinction between “invidious” and “benign” uses of race—all uses of race are equally constitutionally suspect. Call this the *Colorblind Equivalency Principle*.

(2) The view that it is only permissible to use race in order to restore the state of racial affairs that would have existed but for the prior illegitimate usage of race. Call this the *Colorblind Restoration Principle*.

Together, these two principles underpin contemporary doctrinal colorblindness while also legitimizing the affirmative desegregation efforts during the civil rights era that stemmed from *Brown II*<sup>10</sup> and later cases such as *Green v. County School Board of New Kent County*<sup>11</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>12</sup> Consistent with these principles, the use of race in those cases is said to be not about integrating the schools per se, but rather a measure necessary to undo the effects of the prior unlawful usage of race by segregationists. Race can be used to reverse prior government departures from the colorblind principle. The unacknowledged corollary to that logic, however, is that if a state or locality was unlawfully using race to *integrate* schools—for example, operating a race-conscious busing program—then courts would be legitimized in using race to undo the effects of the unlawful race-conscious measures. In other words, the combination of these two principles sanctions, at least in concept, the prospect of judicially-ordered *resegregation*.

That judicial resegregation fits alarmingly well inside prevailing Fourteenth Amendment jurisprudence does not mean that officially-mandated racial resegregation is inevitable. To the contrary, precisely because judicial resegregation is doctrinally plausible under the prevailing doctrine of colorblindness even as it remains politically abhorrent, the concept of judicial resegregation presents a difficult challenge to the conservative “colorblind” understanding of the Fourteenth Amendment and *Brown v. Board's* legacy. This challenge manifests on both a philosophical and a practical level. Philosophically, it is difficult for conservative advocates of strict colorblindness to dismiss the validity of judicial resegregation without also jettisoning the affirmative desegregation remedies that are the legacy of *Brown II*. Yet treat-

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<sup>10</sup> 349 U.S. 294 (1955). See *infra* notes 35–38 & 48–49, and surrounding text.

<sup>11</sup> 391 U.S. 430, 437–38 (1968) (holding that hitherto segregated school districts have “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”).

<sup>12</sup> 402 U.S. 1, 15 (1971) (hereinafter “*Swann I*”) (holding that “affirmative obligations” exist to undo school segregation, which may include remedies such as busing or judicial oversight of school siting decisions).

ing race-conscious *desegregation* as permissible and race-conscious *resegregation* as forbidden tacitly concedes a recognizable difference between benign and hostile racial classifications—a distinction the Supreme Court has labored hard to deny exists.<sup>13</sup> Practically, the fact that judicial resegregation is a functional non-starter limits the ability of the judiciary to counteract incipient resistance by democratic and social actors (whether in the form of lawmaking, hiring practices, revised admissions policies, or otherwise) to judicial colorblindness. Integrationists eventually hit a wall when the judiciary lost its willingness to intervene against sustained (white) popular opposition to racial integration. Similarly, any unwillingness to engage in judicial resegregation places practical limits on the colorblind judiciary's inclination to counteract sustained democratic efforts to foster racial integration—if such efforts can indeed be mustered. By identifying the tension between the philosophical demands of conservative colorblind jurisprudence and the practical limits on the judiciary's willingness or capacity to order official resegregation, we can uncover both conceptual and pragmatic strategies supporting continued liberal integrationist efforts even in an extremely hostile legal environment.

Part One offers a truncated history of the federal judiciary's efforts to desegregate American schools in the wake of *Brown v. Board*. In particular, the goal is to reconstruct a theory to legitimize *Brown II* and its progeny—that is, cases which ordered race-conscious integrative measures. For those who view integration as a valid constitutional end in and of itself, the answer is simple: the decisions which used race-conscious remedies were legitimate insofar as they practically integrated hitherto segregated schools. By contrast, affirmative race-conscious remedies are considerably more difficult to harmonize with later doctrinal developments which have elevated colorblindness to a constitutional principle and have rejected a free-standing constitutional interest in school integration. Yet these decisions did not purport to repudiate *Brown II*, meaning that they must have some theory of when, why, and to what end race-conscious remedies might be appropriate that does not rely on the intrinsic constitutional desirability of integration. The best way of understanding the legitimacy of race-conscious remedies under a colorblind perspective is that courts can (and, perhaps, are obligated to) use race to restore the racial balance that would have existed in the school system *but for* the prior unlawful use of race.

Part Two then introduces the concept of judicial resegregation as a logical application of this principle. By judicial resegregation, I mean race-conscious judicial orders that function to separate students into different schools along racial lines. For example, instead of drawing attendance lines to intentionally bring predominantly Black and white neighborhoods under the ambit of a single school, as was the case in some race-conscious integration remedies, a judicial resegregation order might seek to redraw these lines so

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<sup>13</sup> See *infra* note 43.

as to intentionally ensure that largely white and largely Black neighborhoods were zoned to separate schools. That it may be implausible to imagine a court actually ordering resegregation does not reflect any guardrails in the doctrine but rather illuminates a theoretical deficiency in the colorblind model. Doctrinally speaking, judicial resegregation is not just compatible with current “colorblind” constitutional doctrine, but in some cases would seemingly be compelled by it.

Part Three concludes by exploring the possibility of effective democratic opposition to judicially-mandated colorblindness, preserving integration measures that are de facto race-conscious. Historically, the liberal attack on constitutional colorblindness has sought to reject the formalistic parity the Supreme Court insists upon between race-conscious integrative and segregationist measures. Less explored is the path of truly taking this equivalence seriously. What would it mean if the judiciary truly viewed race-conscious segregation and race-conscious integration as identical constitutional wrongs? In particular: is judicial *resegregation* vulnerable to the same sorts of popular resistance initiatives that thwarted judicial *desegregation*? This is a further implication and extension of the claimed parallel between race-conscious segregation and race-conscious integration measures: if the former could be obstructed or even undone by a strategy of “massive resistance,” then it stands to reason that the latter could be as well. The dim prospect for reversing the Supreme Court’s formal colorblind doctrine in the near term renders it all the more essential to uncover avenues for social and political reform that remain viable in the face of deep and entrenched judicial hostility to genuine racial integration.

## I. COLORBLINDNESS AND THE DUELING LEGACIES OF *BROWN V. BOARD OF EDUCATION*

### A. *Two Accounts of Brown v. Board of Education*

*Brown v. Board of Education*<sup>14</sup> famously forbade the practice of racial segregation in public schools.<sup>15</sup> But the initial Supreme Court ruling left open the practical details of how integration was to proceed, or indeed, what it meant for schools to be desegregated at all. This ambiguity was embraced in *Brown II*,<sup>16</sup> which remanded practical implementation of *Brown*’s mandate to lower courts guided only by the vague requirement that desegregation be pursued “with all deliberate speed.”<sup>17</sup> Quickly, the *Brown* cases came to be identified with two distinct and in some ways competing visions.<sup>18</sup> In one,

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<sup>14</sup> 347 U.S. 483 (1954).

<sup>15</sup> *Id.* at 494.

<sup>16</sup> 349 U.S. 294 (1955).

<sup>17</sup> *Id.* at 301.

<sup>18</sup> Consider Jack Balkin’s observation that nobody argues against *Brown*, they merely argue over which understanding of *Brown* is the correct heir to its legacy. See Jack M. Balkin,

“the Constitution required only that government decisions be taken without regard to race.”<sup>19</sup> In the other, “the Constitution required students of both races to attend the same schools.”<sup>20</sup> As constitutional dogmas, the former view now is associated with conservative colorblindness. The latter is the rallying cry of liberal integrationism.

These two accounts provide very different understandings of what the constitutional “wrong” was in the *Brown* decisions, and especially how to remedy that wrong. On the liberal integrationist view, the wrong *Brown I* addressed was that schools were segregated—Black children and white children attended separate educational systems.<sup>21</sup> One corrects that wrong when Black and white children are, to the extent feasible, attending the same schools.<sup>22</sup> So on the remedial side, *Brown II*<sup>23</sup> sanctions the use of race insofar as it is needed to place white and Black children at the same schools. Consent decrees, busing, and other like measures are justified in order to

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*Brown as Icon*, in JACK M. BALKIN, ED., WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 14, 8–9 (2002). But see Derrick A. Bell, Jr., *Bell, J., Dissenting*, in BALKIN, *supra*, at 185–87 (criticizing the *Brown* decision as providing only “symbolic” relief while failing to secure actual educational equity for Black schoolchildren). In earlier work, Bell sharply criticized NAACP litigation strategies which single-mindedly pursued “racial balance” over educational equity, even against the wishes of local Black community leaders. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–88 (1976) [Hereinafter, Bell, *Serving Two Masters*]. Bell’s critique is beyond the scope of this paper, except to the extent that his proposals for focusing on “equity” over racial “balancing” may potentially be incorporated into social movement resistance strategies that will be discussed in section III.B, *infra*.

<sup>19</sup> Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 FORDHAM L. REV. 23, 23 (1992).

<sup>20</sup> *Id.*

<sup>21</sup> It is important to note that the liberal integrationist view can, but does not have to, come tied to a robust understanding of how racial segregation fit into a broader system of white supremacy. For example, the NAACP’s “green follows white” strategy recognizes how school segregation facilitated the hoarding of resources into the hands of white schoolchildren. Racial integration helps disrupt this practice and ensure that Black children have access to their share of educational opportunity. See Nathaniel C. Jones, *School Desegregation*, 86 YALE L.J. 378, 379–80 (1976) (correspondence in reply to Bell, *Serving Two Masters*, *supra* note 18) (“With integrated schools it is much more difficult to support Blacks as a group through unequal or inadequate school resources. Blacks have learned that ‘green follows white.’ With desegregation—and white children being reassigned to previously black schools—also come new resources.”). Here racial integration is positioned as useful, if not necessary, component of a broader strategy targeting a white supremacist system of unequal educational opportunity. But it is also possible for proponents of liberal integrationism to only focus on the narrow question of whether schoolchildren of different races are in the same building, without linking that inquiry up with any broader account of white supremacy. In that case, such liberal integrationists might be blind to other practices or structures which can generate unequal educational opportunity even inside putatively “integrated” schools.

<sup>22</sup> See *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 442 (1968) (describing the desegregation obligation in *Brown* as one which requires “a system without a ‘white’ school and a ‘Negro’ school, but just schools”).

<sup>23</sup> *Brown I* intentionally left open the question of how to practically implement its decision, setting the case for reargument on “the consideration of appropriate relief.” 347 U.S. at 495. In *Brown II*, the Supreme Court concluded that local courts were best suited to craft individualized decrees “guided by equitable principles.” 349 U.S. at 299–300 (1955).

pursue the goal of school integration. Under this view, the state can (must?) use race in order to ensure that students of different races attend, to the extent possible, the same schools. And the success condition of that usage of race is a world where schools are integrated in fact.

But the liberal integrationist view is not what has prevailed under the Supreme Court's current jurisprudence. *Parents Involved* cemented a different understanding of *Brown*, where it represents a race-neutral command of constitutional colorblindness.<sup>24</sup> Under this view, the "wrong" in *Brown* is not the fact of segregation per se, but rather that the state used race to assign students to schools in violation of the colorblindness principle. Chief Justice Roberts in *Parents Involved* thus described the state of affairs *Brown* rectified as one where "schoolchildren were told where they could and could not go to school based on the color of their skin"—downplaying the salience of actual racial segregation in favor of a generic critique of color-consciousness.<sup>25</sup> For liberal integrationists, this generality is remarkably ahistorical—as Justice Stevens acidly noted in his dissent, "The history books do not tell stories of white children struggling to attend black schools."<sup>26</sup> But the colorblind view abstracts from these points, and requires that the Black struggle to integrate exclusively white schools be deracialized in order to gain constitutional legibility.

If the wrong targeted by *Brown* is that "schoolchildren were told where they could and could not go to school based on the color of their skin," one corrects that wrong by eliminating race as part of the procedure for determining who goes to what school. To keep going with Chief Justice Roberts, "the way 'to achieve a system of determining admission to the public schools on a nonracial basis' is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>27</sup> Under this understanding, there is no difference between race-conscious efforts to integrate and race-conscious efforts to segregate. Both are equal violations of the colorblindness principle.

The trajectory of the Court's jurisprudence has steadily moved in the direction of formal constitutional colorblindness. "Equal protection doctrine increasingly demands that government institutions be 'colorblind'; that is, give no effect to race in governmental decisionmaking."<sup>28</sup> Under the liberal view, this approach has had grim consequences. As Erwin Chemerinsky put

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<sup>24</sup> See Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1051 (2009).

<sup>25</sup> *Parents Involved*, 551 U.S. at 747 (plurality opinion) (citation omitted).

<sup>26</sup> *Id.* at 799 (Stevens, J., dissenting). See Karlan, *supra* note 24, at 1063–67; Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and United Steelworkers v. Weber*, 95 ETHICS 86, 88–89 (1984) ("[A] claim made by a white person as a member of the dominant majority draws its moral force largely from our collective horror at centuries of oppressing black people.").

<sup>27</sup> *Parents Involved*, 551 U.S. at 748.

<sup>28</sup> Kim Forde-Mazrui, *The Canary-Blind Constitution: Must Government Ignore Racial Inequality?*, 79 LAW & CONTEMP. PROBS. 53, 55 (2016).



it, the Supreme Court's approach to segregation has effectively been to "declare victory" and withdraw from the field.<sup>29</sup> Ian F. Haney Lopez has traced the development of this "reactionary" iteration of colorblindness across the back half of the twentieth century, where colorblindness rapidly became the banner through which localities and school boards resisted integration measures.<sup>30</sup> As judges allow effective court-ordered desegregation programs to expire, localities steadily regress back into old segregationist patterns.<sup>31</sup> Consequently, American schools have been effectively resegregating since the 1970s.<sup>32</sup> Unbridled free choice by parents has facilitated renewed segregation in practice.<sup>33</sup>

Conservatives counter that these concerns conflate racial imbalance and racial segregation.<sup>34</sup> That schools may be becoming more racially imbalanced is not a constitutional issue, or perhaps even a moral issue, unless the imbalance is a product of *state* action.<sup>35</sup> Continued public efforts that concentrate on *race* as a site of social injustice are, under this view, poor allocations of resources insofar as they stretch beyond remedying discrete and identifiable *governmental* discrimination and try to eradicate lingering social inequalities that may simply be matters of individual decisionmaking and private preferences.<sup>36</sup> Indeed, advocates of conservative colorblindness

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<sup>29</sup> Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1622 (2003) ("The Supreme Court seems intent on declaring victory over the problem of school segregation and withdrawing the judiciary from solving the problem.").

<sup>30</sup> Ian F. Haney Lopez, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1001–04 (2007) (observing how anti-integration bodies began in the 1960s to cite "colorblindness" as a rationale for contesting race-conscious integration programs, such that by the end of the decade "colorblindness had become a favored argument among those attempting to protect segregation" while having "lost much of its attractiveness to those striving for racial progress").

<sup>31</sup> Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876 (2012).

<sup>32</sup> Jeremy E. Fiel, *Decomposing School Resegregation: Social Closure, Racial Imbalance, and Racial Isolation*, 78 AM. SOC. REV. 828, 829 (2013).

<sup>33</sup> See R. Kenneth Godwin et al., *Sinking Swann: Public School Choice and the Resegregation of Charlotte's Public Schools*, 23 REV. POL'Y RES. 983, 994 (2006).

<sup>34</sup> *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring) ("Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race.").

<sup>35</sup> *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications."). Presumably, the decision by a court to withdraw endorsement of a previously functioning desegregation program does not qualify as "state action" under this framework, as this withdrawal is understood as merely allowing natural private choices to dictate any ensuing alteration in racial demography.

<sup>36</sup> See, e.g., Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101, 1112 (1996) (arguing that, the further we remove ourselves temporally from the era of explicit racial discrimination, the harder it is to establish that any current inequalities are proximately caused by that discrimination); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 926–27

often argue that the continued attempts to use race or engage in racial classification, even for supposedly salutary ends, is itself counterproductive—indicative of an “obsession with race that is America’s more consequential ‘race problem’ today.”<sup>37</sup> And so we return to Chief Justice Roberts’ pithy instruction: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>38</sup>

Given this controversy, it is no accident that Mark Tushnet identifies the colorblindness approach with *Brown I* and the integrationist approach with *Brown II*.<sup>39</sup> *Brown I* focused on striking down an extant regime of racial apartheid, while *Brown II* was concerned with how to reconstruct a racially equitable system in its aftermath. In the context of these two distinct projects, constitutional colorblindness takes on two very different valences. As an attack on then-extant Jim Crow legislation, the colorblind “anticlassification claim was the boldest argument in the debate. . . . If the Court were to accept this rationale, not only would it void all school segregation laws, it would also void all the race-based laws on which Jim Crow had been built.”<sup>40</sup> Yet once it became time to remedy the legacy of decades of state-sponsored segregation and racial subordination, “this situation was reversed,” with pure colorblindness immediately becoming “the more moderate option.”<sup>41</sup> In the aftermath of the two *Browns*, the anti-classification colorblind interpretation of the decision rapidly became the favored mechanism for distinguishing “desegregation” from “integration,” “with those who hoped to minimize the impact of *Brown* favoring the former option and often supporting it with rhetoric about the importance of removing laws that divide students by race.”<sup>42</sup>

### B. *The Colorblind Equivalency Principle*

Well before *Parents Involved*, the Supreme Court had begun to insist that there was no such thing as a “benign” use of racial classifications.<sup>43</sup>

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(2009) (suggesting that a tenant of contemporary race discourse is “exhaustion” over allocating probably futile or redundant resources towards combating racial inequality).

<sup>37</sup> Larry Alexander & Maimon Schwarzschild, *Race Matters*, 29 CONST. COMM. 31, 31 (2013) (reviewing DAVID BOONIN, *SHOULD RACE MATTER?: UNUSUAL ANSWERS TO THE USUAL QUESTIONS* (2011)) (“America has vanquished slavery, segregation, and long-standing racial discrimination only to succumb to an almost equally destructive race obsession.”).

<sup>38</sup> *Parents Involved*, 551 U.S. at 748.

<sup>39</sup> Tushnet, *supra* note 19, at 23–24.

<sup>40</sup> Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 233 (2008) (noting that more context-specific inquiries would have given courts latitude to let stand, on a case-by-case basis, some race-based legislation).

<sup>41</sup> *Id.* at 234.

<sup>42</sup> *Id.* at 234–35.

<sup>43</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294–98 (1978) (Powell, J.) (expressing skepticism regarding the ability to demarcate the category of “benign” racial classifications); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 609–10 (1990) (O’Connor, J., dissenting) (The “emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach

Laws which use race to foster integration or to promote diversity are, under this view, every bit as suspect as laws which seek to install segregation or entrench white supremacy.<sup>44</sup> Justice Thomas put the position most starkly, stating that “there is a ‘moral [and] constitutional equivalence,’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”<sup>45</sup> Whether done for putatively remedial purposes or not, “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”<sup>46</sup>

Call this the *Colorblind Equivalency Principle*. Under the colorblind equivalency principle, there is no distinction between “invidious” and “benign” uses of race. Any use of race, no matter the purpose and no matter its effects, is equally suspicious, and therefore must equally satisfy the high barrier of strict scrutiny.<sup>47</sup> Although nominally it is still possible for some racial classifications to clear this bar,<sup>48</sup> the colorblind equivalency principle fundamentally is based on a view of parity between all government usages of race.<sup>49</sup>

In popular discourse, this perspective is often associated (somewhat ahistorically) with Martin Luther King Jr.’s famous declaration that he

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greater humility. . . . [B]enign’ carries with it no independent meaning, but reflects only acceptance of the current generation’s conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.”); *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 226 (1995) (“[I]t may not always be clear that a so-called preference is in fact benign.”).

<sup>44</sup> See, e.g., *Cty. of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 494 (1989) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”); *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications.”); *Parents Involved*, 551 U.S. at 742 (“[The] argument that different rules should govern racial classifications designed to include rather than exclude . . . has been repeatedly rejected.”).

<sup>45</sup> *Adarand*, 515 U.S. at 240 (Thomas, J., concurring) (quoting *id.* at 243 (Stevens, J., dissenting)).

<sup>46</sup> *Id.* at 229–30.

<sup>47</sup> *But see id.* at 243 (Stevens, J., dissenting) (criticizing the Court’s demand for “consistency” in applying strict scrutiny as one that posits an “equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination”).

<sup>48</sup> See *id.* at 237 (denying that strict scrutiny review is “strict in theory, but fatal in fact,” and conceding that when “race-based action is necessary to further a compelling interest,” such as remedying prior governmental discrimination, “such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases”).

<sup>49</sup> Perhaps we could expect that, in practice, those classifications which had been labeled “benign” are more likely to be among the rarefied elect that survive strict scrutiny review. But “more likely” in this context still operates out of a very small (and likely shrinking) baseline—the vast majority of all racial classifications (whether labeled “benign” or “invidious”) fail strict scrutiny review, and in any event the Court has been insistent that the asserted “benign” versus “invidious” character of a classification plays no role in ameliorating the exactness of strict scrutiny review. See *Parents Involved*, 551 U.S. at 741 (Roberts, C.J.) (“Justice Breyer . . . [states] that he has found ‘no case that . . . repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races.’ We have found many.”) (quoting *id.* at 830 (Breyer, J., dissenting)).

dreamed of a day where children “will not be judged by the color of their skin but by the content of their character.”<sup>50</sup> Nonetheless, the Colorblind Equivalency Principle has been sharply criticized by liberal integrationists as not an instantiation but a betrayal of *Brown I*'s legacy.<sup>51</sup> But whatever its other faults, this principle does not struggle to replicate the outcome of *Brown I*. Southern state laws mandating racial segregation in public schools clearly and obviously used race, and therefore were constitutionally infirm.

*Brown II* is a different story. *Brown II* was the Court's opening gambit at laying out what practical remedies the *Brown I* decision demanded.<sup>52</sup> It quite famously punted that question back to lower courts and local school authorities, guided only by the cryptic command that Black children be admitted to formerly segregated schools “with all deliberate speed.”<sup>53</sup> In many ways, the next several decades of school desegregation litigation—from controversies over busing to those over “school choice”—are glosses on *Brown II* more so than on *Brown I*.

For the liberal integrationists, identifying what courts were obliged to do to rectify the racial segregation struck down in *Brown I* is relatively straightforward: they were to supervise the actual, in-fact racial integration of the schools. The constitutional wrong identified in *Brown I* would be

<sup>50</sup> Dr. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 217 (J. Washington ed. 1986). For examples tying Dr. King's ideology to that of colorblindness, see *Reagan Quotes King Speech in Opposing Racial Quotas*, N.Y. TIMES (Jan. 19, 1986), [https://perma.cc/XS4S-8QQ4]; Coleman Hughes, *Martin Luther King, Colorblind Radical* WALL ST. J. (Jan. 17, 2019), [https://perma.cc/CKQ5-NPVQ]; Jennifer Schuesser, *Ted Cruz Invokes Dr. King, and Scholars See a Familiar Distortion*, N.Y. TIMES (Mar. 23, 2022), [https://perma.cc/TR97-U2WE]. Allusions and citations to Dr. King's speech are also easy to find in the judiciary. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.”); *Rollerson v. Brazos River Harbor*, 6 F.4th 633, 648 (5th Cir. 2021) (Ho, J., concurring) (juxtaposing “color blindness” and Martin Luther King together against “disparate impact theory” and “critical race theory”). Dr. King himself was clear in his support for race-conscious affirmative action-like programs as necessary and proper. See MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 134 (1964). His vision of racial integration demanded “a standard higher than one ever embraced by the Supreme Court.” Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 601 (2008). For more on the ahistorical character of citing Dr. King for the proposition that race-conscious remedial programs violate his understanding of colorblindness, see Mary Frances Berry, *Vindicating Martin Luther King, Jr.: The Road to a Color-Blind Society*, 81 J. NEGRO HIST. 137, 140 (1996); Anthony Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1041 (1990).

<sup>51</sup> See, e.g., *Parents Involved*, 551 U.S. at 799 (Stevens, J., dissenting) (accusing the majority of having “rewrite[ten] the history of one of this Court's most important decisions.”); Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (Jun. 29, 2007) (collecting dismayed reactions from the original *Brown* litigators to the *Parents Involved* decision); see also David Schraub, *Sticky Slopes*, 101 CAL. L. REV. 1249, 1278–79 (2013).

<sup>52</sup> *Brown II*, 349 U.S. at 298 (considering specifically “the manner in which relief is to be accorded”); see also EMILY SHERWIN ET AL., AMES, CHAFEE, AND RE ON REMEDIES 2 (Robert C. Clark et al. eds., 2012) (describing remedies in terms of the judicial relief “available for violations of legal rights”).

<sup>53</sup> *Brown II*, 349 U.S. at 301.

righted once the schools had been successfully and durably desegregated. And race is a legitimate tool for courts or policymakers to take into account in order to achieve this end. Such is the logic that prompted Justice Blackmun to write in *Bakke v. Regents of the University of California* that “[i]n order to get beyond racism, we must first take account of race.”<sup>54</sup>

The liberal integrationist account of *Brown*’s remedial dimension rests awkwardly with the Colorblind Equivalency Principle, in more ways than one. Most obviously, by sanctioning the use of race—even for a supposedly “benign” or salutary reason such as integrating the schools—the liberal approach violates the core precept of the principle, which is that *all* uses of race by government rest on equal footing as constitutionally suspect. But on a deeper level, the Colorblind Equivalency Principle implies that the very objective of “integrating schools” represents a misapprehension of the constitutional wrong *Brown I* sought to correct. Recall that, as articulated by Chief Justice Roberts in *Parents Involved*,<sup>55</sup> the reason racial segregation policies were unconstitutional has nothing to do with the actual racial distribution of student populations across various schools. Rather, it stems from the fact that the state told schoolchildren “where they could and could not go to school based on the color of their skin.”<sup>56</sup> That is, the unconstitutionality stems from the fact that the government used race. And indeed, conservatives on the Supreme Court have been stridently resistant to any suggestion that remedying *Brown* requires attending to the ultimate racial “balance” of the student body within a given school system.<sup>57</sup> Under their view, government actors can and perhaps must decouple remedying racial segregation from effectuating racial integration.

The Colorblind Equivalency Principle accordingly suggests its own straightforward interpretation of how to remedy the constitutional wrong identified in *Brown*: one simply ceases to permit the de jure use of race in any form when crafting or enforcing school assignment policies. William Van Alstyne, in his own retort to Justice Blackmun, expressed the principle concisely: “One gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race.”<sup>58</sup> If the constitutional wrong stems

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<sup>54</sup> *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 407 (1978) (Blackmun, J.).

<sup>55</sup> See *supra* notes 27–29 and surrounding text.

<sup>56</sup> *Parents Involved*, 551 U.S. at 747 (plurality opinion) (citation omitted).

<sup>57</sup> See, e.g., *id.* at 749 (Thomas, J., concurring) (“Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference”); *Milliken v. Bradley* (“*Milliken II*”), 433 U.S. 267, 280 n.14 (1977) (“[T]he Constitution is not violated by racial imbalance in the schools, without more.”); *Freeman*, 503 U.S. at 494 (“Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.”).

<sup>58</sup> William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHL. L. REV. 775, 809 (1979) (emphasis in original).

entirely from the government's use of race, then the wrong is corrected entirely once the government stops using race. Any further uses of race by the government—even those purportedly done to counteract the effects of past discrimination—do not rectify the wrongdoing; if anything, they resurrect it.

But, rhetorical appeals aside, even the most stalwart defenders of constitutional colorblindness have not quite adopted this approach. It is not hard to explain why: doing so would repudiate virtually the entirety of the judiciary's desegregation work in the decades after the *Brown* decisions—much of which was expressly race-conscious. Indeed, six weeks after *Brown II*, a three-judge panel in *Briggs v. Elliott*, sitting in the Eastern District of South Carolina, offered the first glimpse of the southern response to the desegregation mandate—and it was to advocate precisely this “colorblind” interpretation of *Brown*.<sup>59</sup> Finding it “important that we point out exactly what the Supreme Court has decided and what it has not decided” in *Brown*,<sup>60</sup> the panel insisted that the Supreme Court:

[H]as not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.<sup>61</sup>

With the *Brown* decisions, “the Court had condemned state-enforced segregation negatively; but it had not established a positive desegregation remedies program that generally required judges to enjoin states and locali-

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<sup>59</sup> *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* See also Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 How. L.J. 251, 272 (2008) (describing *Briggs* as presenting “*Brown* as a segregation-prohibiting but not integration-mandating decision”).

ties to integrate their schools.”<sup>62</sup> *Briggs v. Elliott* quickly became the go-to citation for southern politicians and lawyers arguing that the judiciary had no cause or authority to order any *affirmative* steps towards racial integration.<sup>63</sup> Once it became clear that open defiance of *Brown* would not be accepted by the judiciary, segregationists “became more creative,” and the dicta in *Briggs* that the Constitution “does not require integration, it merely forbids discrimination[,]”<sup>64</sup> became an attractive fulcrum for defending a range of legal and legislative strategies aimed at ensuring that the decision in *Brown* did not practically alter the racial composition of Southern schools.<sup>65</sup> Moreover, if the Fourteenth Amendment did not *compel* integration, “it was but a short step to the contention that colorblindness affirmatively *prohibited* race-conscious integration measures.”<sup>66</sup> It did not take long for Southern states to begin packaging anti-integration measures in the language of racial colorblindness. For example, North Carolina’s “Anti-Busing Law,” drafted with the express purpose of prohibiting the “[i]nvoluntary bussing of students” as a racial integration measure, characterized itself as forbidding students from being “assigned or compelled to attend any school on account of race, creed, color or national origin.”<sup>67</sup>

Eventually, however, *Briggs* was discredited as a viable gloss on the meaning of *Brown*.<sup>68</sup> Courts both ordered affirmative racial desegregation

<sup>62</sup> Doug Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: A Golden Anniversary or A Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1588 (2004).

<sup>63</sup> See, e.g., *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 861–62 (5th Cir. 1966) (litigants cite *Briggs* as a “gloss” on *Brown* in support of the proposition that “school boards have no affirmative duty to integrate”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1291, 1294 (W.D.N.C. 1969) (“For years people of this community and all over the south have quoted wistfully the statement in [*Briggs*] . . . that though the Constitution forbids segregation it does not require integration.”); see also *Blocker v. Bd. of Educ. of Manhasset, N.Y.*, 226 F. Supp. 208, 220–21 (E.D.N.Y. 1964) (noting that while many cases have proclaimed, “often gratuitously,” that *Brown* does not require school integration, only an end to explicit segregation, “it would appear that the ultimate and solitary source” for this claim “is this dictum in *Briggs*”).

<sup>64</sup> Robert R. Mehrige Jr., *The Promise of Equality: Reflections on the Post-Brown Era in Virginia*, 39 U. RICHMOND L. REV. 11, 17–18 (2004).

<sup>65</sup> For an early survey of these strategies written just two years after *Brown* was released, see Robert B. McKay, *With All Deliberate Speed—A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1039–59 (1956).

<sup>66</sup> Ian F. Haney Lopez, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 810 (2010) (emphasis added).

<sup>67</sup> *North Carolina Bd. of Ed. v. Swann*, 402 U.S. at 43 n.1 (1971). The Supreme Court struck down the statute, concluding that “if a state-imposed limitation on a school authority’s discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall.” *Id.* at 45.

<sup>68</sup> The Supreme Court explicitly disavowed *Briggs* as inconsistent with its own precedents in *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 200 n.11 (1973); see also, e.g., *Kemp v. Beasley*, 352 F.2d 14, 21 (8th Cir. 1965) (“The dictum in *Briggs* has not been followed or adopted by this Circuit and it is logically inconsistent with *Brown* and subsequent decisional law on this subject.”); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 730 n.5 (5th Cir. 1965) (arguing that *Briggs* “should be laid to rest. It is inconsistent with *Brown* and the later development of decisional and statutory law in the area of civil rights.”); *Walker v.*

measures and affirmed governmental programs mandating the same.<sup>69</sup> Today, no member of the Supreme Court purports to endorse *Briggs*, and all affirm the legitimacy of using race at least to remedy prior acts of de jure racial discrimination.<sup>70</sup> Yet the majority of the Court does appear to endorse the Colorblind Equivalency Principle, rejecting out of hand that race-conscious integration programs should be accorded more lenient review than their segregating peers.<sup>71</sup> How can these stances be reconciled?

### C. *The Colorblind Restoration Principle*

The universal repudiation of *Briggs* leaves us with something of a puzzle. The Colorblind Equivalency Principle tells us that all uses of race are equally constitutionally suspect, and therefore the government has no more of a specific interest in promoting racially-integrated (or “balanced”) schools than it does in promoting racially-segregated schools. Constitutionally speaking, the state seemingly must be agnostic as to the racial composition of its public schools. But given that constraint, what could justify *any* of the post-*Brown II* remedial measures? Or put differently: why, under the Colorblind Equivalency Principle, was *Briggs* wrong?

Liberals, of course, do not have any problem repudiating *Briggs*: *Brown* is about school integration, and without affirmative desegregative measures, integration would have never occurred in the segregated south.<sup>72</sup> Measured against an end goal of actually-integrated schools—that is, schools that are neither identifiably “white schools” nor identifiably “Black schools,” but just “schools”<sup>73</sup>—simply removing explicit race-based pupil assignment would fall far short of effectuating *Brown*’s mandate.

The colorblind vision of *Brown* embodied in the Colorblind Equivalency Principle, by contrast, struggles to disavow *Briggs*. Indeed, it seems to endorse it. If the only wrong in *Brown* is the de jure use of race in

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Cnty. Sch. Bd. of Brunswick Cnty., Va., 413 F.2d 53, 54 n.2 (4th Cir. 1969) (“The famous *Briggs v. Elliott* dictum—adhered to by this court for many years—that the Constitution forbids segregation but does not require integration is now dead.”).

<sup>69</sup> See *Parents Involved*, 551 U.S. at 804 (Breyer, J., dissenting) (collecting cases where the court-ordered desegregation mandates “included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers”) (citing *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 455 n.3 (1979); *Davis v. Bd. of Sch. Comm’rs of Mobile Cty.*, 402 U.S. 33, 37–38 (1971); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 441–442 (1968)).

<sup>70</sup> Even Justice Thomas, perhaps the most steadfast critic of race-conscious decision-making on the Court, acknowledges that “race-based measures are sometimes constitutionally compelled to remedy prior school segregation” and, more broadly, that “a government unit [is authorized to use race] to remedy past discrimination for which it was responsible.” *Id.* at 751 (Thomas, J., concurring).

<sup>71</sup> See *supra* notes 44–46 and surrounding text.

<sup>72</sup> Cf. *Broussard v. Hous. Indep. Sch. Dist.*, 395 F.2d 817, 822 (5th Cir. 1968) (Wisdom, J., dissenting) (“I doubt if many laymen understand the question-begging distinction between ‘desegregation’ and ‘integration’. In the vernacular there is no distinction.”)

<sup>73</sup> See *Green*, 391 U.S. at 442.



school assignments, then that wrong is fully righted as soon as the offending law mandating such race-based assignments is struck down. No further remedy—certainly not the extensive race-conscious remedial measures of the sort that courts actually deployed to undo the effects of racial segregation—is needed. And this was precisely the position taken in *Briggs*.

But *Brown II* and its progeny didn't just excise race from the relevant statutes.<sup>74</sup> They did much more than that, and they used race to do it. These cases have never been repudiated, notwithstanding the sharp turn towards aggressive colorblindness characterized by cases like *Parents Involved*. Even the most fervent advocates of colorblindness on the Supreme Court concede race can be used for at least one purpose: to remedy prior, unlawful instances of racial discrimination.<sup>75</sup>

If this stance is to be reconciled with the Colorblind Equivalency Principle, then there needs to be a different accounting of the “success condition” of *Brown II* under the colorblind telling.<sup>76</sup> We know it cannot be a demand that schools actually be integrated—that is the liberal integrationist position. But neither can it require only the abandonment of the explicit use of race by the state in school assignment decisions—that is the discredited position of *Briggs*, and since it would be achieved almost automatically once the segregation statutes were struck down, it cannot explain or justify the use of race-conscious measures to alter the racial composition of local schools even after the statutes had been formally cleansed of their statutorily-dictated racial character.

The answer from the colorblind perspective must be something like the following: when there has been de jure racial discrimination in the school system, the state must remedy that discrimination by taking affirmative steps (including, if necessary, race-conscious steps) to effectuate a racial makeup in the schools that mimics that which would have existed but-for the prior unlawful usage of race.<sup>77</sup> Call this the *Colorblind Restoration Principle*. In

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<sup>74</sup> Importantly, many if not most of the southern laws written in response to and seeking to undermine *Brown* were, on the face of it, race-neutral. See, e.g., *Hall v. St. Helena Par. Sch. Bd.*, 197 F. Supp. 649, 652 (E.D. La. 1961) (“As with the other segregation statutes, in drafting Act 2 [permitting closure of integrated schools and the redirection of state funds to private, segregated academies] the Legislature was at pains to use language disguising its real purpose. All reference to race is eliminated, so that, to the uninitiated, the statute appears completely innocuous.”).

<sup>75</sup> See, e.g., *Parents Involved*, 551 U.S. at 720 (acknowledging “the compelling interest of remedying the effects of past intentional discrimination”); *Croson*, 488 U.S. at 524 (Scalia, J., concurring in the judgment) (“In my view there is only one circumstance in which the States may act by race to undo the effects of past discrimination: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.”) (quotations omitted).

<sup>76</sup> See Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 284–85 (2002) (noting that it is impossible to gauge the appropriateness of any particular desegregation remedy without a clear account of what the specific constitutional violation of segregation is).

<sup>77</sup> In earlier work, I have characterized the conservative concept of “post-racialism” as attaining a world “where it is as if race never ‘happened.’” David Schraub, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L.J. 599, 610 (2017). This tracks well with understanding

cases where the government put its finger on the scales with some prior unlawful use of race, even colorblindness advocates are willing to concede that the government may be forced to take affirmative, race-conscious measures in order to erase the effects. But this interest is not tied to racial integration *per se*.<sup>78</sup> As Justice Thomas put it, the “hard-won gain” of the judiciary’s desegregation cases is *not* “the achievement of a certain statistical mix in several schools.”<sup>79</sup> Rather, it solely stems from “the elimination of the vestiges of the system of state-enforced racial separation that once existed.”<sup>80</sup> The wrong is the use of race by government; the remedy is to erase any lingering effects of that usage. If, after the last “vestiges” of the effects of prior discrimination have been erased, the schools remain racially separate in practice, that is of no constitutional concern.<sup>81</sup>

Consequently, the state can (must?) use race only to recreate the racial makeup of schools that would have existed absent the prior illegal use of race (whether any given school system is largely integrated or largely segregated). As the Court put it in *Milliken v. Bradley*,<sup>82</sup> a remedy for unlawful segregation must “restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”<sup>83</sup> Only then can we say that the last “vestiges” of the unlawful discrimination have been eradicated.<sup>84</sup> So, for example, in *Berry v. School District of Benton Harbor*, the race-conscious decision by the state of Michigan approving the transfer of a predominantly white residential area from a largely Black to a largely white school district was remedied by canceling the transfer and reverting the white neighborhood and its local school back to the predominantly Black district.<sup>85</sup> As one commentator put it, this approach entails “the court simply

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the proper remedial role of courts, responding to a state of affairs where race very much did “happen,” as seeking as best as possible to create a world that is *as if* these usages of race had never occurred. Such an endeavor is, however, by necessity highly speculative in nature.

<sup>78</sup> See *Milliken II*, 433 U.S. at 280 n.14 (noting that “racial imbalance in the schools, without more” is not a constitutional violation).

<sup>79</sup> *Parents Involved*, 551 U.S. at 750 n.3 (Thomas, J., concurring).

<sup>80</sup> *Id.*

<sup>81</sup> See *id.* at 721 (plurality opinion) (“Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis”); *id.* at 749–50 (Thomas, J., concurring) (distinguishing “segregation” from “racial imbalance” and arguing that the latter is not an independent constitutional wrong in absence of the former).

<sup>82</sup> 418 U.S. 717 (1974).

<sup>83</sup> *Id.* at 746. In *Milliken II*, the Court included this as part of the three “equitable principles” courts should consider in effectuating desegregation remedies. *Milliken II*, 433 U.S. at 280–81 (citing *Brown II*, 349 U.S. at 300 (“In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles.”)). See Joseph H. Bates, Note, *Out of Focus: The Misapplication of Traditional Equitable Principles in the Nontraditional Arena of School Desegregation*, 44 VAND. L. REV. 1315, 1344 (1991).

<sup>84</sup> See *Freeman*, 503 U.S. at 492 (concluding that unitary status can only be declared once the “the vestiges of past discrimination [have] been eliminated to the extent practicable”) (quoting *Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249–50 (1991)).

<sup>85</sup> *Berry v. Benton Harbor Sch. Dist.*, 698 F.2d 813, 815–17 (6th Cir. 1983).

turn[ing] back the clock to the time before the latest and most easily isolated discriminatory conduct.”<sup>86</sup>

One clear shortcoming of this approach is that, from the origins of the United States up through the *Brown* decision, there never was a period of American history that had been free of official race-conscious discrimination. There is no innocent period to which the courts can “turn back the clock.” The implication within the logic of *Berry*, that simply unrolling the “the latest” instance of discriminatory conduct would suffice to restore victims to the position they would have occupied in a race-neutral society, only makes sense if one views instances of racial discrimination in American history as aberrant exceptions to a norm of racial equality.<sup>87</sup> Were that the case, rectifying racial injustice may have indeed entailed nothing more complicated than “turning back the clock” to reverse singular, easily isolated deviations from the colorblind norm. But recognizing the reality of the pervasiveness of racism throughout American history thwarts such simple resolutions.<sup>88</sup> To speak of the position victims of American racism “would have occupied in the absence” of such discrimination is to engage in an exercise of imagination, not history.

Indeed, while it is likely that state enforcement of segregationist rules was necessary to preserve absolute separation of the races, it seems exceptionally optimistic to imagine that even in absence of these rules local school systems would have witnessed more than token integration.<sup>89</sup> The deep social entrenchment of white supremacist structure and sentiment would have almost certainly created and maintained significant levels of racial inequality and separation on its own. Arguably, then, the Colorblind Restoration Principle implies that this minimal degree of integration, and no more, is the baseline that should be “restored” to, since this is the only level of integration

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<sup>86</sup> Bates, *supra* note 83, at 1344.

<sup>87</sup> Part of the recent “anti-Critical Race Theory” campaign emanating from the American right has included the insistence that racism is not normal but rather a “deviation” from authentic and dominant American values. See, e.g., Rick Casey, *Texas Law Says Racism Must Be Taught as a ‘Deviation,’ but it Should Also Be Taught as a Persistent Reality*, SAN ANTONIO REPORT (Jan. 18, 2022), <https://sanantonioreport.org/racism-texas-senate-bill-3/> [<https://perma.cc/UM3K-WZCH>] (quoting a Texas state bill which would prohibit teaching that “slavery and racism are anything other than deviations from . . . the authentic founding principles of the United States”).

<sup>88</sup> See Charles W. Mills, *Whose Fourth of July?: Frederick Douglass and “Original Intent,”* in BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE 167, 192 (1998) (criticizing as historically unsupportable the view that “the United States was intended to be and is basically a nonracial liberal democracy in which racism is a ‘deviation’ from the ideal norm”).

<sup>89</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 59–60 (2004) (“Most Jim Crow laws merely described white supremacy; they did not produce it. Legal disfranchisement measures . . . played relatively minor roles in disfranchising and segregating southern blacks. Entrenched social mores, reinforced by economic power and the threat and reality of physical violence, were primarily responsible for bolstering the South’s racial hierarchy. Legal instantiation of these norms was often more symbolic than functional.”).

that would have existed but-for the unlawful government usage of race.<sup>90</sup> At the very least, the highly speculative and counterfactual nature of the idea of “restoring” American racial dynamics to what would have existed absent unlawful government use of race allows for considerable subjective judgment by judicial decisionmakers.

To recap the argument so far: the dominant conservative understanding of *Brown*, and the Fourteenth Amendment’s equal protection guarantee more broadly, is reflected through the Colorblind Equivalency Principle—holding that all government uses of race, for any purpose, are equally constitutionally suspect. This position can easily encompass the result in *Brown I*: while de facto segregation may not itself be constitutionally problematic, segregating schools by law represents government uses of race and for that reason alone is unconstitutional.

The Colorblind Equivalency Principle struggles, however, to accommodate *Brown II* in justifying concrete *remedies* to prior de jure segregation. One reason for the conflict is simply because the remedies lower courts implemented after *Brown II* often were explicitly race-conscious. But a deeper problem is that, by positioning integration in-fact as the constitutional remedy, they imply that racial segregation (not the mere “use of race”) was the constitutional wrong—the very view the Colorblind Equivalency Principle is committed to rejecting.

The most straightforward mode of reconciliation would be to adopt the view of the Eastern District of South Carolina in *Briggs*: if the constitutional wrong is that the state formally uses race, the wrong is rectified the moment the state stops formally using race. But this approach would effectively repudiate decades of judicial precedent which had affirmatively used race to desegregate schools—precedents which are almost as valorized as *Brown* itself is in the corpus of the civil rights era. Even the most passionate judicial supporters of constitutional colorblindness have not been willing to step this far.

Given these constraints, the most plausible way to harmonize the Colorblind Equivalency Principle with the use of race-conscious desegregation remedies associated with *Brown II* is to say that race can be used *not* to achieve the end of racial integration per se, but only to restore the state of racial affairs that would have existed but-for the prior unlawful usage of race—the Colorblind Restoration Principle. And it is the interaction of these two principles which makes judicial resegregation a theoretically live possibility.

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<sup>90</sup> Arguably, though, the belief that racism is an “aberration” in American life, *see supra* note 87, may allow adherents of the Colorblind Restoration Principle more leeway to endorse the relatively aggressive integrationist measures taken by the Court in the decades immediately following *Brown*. If racism is a “deviation” from the natural baseline, then, *contra* KLARMAN, *supra* note 89, the degree of racial integration that would have existed absent unlawful state action likely would be comparatively greater.

## II. DOCTRINALLY FEASIBLE, PRACTICALLY INCONCEIVABLE: THE LIMITS OF JUDICIAL RESEGREGATION

In racial segregation cases, the Supreme Court has written, “[T]he nature of the violation determines the scope of the remedy.”<sup>91</sup> This remedy must be one “aimed at the *condition* alleged to offend the Constitution,”<sup>92</sup> and in this context the Court has emphasized that “racial imbalance in the schools, without more” is not a constitutional violation.<sup>93</sup> Rather, the purpose of remedial action is “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”<sup>94</sup> *Brown II* represents a circumstance where the state used race to try to keep schools segregated, so the remedial action took the form of race-conscious desegregation. But if there really is no difference between race-conscious segregation and race-conscious integration, then the corollary is that in a circumstance where the state used race to try and keep schools integrated, the proper remedial form to restore a “race-neutral” or “colorblind” state of affairs would be explicit, race-conscious resegregation.

Return to the *Teague* case from the introduction.<sup>95</sup> From 1989 to 2013, Arkansas prohibited certain school transfers where they would increase racial homogeneity—an exception to the state’s general policy of freely allowing student transfers.<sup>96</sup> In the wake of *Parents Involved*, white parents who wished to transfer their children out of an integrated district into an overwhelmingly white district sued, claiming the policy violated the Equal Protection Clause. The district court agreed and struck down the program.<sup>97</sup>

Were this a situation where a state had for a quarter century enforced a school transfer rule fostering segregation, it is almost certain that the remedy would involve continued judicial oversight and the strong possibility of race-conscious remediation. Yet the *Teague* court did not consider either option—almost certainly because the unlawful program was meant to foster integration, and so the equivalent race-conscious remediation programs would entail using race to resegregate. Indeed, the district court elected to strike down the entirety of Arkansas school transfer program in order to *preserve* at least some of the integrationist ambitions of the law—precisely the opposite of what it should have done under the Colorblind Equivalency Principle (imag-

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<sup>91</sup> *Swann I*, 402 U.S. at 16; *see also Milliken II*, 433 U.S. at 280 (“[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation.”).

<sup>92</sup> *Milliken v. Bradley* (“*Milliken I*”), 418 U.S. 717, 738 (1974).

<sup>93</sup> *Milliken II*, 433 U.S. at 280 n.14.

<sup>94</sup> *Milliken I*, 418 U.S. at 738. *See also* Epstein, *supra* note 36, at 1111 (“The . . . court’s goal [in desegregation litigation] is not to restore the system to the position that it was in forty years ago, but rather to create what would exist today had the original wrongs never been committed.”).

<sup>95</sup> *Teague v. Cooper*, 720 F.3d 973 (2013); *see also supra* notes 1–6 and surrounding text.

<sup>96</sup> *See id.* at 975.

<sup>97</sup> *T.T.*, 873 F. Supp. 2d at 1069.

ine if a court interpreted a statute in a particular way expressly to ensure that at least some of a legislature's *segregationist* intent would be effectuated).<sup>98</sup> The Arkansas law was written in a race-conscious fashion, with a particular integrationist goal in mind. As far as the Colorblind Equivalency Principle is concerned, this is legally identical to a circumstance where Arkansas had written a race-conscious law with a segregationist goal in mind. The upshot is that, under the Colorblind Equivalency view the Arkansas schools had become unlawfully *integrated* and, as per the Colorblind Restoration Principle, the reviewing court should have considered how to restore the racial balance of Arkansas schools to that which would have existed absent the impermissible integrationist steps.

Are there conceptual arguments consistent with the Colorblind Equivalency and Restoration principles that would nonetheless block judicially mandated resegregation? One possibility is that the Colorblind Equivalency Principle is not as rock-solid as it appears, even following cases like *City of Richmond v. J.A. Croson*,<sup>99</sup> *Adarand Constructors v. Peña*,<sup>100</sup> and *Parents Involved*. Perhaps there are, in current doctrine, some measures that would be deemed unlawful if taken to segregate that would be permitted in service of racial integration. Even as the Court says it applies strict scrutiny across the board, there are intimations from at least some justices—most prominently, in Justice Kennedy's *Parents Involved* concurrence—that integrationist efforts *should* be treated differently from their segregationist counterparts.<sup>101</sup> For example, Justice Kennedy endorsed considering racial demographics in drawing school attendance zones as a means of promoting diversity; it is unlikely that such consideration in pursuit of preserving segregation would be similarly permitted.<sup>102</sup> If here the Colorblind Equivalency Principle nonetheless permits government policies in pursuit of integration that would not be allowed in service of segregation, maybe the same logic would also justify allowing remedial race-conscious segregation while abjuring race-conscious integration.

Yet on further examination, the judiciary's occasional acceptance of racial integration programs cannot explain why courts have yet to implement resegregation measures. Even assuming Justice Kennedy's position is truly compatible with the Colorblind Equivalency Principle (to say nothing about whether it will survive his departure from the Court),<sup>103</sup> all his concurrence

<sup>98</sup> See *id.* (finding the race-conscious transfer limitations not severable from the broader school transfer law because the legislature imposed the former with the express purpose of ensuring the latter "did not adversely affect desegregation").

<sup>99</sup> 488 U.S. 469 (1989).

<sup>100</sup> 515 U.S. 200 (1995).

<sup>101</sup> See *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

<sup>102</sup> See *id.*

<sup>103</sup> It is notable that Justice Kennedy does not say that these integrationist programs would survive strict scrutiny, rather, he says strict scrutiny likely should not apply to such programs. See *id.* (arguing that "it is unlikely any of [the race-conscious integrationist measures Justice Kennedy suggests] would demand strict scrutiny to be found permissible").

suggests is that certain racial integration programs are not unconstitutional. But this offers little guidance on how courts should remedy the effects of those programs which *are* deemed unconstitutional. Judicial resegregation, like court-ordered desegregation, is a remedy. It would occur in response to integrationist programs that have, as in the *Teague* case, already been deemed *unlawful*, creating an illegitimate racial distribution which, under the Colorblind Restoration Principle, must be undone. That a different integrationist program might hypothetically survive constitutional examination does not have much bearing on how a court should rectify one it has already concluded fails strict scrutiny review.

Another argument is that court-ordered resegregation is simply not necessary because courts believe that, even in circumstances where the polity has been “unlawfully” trying to integrate, all that is needed to restore the “natural” state of racial affairs that would have otherwise existed is for the law to step out of the way. In other words, it may be that the demands of the Colorblind Restoration Principle can be met simply by striking down offending integration programs, and nothing more—no need for additional, “affirmative” relief.

At one level, this is simply the *Briggs* position that, in the context of *Brown II*, was widely discredited.<sup>104</sup> In general, as Justice Thomas noted, “[A] State does not satisfy its obligation to dismantle a dual system of higher education merely by adopting race-neutral policies for the future administration of that system.”<sup>105</sup> Still, it is not conceptually impossible that it would be easier, and require less intensive judicial intervention, to undo the effects of relatively novel racial integration measures compared to the attention and resources that were needed in order to dismantle deeply entrenched segregationist systems. In any particular scenario, the necessity of race-conscious remedies in order to restore the prior racial state of affairs is an empirical question. Perhaps in the case of Arkansas following the *Teague* litigation race-conscious remedies were simply not needed to effectuate the proper restoration, whereas in the case of Arkansas following *Brown* they were.

Notice, however, that this distinction rests entirely on an empirical rather than a principled difference in circumstances. Courts do not impose race-conscious resegregation measures not because such measures are inherently impermissible, but because they happen to be unnecessary. This skirts rather than resolves any scenario where race-conscious resegregation *would* be necessary in order to satisfy the demands of the Colorblind Restoration Principle. The more aggressively the polity seeks to integrate, the less tenable it is to simply assert that the latter scenario could never come into being. It is not hard to imagine circumstances where a Court truly committed to the Colorblind Equivalency Principle might find that “unlawful” integrationist

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<sup>104</sup> See *supra* note 68 and surrounding text.

<sup>105</sup> *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring).

measures had sufficiently altered a state or locality's educational environment such that "proclamation alone"<sup>106</sup> would not suffice to undo the effects. For example, imagine if a state had been allocating additional funding to integrated schools in order to make them more attractive.<sup>107</sup> Under the Colorblind Equivalency Principle, this could easily be viewed as "unlawfully" depriving predominantly white schools of their fair share of resources.<sup>108</sup> It is possible that, even if that particular program was abandoned, the favored status of the integrated school might persist via path dependence. A court might then, in order to satisfy the requirements of the Colorblind Restoration Principle, have to order additional resources to the less-integrated school district in order to attract more white students back to it—a judicial order promoting resegregation.<sup>109</sup>

Despite these doctrinal arguments, judicial resegregation orders may seem outlandish. It seems obvious that judges are capable of distinguishing between the use of race to integrate schools (at least nominally tolerable, if only as a remedy for prior de jure discrimination) and the use of race to

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<sup>106</sup> Cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347 (1988).

<sup>107</sup> See Epstein, *supra* note 36, at 1107 (discussing proposals by the district court to significantly increase spending on certain Kansas City area schools in order to promote their "desegregative attractiveness"). Epstein suggests that these programs were less forms of "desegregation" and more unjustified "affirmative action" programs, albeit very poorly tailored ones insofar as they do not include many Black students outside Kansas City and do include white students inside the city. *Id.* at 1119. They are not "desegregation" initiatives, he argues, because they have long since ceased to target conditions which are clearly traceable to the initial wrong of segregation. *Id.* at 1111–13. Framed that way, one could easily characterize Kansas City's contemporary "desegregation" initiatives as simple racial discrimination—at which point there would be a proximate, not distant, injury that could support race-conscious remediation in favor of the (predominantly) white students allegedly deprived of their fair share.

<sup>108</sup> Note that *depriving* integrated schools of funding was a common feature of early Southern resistance to *Brown* until it was struck down by federal courts. See Griffin v. County School Bd., 377 U.S. 218 (1964); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd mem.*, 368 U.S. 515 (1962). Likewise, increases in funding for predominantly Black schools have been approved as a remedy for prior unlawful race discrimination. See Missouri v. Jenkins, 495 U.S. 33, 57–58 (1990). For a proposal suggesting policies whereby the state could favor integrated over non-integrated schools, see Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1354, 1396 (2005) (considering the possibility of collegiate affirmative action programs which favor students of any race who attended integrated primary or secondary schools).

<sup>109</sup> Resegregation is not the only extreme "remedy" that might be required under application of the Colorblind Restoration Principle. Critics of Historically Black Colleges and Universities (HBCUs) contend that such schools represent the apogee of state-funded (and often sponsored) racial division—promoting their own form of "segregation." They argue not just that HBCUs should have racially non-discriminatory admissions policies (which they already do), but that they should be blocked from receiving government funding. See Sean B. Seymore, *I'm Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 287, 317–18 (2006) (contending that "efforts by the President and Congress to strengthen HBCUs frustrate diversity and likely hinder the judiciary's efforts to fulfill the *Brown* legacy").



(re)segregate them. But “an inability to effectively distinguish between benign and malign [racial] classifications is an incompetence the Supreme Court ascribes to itself,” and to the judiciary as a whole.<sup>110</sup> Indeed, this inability represents the core thesis of the Colorblind Equivalency Principle.<sup>111</sup> Once one concedes that one *can* distinguish (indeed, *can obviously* distinguish) between integrating and segregating uses of race, the entire conceptual architecture of modern constitutional colorblindness jurisprudence collapses.

Hence, to the extent we cannot fathom actual judicial resegregation orders, their implausibility is *not* a function of them being incompatible with contemporary equal protection doctrine. If anything, they may well be demanded by contemporary equal protection doctrine, at least in certain circumstances. They are nonetheless inconceivable only because few actually believe, at core, that using race to pursue racial integration and using race to pursue racial segregation are morally and legally identical. In other words, the unfathomable nature of judicial resegregation falsifies the Colorblind Equivalency Principle. If all uses of race are equally pernicious, courts would not shy away from deploying the same remedial tools against illegal race-conscious integration as have long been accepted against race-conscious segregation.

A few years ago, this might have sufficed as a conclusion: obviously, the judiciary would never endorse race-conscious resegregation measures, and even the conservatives who claim that race-conscious integration and race-conscious segregation are morally identical actually are in practice perfectly capable of telling the difference between the two. The fact that even the conservatives who accept the validity of using race to remedy segregation would blanch at using race to “remedy” integration shows that they actually do acknowledge the core truth of the liberal story about *Brown*.

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<sup>110</sup> David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 407 n.234 (2016). Nor has the Court taken the route of deferring to lower court judgments seeking to distinguish benign and malign uses of race. *See, e.g., Croson*, 488 U.S. at 500 (plurality). And it certainly does not view Congress or other legislative bodies as deserving deference in these inquiries. *See id.* at 551 (“The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis”); *see also Parents Involved*, 551 U.S. at 744 (arguing that “deference” to local school boards regarding whether race-conscious integration measures are appropriate “is fundamentally at odds with our equal protection jurisprudence”) (quoting *Johnson v. California*, 543 U.S., 499, 506 n.1 (2005)); William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 939 (2013) (observing that the Court’s “own ultimate understanding of what equal protection means” indicates it does and should not give deference to congressional fact-finding that conflicts with the Court’s intuitions).

<sup>111</sup> *See, e.g., Adarand*, 515 U.S. at 225 (criticizing proponents of applying intermediate scrutiny to “benign” classifications for failing to “explain how to tell whether a racial classification should be deemed ‘benign’”); *Metro Broad.*, 497 U.S. at 609 (O’Connor, J., dissenting) (“The Court’s emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility.”).

When push comes to shove, they do not and cannot truly endorse the formalistic parity between using race to segregate and using race to integrate.<sup>112</sup>

In the year 2022, the pessimists among the liberal integrationist cohort are perhaps a little less confident about what the current federal judiciary would “never endorse” when it comes to matters of race.<sup>113</sup> So the pessimistic version of the story illustrates the true terminus of the conservative colorblind road: a world in which the judiciary feels empowered to implement consent decrees and busing programs and any number of other programs to ensure that white kids are attending white(r) schools and Black and brown kids Black(er) and brown(er) schools—judicially mandated resegregation. If that future is to be avoided, the tools of resistance will not be found in logical application of prevailing constitutional doctrine. Rather, it will be through social movements exploiting the practical limits of judicial power in the face of sustained popular opposition. Just as judges were limited in their ability to compel racial integration, so too may they be limited in their ability to undo racial integration—at least in circumstances where there is significant pressure outside the courts pushing programs and policies that demand racial equity.

### III. OLD LESSONS IN NEW CONTEXTS: THE NEW RESISTANCE TO DOCTRINAL COLORBLINDNESS

The previous sections have used the prospect of judicial resegregation to illuminate a theoretical flaw in contemporary colorblind jurisprudence. But there is a bigger issue lurking underneath. Many liberals, seeing which way the jurisprudential winds are blowing, have despaired about the degree to which these legal trends threaten even popular, democratic, or private efforts to foster greater integration. The decision in *Parents Involved* blocked “the voluntary, democratic effort by the community to achieve student integration (in a former slave state, no less!).”<sup>114</sup> Taking that option away “takes away some hope . . . [and] it is no small thing to dash hope.”<sup>115</sup>

But the despair over the ascendancy of the fundamentalist colorblind interpretation of *Brown* overlooks the other part of the *Brown II* story. It

<sup>112</sup> Compare *Parents Involved*, 551 U.S. at 830 (Breyer, J., dissenting) (arguing that there is a “constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races”) with *id.* at 741 (Roberts, C.J.) (asserting that “many” cases have in fact “repudiated” this alleged asymmetry).

<sup>113</sup> See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (staying a lower court injunction and permitting elections to proceed using lines the district court had held unlawfully diluted Black voting power); *Wis. Legislature v. Wis. Elections Comm’n*, 142 S. Ct. 1245 (2022) (summarily reversing the Wisconsin Supreme Court’s decision regarding selection of redistricting maps on the basis that the map provided for too many majority Black districts); *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (sharply limiting Section 2 of the Voting Rights Act).

<sup>114</sup> David Schraub, *Our Divine Constitution*, 44 LOY. U. (CHI.) L.J. 1201, 1258 (2013).

<sup>115</sup> James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 133 (2007).

used to be, in the Warren Court era, that courts fought to bring about integration in schools against the preference of public and private actors to maintain segregated systems. Cases like *Parents Involved*, where a popularly-supported integration measure was invalidated by a skeptical court, have flipped the historical Equal Protection script. Instead of a friendly judiciary seeking to protect “discrete and insular minorities”<sup>116</sup> from predation by democratic bodies, or trying to disturb settled arrangements of hierarchy and power at hidebound universities or major corporations, now it is often established social, economic and political actors who seek greater educational diversity and integration,<sup>117</sup> and an emboldened conservative legal movement attempting to stop them.<sup>118</sup> In the ensuing confusion, it seems that the hard lessons regarding the structural limitations of the judicial branch may have been forgotten. *Brown II*, certainly under the liberal telling, is not a story about the judiciary’s inexorable power to effectuate social change even in the face of determined external opposition. Much the opposite: the judiciary’s efforts to integrate schools struggled mightily against steadfast public opposition to preserve their segregationist preferences.<sup>119</sup> Despite the gnashing of teeth over *Parents Involved*, there is no reason to think the current court has any more ability to eliminate popular resistance to its mandate than did the *Brown* court. Courts, even very determined courts, have only so many options to force either integration or resegregation as against political actors willing to resist their efforts. The story about how popular actors resisted

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<sup>116</sup> See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

<sup>117</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing briefs by major businesses in support of affirmative action programs); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1464–66 (detailing briefs in favor of affirmative action by business, military, educational, and professional leaders). As Cynthia Estlund points out, “[n]o major American corporation—indeed, virtually no major American institution of any kind—filed a brief in opposition to affirmative action” in *Grutter*. Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workforce*, 26 BERKELEY J. EMP. & LAB. L. 1, 2 n.3 (2005).

<sup>118</sup> See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (Jan. 24, 2022) (lawsuit against Harvard University challenging its voluntary racial affirmative action programs as violating Title VI of the Civil Rights Act). Students for Fair Admissions was founded by Abigail Fisher—the lead plaintiff in *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 365 (2016) (“*Fisher II*”) and Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (“*Fisher I*”)—her father, and Edward Blum, a prominent conservative activist who has been involved in many challenges to race-conscious programs designed to increase the power or representation of racial minorities. See Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He’s Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> [<https://perma.cc/4BJB-EZFS>].

<sup>119</sup> An interesting and largely forgotten history concerns attempts by segregated school districts to resist the more robust “separate but equal” regime announced by cases like *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), and the limits in the judiciary’s practical ability to secure actual “equality” under separate but equal, notwithstanding the formal doctrinal requirements and increasing support in the Supreme Court for actual rather than merely nominal equal status. See Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 393–402 (1954).

judicial desegregation can provide important lessons guiding how judicial resegregation might be resisted today.

### A. *Resisting Desegregation*

In a very real sense, massive resistance succeeded in neutering *Brown*. However, the degree to which *Brown* was in fact massively resisted varied significantly throughout the country. As Michael Klarman notes, the immediate impact of *Brown* was dramatically different in border states, where opinions on desegregation were mixed, compared to the deep South, where resistance was immediate and deeply entrenched.<sup>120</sup> In the former, formal desegregation probably would not have been undertaken voluntarily, but neither was there strong resistance to it.<sup>121</sup> In at least a few cases, *Brown* may have even given local districts an “excuse to do what they wanted”—namely, dispense with state-mandated but economically inefficient segregated systems requiring wholly separate educational facilities to serve relatively small Black populations.<sup>122</sup> This is not to say that school integration proceeded seamlessly, but it occurred at a pace that could fairly be reconciled with *Brown II*'s “all deliberate speed” language.<sup>123</sup>

Things were very different in the middle and deep South. In those states, *Brown*'s mandate had virtually no impact for years after the decision was announced. Local school boards retained primary authority to determine how to implement *Brown*,<sup>124</sup> and faced tremendous political and popular pressure to refrain from taking any tangible steps to desegregate the school system. Frequently, school boards—exploiting the fact that *Brown* nominally only bound the named defendants in the case<sup>125</sup>—simply announced

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<sup>120</sup> See KLARMAN, *supra* note 89, at 346.

<sup>121</sup> See *id.* (“Under such circumstances, *Brown* supplied the push that was necessary to induce public officials to do what they would not have undertaken voluntarily but were not strongly resistant to doing.”).

<sup>122</sup> *Id.* at 345. The Supreme Court, in *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151 (1914), had held that under “separate but equal” a state could not refrain from providing a given service to Black patrons simply because there was relatively little demand for it within that community. *Id.* at 161–62. This requirement often made separate but equal prohibitively expensive in regions where the Black population was relatively small.

<sup>123</sup> *Brown II*, 349 U.S. at 301.

<sup>124</sup> See *id.* at 299 (“Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”).

<sup>125</sup> Jonathan Mitchell has written on the so-called “writ of erasure fallacy,” where the judiciary, in refusing to permit a particular actor from enforcing a given law, is said to have “struck down,” “invalidated,” or otherwise “nullified” said law. Jonathan Mitchell, *The Writ of Erasure Fallacy*, 104 VA. L. REV. 933, 942 (2018). This language, Mitchell observes, is at best imprecise—the judiciary has no power to “erase” a law from the statute books; it merely can decline to enforce it. *Id.* And while the Court can enjoin particular parties before it from acting in a certain way, such an injunction only binds the parties and their agents—other actors, even those engaging in identical conduct while fully aware of the legal ruling asserting

they would take no desegregationist steps unless and until confronted with a direct court order, buying time and forcing the NAACP and allied groups to engage in expensive and time-consuming district-to-district litigation.<sup>126</sup> Such cases were inevitably heard first by local judges who, being entirely white and predominantly products of the local white southern legal and political culture, typically were not inclined toward immediate sympathy for desegregationist claims.<sup>127</sup> Decisions which openly defied *Brown*'s dictates could be overturned on appeal, but the process was laborious and not fully reliable in cases where the underlying opinions at least plausibly identified legitimate local concerns or practical objections. Even the *Briggs* decision, identified above as the favored interpretation of *Brown* by segregationist Southern politicians,<sup>128</sup> was not issued by a “nullifier” and indeed echoed the perspective of at least one Supreme Court Justice during the *Brown* deliberations.<sup>129</sup>

Meanwhile, though many school officials' own political preferences certainly aligned with their segregationist constituents, even those who may have been theoretically willing to comply with the *Brown* ruling found it

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its unlawful character, are not violating an injunction that they were not party to in the first place (though they can, of course, *subsequently* be themselves enjoined). See *Berger v. Superior Court*, 175 Cal. 719, 721 (1917) (“[I]t is generally held that a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms or acting in concert with the enjoined party”); see also P. L. F., Comment, *Injunctions: When Binding on Persons Not Named*, 6 CAL. L. REV. 149, 149–51 (1918). A few years later, Professor Mitchell used this same insight to help craft Texas' SB 8 law as a means of resisting the Supreme Court's abortion jurisprudence, notwithstanding the seemingly binding (at the time) precedents of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See Mimi Swartz, *Meet the Legal Strategist Behind the Texas Abortion Ban*, TEXAS MONTHLY (Sept. 5, 2021), <https://www.texasmonthly.com/news-politics/meet-the-legal-strategist-behind-the-texas-abortion-ban/> [https://perma.cc/2485-A4V9]; see also Whole Women's Health v. Jackson, 142 S. Ct. 522 (2021). Whereas normally a government policy which violates a constitutional right can be blocked by enjoining enforcement of the relevant government decisionmakers, SB 8 relies solely on private enforcement. *Id.* Hence, there is no particular agent who can be sued preemptively to bind the relevant agents from bringing their own cases, forcing abortion clinics to litigate in a defensive posture. *Id.* And even if the clinics do prevail “defensively,” any judgment they secure would not itself bind the innumerable other private plaintiffs who remain free to bring their own cases. See Charles W. “Rocky” Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of Texas' Fetal-Heartbeat Law and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 245–48 (2022).

<sup>126</sup> See KLARMAN, *supra* note 89, at 351–52. Because such litigation was often unaffordable and unattractive for individual Black families, it typically had to run through an organized body which could act collectively on behalf of the Black community. But this created its own vulnerability, as the NAACP's obvious linchpin role in this litigation made it an inviting target for harassment and abuse. See *id.* at 352–53.

<sup>127</sup> See *id.* at 344–55. See also Schraub, *supra* note 110, at 410 (“Judges come from society and thus are likely to harbor prejudices similar to those held in society at large (or at least society's elite)”); David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1463 (2010) (“Where there is no social support for protecting a given minority, it is unclear why judges, who are part of that same society, should be expected to consistently rise above the prejudices of their times.”).

<sup>128</sup> See *supra* notes 63–65 and surrounding text.

<sup>129</sup> See KLARMAN, *supra* note 89, at 358 (attributing this position to Justice Burton).

difficult to flout the overwhelming pressure to resist the Court's mandates. Elected officials were forced to compete to present the most extreme anti-integration positions. Those who refused or even simply adopted "moderate" positions found themselves turned out of office.<sup>130</sup> Political consequences aside, public officials "had to live in the communities that they were being asked to integrate against the wishes of most whites."<sup>131</sup> Scorn, ostracization, and social blackballing were omnipresent risks that exerted genuine pressure, even when they were not accompanied by political (to say nothing of physical) threat.<sup>132</sup> Consequently, "the incentives of school board members were heavily skewed toward delay and evasion."<sup>133</sup> The overwhelming pressure placed upon southern public officials to defend segregationist policies, in turn, led to the development and deployment of a plethora of excuses and rationales for why integration must be delayed or abandoned—each of which needed to be litigated, any of which might (at least temporarily) stave off, undermine, or limit the duty to desegregate.

"Massive resistance" against *Brown* accordingly saw dozens of direct Supreme Court rulings founder against determined popular and local opposition.<sup>134</sup> States and local school boards delayed and prevaricated. They appealed and asked for reconsideration. And they came up with an astounding array of creative programs which did not violate the letter of any extant court decision while still largely preserving a segregated system.<sup>135</sup> It was not until Congress intervened by conditioning federal educational funding on tangible desegregation that any significant progress was made with respect to integration.<sup>136</sup>

Even then, what resulted was at most only a modest victory. The Civil Rights Act's decision to condition federal educational funding on southern desegregation, coupled with persistent judicial oversight of de jure segregated schools, did eventually make considerable progress in measurably in-

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<sup>130</sup> *Id.* at 350 ("Brown radicalized southern politics, leading candidates for office to maneuver for the most extreme segregationist position . . . . Board members were elected officials, who could ill afford to ignore public opinion. Those who did often lost their jobs.")

<sup>131</sup> *Id.* at 356.

<sup>132</sup> *See, e.g., id.* at 411 (quoting a Southern editor as threatening whites who may have been inclined to cooperate with federal civil rights initiatives with "the well-deserved contempt and ostracism that any proud people would feel for a traitor"); Richard H. Fallon, Jr., *Greatness in a Lower Federal Court Judge: The Case of J. Skelly Wright*, 61 *LOY. L. REV.* 29, 30 (2015) (noting how Judge J. Skelly Wright braved "social ostracism, death threats, and a cross-burning on his lawn" in the process of enforcing integration decrees in New Orleans).

<sup>133</sup> KLARMAN, *supra* note 89, at 350.

<sup>134</sup> On the history and trajectory of "massive resistance", see, for example, MICHAEL J. KLARMAN, *Why Massive Resistance*, in *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* 19 (Clive Webb ed., 2005); NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950s* (1969).

<sup>135</sup> *See* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 79 (2d 2008) (describing Southern politicians' "creativity in finding ways to avoid [Brown] [that] was seemingly inexhaustible"); Haney Lopez, *supra* note 30, at 1001–02 ("[W]hite support for Jim Crow segregation ran the gamut from endless litigation on the part of local school boards, to bold intransigence by state officials, to violence by angry mobs.")

<sup>136</sup> *See* ROSENBERG, *supra* note 135, at 99.

tegrating officially segregated systems in the American South.<sup>137</sup> But this success was paired with the Court waving the white flag at the prospect of having to confront resegregation attributable primarily to “private” choices.<sup>138</sup> *Milliken v. Bradley*,<sup>139</sup> which sharply limited the judiciary’s authority to order desegregation remedies that cut across multiple political jurisdictions, was particularly lethal to the integrationist project in the face of white flight—white families who could successfully cross district lines could avoid all but token integration.<sup>140</sup> Particularly in *northern* locales where facial racial classifications were rare but *de facto* segregation ran rampant, these decisions created conditions ripe for the rapid resegregation within a metropolitan area.<sup>141</sup> In effect, the identifiably “Black” and “white” schools indicted in *Green v. County School Board of New Kent County*<sup>142</sup> simply converted into identifiably “Black” and “white” school *districts* blessed by *Milliken v. Bradley*.<sup>143</sup> As a result, schools in the old South are often the *most* likely to be integrated precisely because they remain under explicit desegregation orders.<sup>144</sup> And even that partial success story may be

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<sup>137</sup> Gary Orfield & Chungmei Lee, *Brown At 50: King’s Dream or Plessy’s Nightmare?*, THE CIVIL RIGHTS PROJECT (Jan. 2004), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf> [<https://perma.cc/23G8-QSGP>] (finding that the proportion of Black students attending majority white schools began to rise precipitously in 1964, peaked in 1988, and has been falling ever since).

<sup>138</sup> See *Freeman*, 503 U.S. at 495 (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications”); see also Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-Parents Involved Era*, 48 WAKE FOREST L. REV. 397, 407–12 (2013) (tracing the Court’s reliance on “private choice” as an explainer for modern segregationist patterns); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 727 (“Despite the recent history of discriminatory government actions in so many areas, the Court now sharply separates ‘private choices’ and government responsibility—and acknowledges no interaction between the public and private spheres.”).

<sup>139</sup> 418 U.S. 717 (1974).

<sup>140</sup> See *id.* at 744–45. Judge Nathaniel R. Jones highlights *Milliken* as the linchpin case of *Brown*’s “troubled journey north.” Nathaniel R. Jones, *Milliken v. Bradley: Brown’s Troubled Journey North*, 61 FORDHAM L. REV. 49 (1992).

<sup>141</sup> See Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364 (2015) (comparing the racial desegregation trajectories of Detroit, where interdistrict remedies were forbidden, and Louisville, where remedies extended across the entire metropolitan area encompassed by Jefferson County, Kentucky).

<sup>142</sup> *Green*, 391 U.S. at 442.

<sup>143</sup> See *Milliken I*, 418 U.S. at 739–40 (refusing to find any constitutional problem with massive racial imbalances across different school districts in metropolitan Detroit). Worse still, because the Court also in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), found no constitutional violation in the case of disparate school funding regimes based on wealth, *id.* at 54–55, the predominantly Black school systems can be underfunded and underresourced compared to their white peers—a system of separate and unequal.

<sup>144</sup> In 1968, Black students in the south were more likely to attend schools with majority (greater than fifty percent) or overwhelmingly (greater than ninety percent) minority enrollment than any other region—eighty-one percent and seventy-eight percent of Black students were in such schools, respectively, compared to just sixty-seven percent and forty-three percent in the Northeast. By 2001, those standings had flipped: Black students in the South were among the *least* likely to attend majority or overwhelmingly minority schools (seventy percent and thirty-one percent, respectively), while the Northeast had the *highest* rates of Black stu-

fleeting, as the Court in *Parents Involved* mandated that districts seeking to continue integrationist measures must justify those measures “on some other basis” besides remedying the wrong of segregation, making the continuance of such programs unlikely.<sup>145</sup>

As much as triumphant narratives of judicial power tell otherwise, the judiciary not only never fully dismantled the regime of explicit racial segregation, but it never truly attempted it. As Gabriel Chin observes, “In large part because of Jim Crow’s gradual rather than abrupt decline, even at the level of formal, written law there was never a systematic, sustained effort to identify the scope of racial discrimination and eliminate all of its manifestations.”<sup>146</sup> The undermining of Jim Crow neither occurred with one dramatic gesture, nor was there a systematic endeavor to root out all of its manifestations. Chin continues:

Unlike some legal regimes, Jim Crow did not end with a disjuncture; there was no single moment of structural change, even as a matter of constitutional doctrine. A state adopting the Uniform Commercial Code, for example, must consciously and deliberately account for the fact that many other parts of the state’s common law and statutory code will have to be amended, altered or repealed to accommodate the new legal structure. The decades-long struggle for precision about the nature of the states’ obligations to desegregate schools, and the decades-long success of the states’ shifting legal response, illustrates that there was never a revelation explicitly declaring Jim Crow illegal in all its forms and advising state actors what to do about it going forward. Instead, Jim Crow trailed off, fading away over a period of decades as the courts and Congress defined the obligations of the law, case by case, detail by detail.<sup>147</sup>

Decisively demolishing and replacing the prior segregationist order would have required a nearly wholesale overhaul of the entirety of at least the Southern American legal system, if not that of the entire United States. This the Court was unwilling and perhaps unable to do; certainly, this already Herculean task was even more insurmountable in the face of emergent democratic backlash to even more modest judicial interventions against Jim Crow. The structural limits on judicial power, coupled with the persistent and ongoing democratic resistance to the prospect of actual racial integration in the schools, eventually yielded cases like *San Antonio Independent School*

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dents attending predominantly Black schools (seventy-eight percent and fifty-one percent, respectively). See Orfield & Lee, *supra* note 137, at 20.

<sup>145</sup> *Parents Involved*, 551 U.S. at 721 (concluding that “[o]nce [Louisville] achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis”).

<sup>146</sup> Gabriel J. Chin, *Jim Crow’s Long Goodbye*, 21 CONST. COMMENT. 107, 126 (2004).

<sup>147</sup> *Id.* at 121 (footnote omitted).



*District v. Rodriguez*<sup>148</sup> and *Milliken v. Bradley*, which accommodated the widespread white American desire to maintain some forms of segregated and racially hierarchical school districts.<sup>149</sup> Even as Jim Crow “trailed off,” it did not fade away entirely. And even as judges remained nominally committed to dismantling Jim Crow, a palpable exhaustion eventually took over a judiciary faced with year after grinding year of resistance, prevarication, obstruction, and delay.<sup>150</sup>

In a very real sense, then, massive resistance succeeded in neutering *Brown*. To be sure, the Southern campaign of resistance did not succeed in its initial and most maximalist ambition: to maintain a system of absolute and unbending racial separation in the educational system. But, to the extent that prevailing (white) political opinion settled on the more modest goals of having most white students attending schools that were mostly (though not entirely) white and mostly (though not along every dimension) better resourced than those attended by their non-white peers, *Brown* was in fact successfully resisted.<sup>151</sup>

### B. Resisting Resegregation

From this grim conclusion, however, there remains a spark of hope. The ultimate trajectory of the Court’s desegregation jurisprudence was to come to an accommodation with the preferences of mainstream white schoolparents. While absolute segregation was discredited and no longer particularly desired,<sup>152</sup> white schoolparents who did want their children educated in *predominantly* white settings remained able to effectuate their preferences. It would be too optimistic to say things have changed entirely along this front. But it is fair to suggest that in *some* communities and among *some* families, there is genuine desire for greater integrationist programs—demonstrated, if nothing else, by the attempts of cities like Seattle and Louisville to implement such programming democratically, without any court order or judicial

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<sup>148</sup> 411 U.S. 1 (1973).

<sup>149</sup> Consider how Justice Marshall, in dissent, characterized the *Milliken* decision: “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 a product of neutral principles of law.” *Milliken I*, 418 U.S. at 814–15 (Marshall, J., dissenting).

<sup>150</sup> See Hutchinson, *supra* note 36, at 953–62; Thomas F. Stigrew, *Justice Deferred: A Half-Century After Brown v. Board of Education*, 59 AM. PSYCH. 521, 523–24 (2004).

<sup>151</sup> See BARTLEY, *supra* note 134, at 340 (noting that while massive resistance “failed to achieve the most cherished aims” of Southern whites in preserving an absolute and yielding racial caste system, it did stabilize patterns of white supremacy that have endured for decades after *Brown*).

<sup>152</sup> Contemporary research suggests that white Americans’ ideal neighborhood is majority, but not exclusively, white. Black Americans, by contrast, are more likely to prefer a “50-50” split in the racial composition of their neighborhood. See, e.g., Maria Krysan, Courtney Carter, & Marieke van Londen, *The Diversity of Integration in a Multiethnic Metropolis: Exploring What Whites, African Americans, and Latinos Imagine*, 14 DU BOIS REV. 35 (2017); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 Soc. F. 937 (2002).

mandate.<sup>153</sup> It is possible, in a way it was not in the 1950s or even the 1970s, to imagine popular and democratic initiatives (whose constituents are not limited to but very much include some white families) pressing for race-conscious integration measures.

Such measures are, of course, the direct targets of the Supreme Court's jurisprudence following *Parents Involved*. But now we finally complete the narrative arc: if there were sizeable limits on judicial *desegregation*, so too are there sizeable limits on judicial *resegregation*, of which the likely squeamishness around using race-conscious resegregation remedies is just one example. Put starkly: if social actors mimicked "massive resistance" to judicial efforts to undo popular integrationist programming—dragging their feet, looking for loopholes, obeying orders in letter while openly flouting the spirit—the judiciary would be very hard-pressed to stop them. A determined popular effort to bring about a racially-integrated social sphere would have many advantages even pitted against a deeply hostile and regressive judiciary. It is neither coincidence nor mere rhetoric that the sustained commitment by university administrators to preserving racially diverse student bodies in the face of hostile court precedent has been explicitly compared—generally by critics—to Southern "massive resistance" to *Brown*.<sup>154</sup> Proponents of "resisting" these judicial doctrines have drawn this parallel as well, albeit with different rhetoric—"righteous resistance" rather than "massive resistance."<sup>155</sup>

Can any of the strategies of "massive resistance" be successfully appropriated into the service of "righteous resistance"? At the outset, the "structural" constraints on judicial power which limited courts' ability to promote integration—the fundamentally reactive role of the judiciary, the costs imposed on plaintiffs forced to wage a large-scale litigation fight against entrenched players for years on end, the ability of defendants to delay cases or replace one struck-down program with a new, slightly different model, and the significant discretion accorded to lower courts to utilize their own discretion and case management techniques to pursue agendas contrary to that desired by the Supreme Court—all remain present in more or less equal force as the Court has shifted away from encouraging and towards

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<sup>153</sup> See *supra* notes 107–109 and surrounding text.

<sup>154</sup> See, e.g., Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 781 n.146 (1995) (describing college responses to a court decision prohibiting public scholarship competitions open only to Black students as "reminiscent of the southern response to *Brown v. Board of Education*"); Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 167 nn.4–5 (1997) (collecting examples in both academic and popular writings).

<sup>155</sup> Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 829 (2005) ("What distinguishes Massive Resistance from Righteous Resistance is the moral decrepitude of the former."). See also Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 617 (2008) (expressing hope that the *Parents Involved* decision, insofar as it appears to flout the will of *majoritarian* political actors, will spark a popular backlash that successfully resists the Court's anti-integration doctrine).

obstructing integration efforts.<sup>156</sup> As for specific policy proposals, the Court has already signaled approval of some putatively “race-neutral” means of promoting racial integration in schools, despite the fact that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”<sup>157</sup>

For example, intentionally gerrymandering school attendance zones to have them cross between de facto segregated neighborhoods seems like it was endorsed in *Parents Involved* despite seemingly running afoul of prohibitions on race-conscious policymaking.<sup>158</sup> Voucher programs which seek to allow opportunities for persons living in highly-segregated communities to move into new communities where their presence would facilitate racial integration are another potential avenue for pursuing integration in a way that may not run afoul of contemporary colorblind doctrine.<sup>159</sup> Just as policymakers seeking to resist *Brown* labored endlessly in finding new policies which could promote their segregationist agenda, so too are there opportunities for integration-favoring officials to put their creative talents to work in proposing their own programs which allow for integrationist policies in

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<sup>156</sup> See ROSENBERG, *supra* note 135, at 86–93 (detailing these constraints).

<sup>157</sup> *Fisher I*, 570 U.S. at 335 (Ginsburg, J., dissenting) (characterizing Texas’ “Top Ten Percent” plan, where the top ten percent of students from qualifying Texas schools are guaranteed to admission to the University of Texas system, as intentionally written to exploit Texas’ widespread housing segregation in service of integrationist ends). See Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 673 (2015) (“There is no chance the Court overlooked the race-conscious aims of the [Texas] percent program.”). But see Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 850 (2011) (noting that several members of the Court have seemingly endorsed the notion that a desire to foster racial integration should be considered to be a racially discriminatory motive).

<sup>158</sup> See *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools” and “drawing attendance zones with general recognition of the demographics of neighborhoods”); cf. Leflar & Davis, *supra* note 119, at 410–13 (discussing gerrymandered attendance zones as a potential mechanism for resisting school integration orders); *Swann I*, 402 U.S. at 21 (noting how decisions over school siting historically “have been used as a potent weapon for creating or maintaining a state-segregated school system” while formally representing “a minimum departure from the formal principles of ‘neighborhood zoning’”).

<sup>159</sup> Poverty & Race Research Action Council, *A National Opportunity Voucher Program: A Bridge to Quality, Integrated Education for Low Income Children* (2009), <http://www.prrac.org/pdf/NationalOpportunityVoucherProgram7-15-09.pdf> [<https://perma.cc/K25E-J38N>]. Similar programs have had mixed success before federal courts. The “Gautreaux” housing voucher program, which sought to dismantle segregated public housing practices in Chicago, has been a model for many integrationist housing reform projects across the country. *Hills v. Gautreaux*, 425 U.S. 284 (1976); for a full accounting of the torturous path of the *Gautreaux* litigation and its aftermath, see generally ALEXANDER POLIKOFF, *WAITING FOR GAUTREAU: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006). But other courts have been skeptical of such programs, at least when they are too overt in describing their agenda in racial (integrationist) terms. See *Walker v. City of Mesquite*, 169 F.3d 973, 979–80 (5th Cir. 1999) (applying strict scrutiny and striking down a plan to remedy de jure housing discrimination by placing new public housing projects in “predominantly white” neighborhoods). For a discussion of how the National Opportunity Voucher Program should be assessed under contemporary doctrine, see Adams, *supra* note 157, at 875–82.

ways that respect or even leverage the logics courts have used to promote doctrinal colorblindness.<sup>160</sup>

To follow one possible proposal in depth, consider how schools with competitive admissions policies might leverage the malleable conceptual content of “merit” to promote racial diversity in their entering classes.<sup>161</sup> In *Grutter v. Bollinger*,<sup>162</sup> Justice Thomas suggested that the University of Michigan’s race-based affirmative action programs were only “necessary” insofar as Michigan wished to retain an “elite” law school along traditional markers.<sup>163</sup> Yet, Justice Thomas continued, it is not the case that Michigan is required to maintain an “elite” law school, and “[w]ith the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination.”<sup>164</sup> This is an underappreciated concession. Once it is established that there is no constitutional *entitlement* that a law school make admissions decisions based on “traditional” sorting criteria (such as high LSAT scores or GPAs), then “accepting all students who meet minimum qualifications” is not the only alternative admissions schema that a law school could adopt. As there is no objective requirement that a law school privilege LSATs and GPAs above all other criteria (and indeed, few, if any, schools purport to do so), a school is presumably free to adopt any cocktail of factors to determine who qualifies as the most “meritorious” candidates. A school might prefer, for example, students of any racial background who can point to significant experience interacting or engaging with underserved communities, or who have had lived experience in racially diverse spaces—a proposal that might simultaneously promote racial diversity in the admitting schools while exerting downward pressure promoting integration in other social forums as well.<sup>165</sup> And

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<sup>160</sup> See, e.g., Jim Hilbert, *School Desegregation 2.0: What is Required to Finally Integrate America’s Public Schools*, 16 NW. J. HUM. RTS. 92, 103–30 (2018) (detailing various strategies that can promote integration in schools).

<sup>161</sup> See David Schraub, *Racism as Subjectification*, 17 BERKELEY J. AF.-AM. L. & POL’Y 3, 24–26 (2016) (arguing that traditional race-based affirmative action programs are entirely compatible with and instantiations of meritocratic principles); cf. Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1492 (1997) (“[A]ll merit standards necessarily must defer to subjective, nonrational, culturally- and racially-specific judgments about what constitutes social value.”).

<sup>162</sup> 539 U.S. 306 (2003).

<sup>163</sup> *Id.* at 355–56 (Thomas, J., dissenting) (“The Law School adamantly disclaims any race-neutral alternative that would reduce ‘academic selectivity’ . . . In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.”).

<sup>164</sup> *Id.* at 361–62 (Thomas, J., dissenting) (citation omitted).

<sup>165</sup> See Lawrence III, *supra* note 108, at 1396 (proposing that students of any racial background who attended racially diverse schools receive some amount of preference in collegiate admissions decisions). Such a policy could expand upon the “diversity statements” that many law schools already require or encourage from applicants. See *How to Write a Diversity Statement for Law School*, STETSON LAW ADMISSIONS BLOG (Dec. 8, 2021), <https://law-blog.law.stetson.edu/how-to-write-a-diversity-statement-for-law-school> [<https://perma.cc/9N5K-FYSU>].

the highly individualized nature of review in the admissions context—a characteristic insisted upon by the Court—can further insulate these judgments from challenge.<sup>166</sup>

As a constitutional matter, Justice Thomas observed that there is no basis for preferring any particular method of determining who attends a law school (or, for that matter, any institute of higher education) like the University of Michigan.<sup>167</sup> Traditional markers of “merit” are merely one choice among many, and while Justice Thomas’ proposal to adopt an all-comers approach is one alternative, there are many options in between. Some of these options will result in relatively higher levels of white students compared to their proportion of the population or applicant pool, others will result in lower levels; but so long as these options do not use race on their face, the problem either way is at most one of disparate impact. But a law school (or any other university) which creatively revises its admissions criteria in a fashion which bolsters its number of admitted minority students does not, under Justice Thomas’ view, engage in impermissible racial discrimination against white students even if certain students who would have been admitted under more traditional criteria are now rejected.

It is true that, to the extent that these new “race-neutral” criteria were adopted *in order to achieve* a racially diverse student body, aggrieved white students may be able to level a constitutional challenge based on the rump remaining disparate impact theory—that the policies were adopted “because of, not in spite of,” their racially disparate impact.<sup>168</sup> Yet thus far courts have generally suggested that an intentional desire to promote racial diversity is *not* an impermissible purpose, even in circumstances where the explicit use of race would still be forbidden.<sup>169</sup> This is implicit in Justice Thomas’ own

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<sup>166</sup> See *Grutter*, 539 U.S. at 334 (insisting that affirmative action programs, if they are to be constitutionally permitted, must provide each applicant with “truly individualized consideration”). Yet even the most “individualized” review feasible at a law school still ultimately results in applicants being sorted into larger group categories, with significant imprecision in the process. Andrew Koppelman & Donald Rebstock, *On Affirmative Action and “Truly Individualized Consideration,”* 101 Nw. U. L. REV. 1469, 1470–71 (2007) (“Try as we might to individualize, the admissions process necessarily involves the crude use of rough and ready techniques of prediction.”).

<sup>167</sup> See *Grutter*, 539 U.S. at 355–56 (Thomas, J., dissenting).

<sup>168</sup> See *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that a racially discriminatory purpose exists where a policy was adopted “because of, not merely in spite of, its adverse effects upon an identifiable group.”).

<sup>169</sup> See *Adams*, *supra* note 157, at 883 (noting that while the Court has perhaps been moving towards the notion that integration qualifies as a racially discriminatory motive, it has not yet endorsed the position and that Justice Kennedy’s *Parents Involved* concurrence seems to repudiate it). *But see* *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022) (applying strict scrutiny, and ultimately invalidating, a race-neutral school assignment policy because its purpose was to increase racial diversity in a prominent magnet program). However, *Coalition for TJ* does not meaningfully cite or discuss the language in Justice Kennedy’s *Parents Involved* opinion that appears to endorse the validity of race-neutral policies “consider the racial makeup of schools and to adopt general policies to encourage a diverse student body.” *Parents Involved*, 501 U.S. at 788 (Kennedy, J., concurring). The Fourth Circuit stayed the district court’s decision in *Coalition for TJ*, with one Judge

example: whether made in complete seriousness or not, his suggestion to the University of Michigan that it could adopt an “admit all qualified applicants” policy is one where the state’s motive *by stipulation* is to increase minority enrollment, yet Justice Thomas presents this proposal as the constitutionally-appropriate avenue for the state of Michigan to take.<sup>170</sup> In *Parents Involved*, Justice Kennedy was even more explicit: he specifically endorsed the authority of education officials to consider issues of race and racial diversity in setting policy, even as he objected to “[a]ssigning to each student a personal designation according to a crude system of individual racial classifications.”<sup>171</sup> Indeed, Justice Kennedy was express in declaring that policies which indulge in such considerations should generally not be required to satisfy “strict scrutiny to be found permissible.”<sup>172</sup> “Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”<sup>173</sup>

All of this suggests that universities which are sufficiently invested in racial diversity have ample avenues to pursue that interest even if the Court’s already-limited official tolerance for affirmative action disappears. The judiciary cannot and likely does not want to become a “super-admissions committee,”<sup>174</sup> second-guessing any and all procedures through which universities govern themselves. This reluctance ultimately imposes significant limits on judges’ practical ability to intercede in admissions decisions

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noting that the Supreme Court has not only “repeatedly stated that it is constitutionally permissible to seek to increase racial (and other) diversity through race neutral means,” it has “*required* public officials to consider such measures before turning to race conscious alternatives.” *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring) (citing *Fisher I*, 570 U.S. at 315; *Tex. Dep’t of Hous. and Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989)).

<sup>170</sup> See *supra* notes 166–67 and surrounding text. Here we may be seeing how the general skepticism of conservatives such as Justice Thomas towards disparate impact theory claims, see *Inclusive Cmty. Project*, 576 U.S. at 547 (Thomas, J., dissenting), could be leveraged to protect nominally race-neutral, but diversity-enhancing, measures even under a putatively strict colorblindness standard.

<sup>171</sup> *Parents Involved*, 501 U.S. at 789 (Kennedy, J., concurring) (“In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”).

<sup>172</sup> *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (“Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are ‘facially race neutral,’ so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases . . .”).

<sup>173</sup> *Id.*

<sup>174</sup> *Farmer v. Ramsay*, 159 F. Supp. 2d 873, 886 (D. Md. 2001) (observing that “courts are ill-advised to serve as super-admissions committees, replacing schools’ professional judgments with their own”).

outside a relatively narrow range of cases where schools facially admit to using race as a criterion.<sup>175</sup>

Ultimately, courts do acknowledge—albeit sometimes reluctantly—that judges are limited in their ability to impose even their deeply-felt political and social commitments upon an unwilling population. Judges are limited—both in role and in capacity—in what they are empowered to do to effectuate their personal agendas. This is certainly recognized when it comes to desegregation, as Justice Thomas observed:

Even if segregation were present, we must remember that a deserving end does not justify all possible means. The desire to reform a school district, or any other institution, cannot so captivate the Judiciary that it forgets its constitutionally mandated role. Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.<sup>176</sup>

As in desegregation, so too in resegregation. As much as some judges may think that colleges or primary or secondary schools are behaving inappropriately in pursuing an explicit project of racial integration, the “deserving” end of combating those endeavors cannot support any and all means. Judges are no more omniscient or omnipotent in seeking to enforce fundamentalist interpretations of colorblindness and post-racialism than they were in seeking to enforce liberal models of racial integration. In either case, the power of the courts can and inevitably will ultimately yield to the strictures of popular actors.<sup>177</sup>

Hence, the most important limit on school officials, local authorities, and other political and social actors pursuing these paths is not the formal boundaries imposed by prevailing constitutional doctrine. It is a matter of

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<sup>175</sup> Richard Epstein, for instance, contends that while the initial “corrective steps” after *Brown*—namely, abolishing explicit segregationist programs—could be achieved “cheaply and effectively,” the further one departs from such simple cases the more complex problems of causation and redress become, and the more likely remedies will become impossibly convoluted as either over- or under-inclusive. See Epstein, *supra* note 36, at 1112. While Epstein is far too generous in claiming that even the initial moves to enforce *Brown* were achieved “cheaply,” he is surely correct in suggesting that such remedies are *relatively* easy to administer compared to circumstances where segregationist programs or effects do not overtly mark themselves. As is true for remedying segregation, so too would be true for judicial efforts to “remedy” desegregation.

<sup>176</sup> *Jenkins*, 515 U.S. at 138 (Thomas, J., concurring).

<sup>177</sup> See John Choon Yoo, *Who Measures the Chancellor’s Foot?: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1138 (1996) (detailing various reasons why structural decrees by courts to effectuate substantial social change are unlikely to be effective, including the courts’ “lack of resources for marshalling political and public support for its decrees, without which [their] efforts likely will fail”).

desire.<sup>178</sup> Even in advance of *Brown*, experts predicted that the ability of local districts to evade desegregation mandates would be “confined more by the limits of personal ingenuity than by judicial restraint.”<sup>179</sup> Resistance, whether of the “massive” or “righteous” variety, requires that implementing actors be willing and able to experiment, push boundaries, litigate creatively, and do so repeatedly in the face of hostile review by federal judicial actors.<sup>180</sup> In the present context, this requires a sustained popular commitment to diversity and integration which at best will only be present in some social locations. Klarman’s distinction between border states, which did not actively desire integration but also did not deliberately seek to evade it, and deep Southern states, which were intensely committed to the segregationist project, applies here too.<sup>181</sup> Judicial hostility to integrationist measures likely means that many jurisdictions which are, at best, neutral on the question will adopt the path of least resistance—and that path is one that accedes to the legally dominant paradigm of colorblindness regardless of whether it functionally permits or even accelerates de facto resegregation.

But at least in some areas, significant social and cultural pressure can prompt local administrators to, if not outright defy, then at least slow-walk judicial attempts to undermine and dismantle integration measures. The functional impossibility of a true judicial resegregation order places a serious limit on the ability of courts to actually block democratically-ratified desegregation programs. A truly committed state, city, or district would probably be able to maintain a fair level of racial integration simply by exploiting the limited and reactive role of the judiciary. Indeed, conservative complaints about the liberal bent of elite legal, academic, and economic culture further suggest that these efforts may be successful.<sup>182</sup> Again, in terms of how positive efforts to foster racial integration will fare against a hostile judiciary, it is notable that programs like affirmative action retain significant support in important non-judicial social institutions, such as the business community and the military.<sup>183</sup> Such elites may successfully influence the

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<sup>178</sup> See KLARMAN, *supra* note 89, at 153 (arguing that a lesson of the Jim Crow era may be that local officials, “if determined to have their way and prepared to lie and cheat, usually have sufficient means to frustrate federal court intervention”).

<sup>179</sup> Leflar & Davis, *supra* note 119, at 416. Leflar and Davis were unnervingly accurate in predicting the various means through which states would seek to avoid desegregation orders. See *id.* at 404 *et seq.* (predicting many of the mechanisms through which states would practically resist desegregation decrees).

<sup>180</sup> See ROSENBERG, *supra* note 135, at 87–88 (detailing effective southern strategies of delay).

<sup>181</sup> See generally KLARMAN, *supra* note 89.

<sup>182</sup> For example, the Federalist Society has from its inception characterized itself as a “counter-elite” and “counter-establishment” meant to balance what it perceives as prevailing liberal orthodoxy in legal institutions. Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 528 (2011) (citing STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008)).

<sup>183</sup> See *supra* note 117 and surrounding text.



development of legal doctrine;<sup>184</sup> but even if they cannot alter judicial decision-making directly, they nonetheless occupy alternative poles of social power that are well-positioned to push back against hostile encroachment from the proverbial “weakest branch.”<sup>185</sup> And without significant backing by the other branches, to say nothing of important social actors such as university officials and business leaders, courts will struggle to translate edict into reality—a lesson Gerry Rosenberg taught well in assessing the aftermath of *Brown*, but which can apply with equal force in the aftermath of *Parents Involved*.<sup>186</sup>

I do not pretend that this approach is risk-free. Part of Klarman’s story on Southern resistance to desegregation is that “massive resistance may have come back to haunt white southerners” because the judiciary “eventually grew tired of the endless evasion and bad faith” and began sanctioning more aggressive anti-segregation remedies than they would have possibly contemplated in 1954.<sup>187</sup> It is likewise possible that creative popular efforts to continue to push racial integration may prompt an aggressive judicial backlash yielding even more extreme racial jurisprudence than can be contemplated today (this prospect is one reason why, in contrast to earlier drafts, I no longer am willing to say with absolute confidence that “the judiciary would never endorse race-conscious resegregation measures”).<sup>188</sup> Likewise, much depends on how many localities, colleges, or school districts are willing to engage in this pitched rear-guard action in defense of integration—that certainly remains an open question. The recent success of “anti-Critical Race Theory” campaigns in many school districts—responding to (real and imagined) educational initiatives designed to promote diversity, equity, and inclusion—suggests at the very least that opponents of aggressive racial integration initiatives will not be quiescent, though there is considerable variation in how much traction such campaigns have gotten at the local level.<sup>189</sup>

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<sup>184</sup> See Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS L.J. 535, 564 (2020) (“[I]n an earlier era, a common social circle of other judges, law professors, lawyers at the top of the profession, and journalists at elite news outlets helped shape the Justices’ values and occasionally rein in their votes, and that given an historic liberal bent of the legal elite . . . many Justices ‘evolved’ over time toward the left on these issues.”) (citing NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019)).

<sup>185</sup> FEDERALIST NO. 78 (Alexander Hamilton).

<sup>186</sup> See ROSENBERG, *supra* note 135, at 73–102 (arguing that despite clear judicial decrees, the judiciary’s attempts to foster racial integration foundered in the years after *Brown* until the Court began to receive significant backing from the democratic branches and important social and economic players).

<sup>187</sup> KLARMAN, *supra* note 89, at 342.

<sup>188</sup> See *supra* section II.

<sup>189</sup> Though nominally styled as opposing “Critical Race Theory,” many proponents of the “anti-CRT” backlash have expanded that term to capture a much wider range of racial justice work—including general diversity, equity, and inclusion initiatives. See, e.g., Angela Sailor, *Schools Hiding Behind Diversity and Inclusion Rhetoric To Spew Critical Race Theory Vile*, HERITAGE FOUNDATION (July 7, 2021), <https://www.heritage.org/education/commentary/schools-hiding-behind-diversity-and-inclusion-rhetoric-spew-critical-race> [https://perma.cc/WV8B-JS2G] (“Many school boards are denying that they’re teaching elements of CRT.

In short, my argument is not that popular resistance to doctrinal colorblindness is guaranteed to succeed, even granting the structural limitations of the judiciary. The ascendance of popular movements which could successfully countermand judicial attempts to preserve de facto racial segregation in American life cannot be taken for granted. Nor do I argue that reliance on these social movement strategies is preferable to a circumstance where courts did not seem to be implacable foes of racial justice. Proponents of racial integration live now in a decidedly less-than-ideal world; we are clearly in the realm of second- and third-best strategies. But remembering the limits of judge-led social change—whether those changes are for good or ill—emphasizes the importance of building constituencies who can leverage non-judicial nodes of power to effectuate necessary change. This endeavor has sometimes been overlooked in large part because of the focus on seeking change through the courts, and the corresponding presumption that political and social efforts are futile given the current composition of the federal judiciary. Yet as we come to terms with a judicial system that seems likely to remain stacked against the liberal integrationist vision for the near-future, it's important not to understate the vitality of these alternative avenues. Remembering that the judiciary is as limited a foe as it was a friend can help dispel fatalism and inspire new, creative efforts at pursuing the integration agenda. The limits of judicial resegregation may not be present in the Supreme Court's current doctrine, but they very much can be found in determined efforts at leveraging sites of democratic and social power whose decisions courts will find themselves hard-pressed to overcome.

#### IV. CONCLUSION

Purely as a matter of contemporary constitutional doctrine, there is no reason why a judicial order mandating race-conscious steps to heighten racial separation in schools is off the table. *Brown II* gives courts the authority to implement race-conscious measures in order to counteract the effects of government-sponsored racial discrimination. And under the current understanding of *Brown I*, racial classifications promoting integration are legally

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Whether it's presented and wrongly disguised as 'diversity and inclusion' or other euphemistic terms, evidence abounds that CRT is spreading in schools"); Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/> [https://perma.cc/DBL9-U3SW ] (quoting Christopher Rufo, a prominent anti-CRT activist, as saying of "Critical Race Theory": "We have successfully frozen their brand [and] will eventually turn it toxic, as we put all of the various cultural insanities under that brand category. The goal is to have the public read something crazy in the newspaper and immediately think 'critical race theory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.").

The result, as Kimberlé Williams Crenshaw has lamented, is that "the name Critical Race Theory [is] now used as interchangeably for race scholarship as Kleenex is used for tissue." Kimberlé Williams Crenshaw, *Critical Reflections, or "A Foot in the Closing Door"*, 49 UCLA L. REV. 1343, 1361 (2002).

identical to those in service of segregation. Hence, in circumstances where a school district has persistently maintained an unconstitutional race-conscious integration program (leading to greater levels of racial integration), a judicial decree which requires some level of compulsory resegregation (restoring the racial distribution to what would have existed absent the “discrimination”) would seem to be a perfectly live option.

Perhaps this prospect seems far-fetched. Courts have confronted and struck down systematic and long-standing racial integration programs, but even when doing so they have never contemplated (much less decreed) an order actively promoting resegregation. Yet this reluctance is itself powerful proof that courts—even those which nominally endorse the principle of constitutional colorblindness—well understand the practical difference between ordering integration and ordering (re)segregation. And pointing out this tacit concession is not just a theoretical or rhetorical victory. The limits of judicial resegregation suggest that, just as there were outer bounds beyond which courts could not effectuate its desegregation agenda over hostile political actors, so too could polities boldly committed to integration resist even committed judicial attempts to stymie democratically-endorsed integrative efforts. It will not be easy to organize such bold resistance. But in grim times, the knowledge that such efforts could succeed even on the most unfavorable doctrinal terrain offers rare hope that the project of racial integration can endure.

