"History Will Be Heard": An Appraisal of the *Seattle/Louisville* Decision

*Goodwin Liu**

The Supreme Court's recent decision on voluntary school desegregation[1] can be read at many levels. Doctrinally, the Court adopted a stringent view of narrow tailoring that forbids the use of racial classifications to integrate public schools except as "a last resort,"[2] even as five Justices agreed that school districts have a compelling interest in "avoiding racial isolation" and in "achiev[ing] a diverse student population."[3] As a practical matter, the Court has made racial integration more difficult for school districts, although the efficacy of the race-conscious strategies left open by Justice Kennedy's controlling opinion remains to be seen.[4]

Taking a step back, the opinions of the Justices can also be read at the level of symbols and social meanings. As Chief Justice Roberts said, the cases frame a debate over "which side is more faithful to the heritage of *Brown*."[5] Further, the plurality's bold assertion that "history will be heard"[6] underscores the significance of *Seattle/Louisville* not only as a set of rules for future conduct, but also as a rendition of our national experience in striving to overcome segregation. In this brief Essay, my theme will be the tension between legal formalism and fidelity to history and social facts. Although this tension is endemic to the law,[7] our history teaches that legal

* Assistant Professor of Law, Boalt Hall School of Law, University of California, Berkeley. I was counsel of record for an amicus brief in the U.S. Supreme Court on behalf of nineteen former University of California chancellors in support of the school districts in the cases discussed here. For helpful comments on earlier drafts of this essay, I thank Michael Heise, Kimberly Jenkins, Pam Karlan, Ann O'Leary, Neil Siegel, Steve Sugarman, and my Boalt colleagues in the Junior Working Ideas Group.

[1] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) [hereinafter *Seattle/Louisville*].

[2] *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2760–61 (majority opinion).

[3] *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2820–24 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting).

[4] *See id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (generally prohibiting individual racial classifications but allowing race-consciousness in attendance zoning, school siting, resource allocation, and student and teacher recruitment). I discuss this aspect of Justice Kennedy's opinion and an example of a school assignment plan that likely satisfies it in Part III, Section B *infra*.

[5] *Id.* at 2767 (plurality opinion of Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ.); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[6] *Seattle/Louisville*, 127 S. Ct. at 2767; *cf. id.* at 2798 (Stevens, J., dissenting) ("Compare *ante*, at 2767 ('history will be heard'), with *Brewer v. Quarterman*, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting) ('It is a familiar adage that history is written by the victors').").

[7] *Compare* Oliver Wendell Holmes, The Common Law 1 (1881) ("The life of the law has not been logic: it has been experience.") *with* Hein v. Freedom From Religion Foundation, 127 S. Ct. 2553, 2582 (2007) (Scalia, J., concurring in the judgment) ("[T]he soul of the law . . . is logic and reason.").

formalism (eventually) loses its authority when it strays too far from social reality.[8] *Seattle/Louisville* comes close to taking us down that troubled path again.

Parts I and II of this Essay take up Chief Justice Roberts's call for history to be heard. While purporting to claim the legacy of *Brown* and Justice Harlan's celebrated dissent in *Plessy v. Ferguson*,[9] the Roberts plurality actually does the opposite. As Part I shows, modern proponents of colorblindness, including the Roberts plurality, misappropriate Harlan's dissent when they invoke the phrase "Our Constitution is color-blind."[10] In *Plessy* and in his other writings, Harlan's nuanced views on race cannot be reduced to a simple axiom of colorblindness. Further, as Part II argues, by refusing to acknowledge or attach legal significance to the social meaning of *de jure* segregation, the Roberts plurality inherits the jurisprudential legacy of the majority opinion in *Plessy*, not Justice Harlan's dissent, and hollows out *Brown*'s primary historical meaning as an authoritative renunciation of racial caste.

Finally, Part III shows that although Justice Kennedy's separate opinion considers the meaning of segregation in the social context, it nonetheless indulges a stilted formalism by extending the distinction between *de jure* and *de facto* segregation to limit voluntary remedial measures. Meanwhile, the distinction Justice Kennedy draws between permissible race-conscious measures and impermissible individual classifications plausibly responds to the social reality of race, but not in the way that he describes.

1. "Our Constitution Is Color-Blind"

Second only to *Brown*, Justice Harlan's dissent in *Plessy* enjoys iconic status in our legal culture in the area of race and equal protection. Many conservatives regard Harlan's dissent with particular fondness because its famous words "Our Constitution is color-blind" provide a thesis statement for the argument that racial classifications have no place in public life. In *Seattle/Louisville*, the quotation was predictably invoked by the plaintiffs[11] and by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Judge Bea in the Ninth Circuit.[12] However, Harlan's dissent in *Plessy* and his

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[8] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190 (1976); Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Gayle v. Browder, 352 U.S. 903 (1956).

[9] *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

[10] *Id.* at 559 (Harlan, J., dissenting).

[11] *See* Petitioner's Brief at 25, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

[12] *See Seattle/Louisville*, 127 S. Ct. at 2758 n.14 (plurality opinion of Roberts, C.J.); *id.* at 2782, 2787, 2788 (Thomas, J., concurring); *id.* at 2791–92 (Kennedy, J., concurring in part and concurring in the judgment); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.2d 1162, 1221 (9th Cir. 2005) (en banc) (Bea, J., dissenting).

broader jurisprudence on race reveal a more complex understanding of the Fourteenth Amendment anchored in a substantive conception of civil rights, not a formal rule of race-neutrality.

As a starting point, let us take a closer look at "Our Constitution is color-blind" by revisiting the passage where it occurs:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved.[13]

Harlan's notion of colorblindness is linked to the idea that the Constitution "neither knows nor tolerates classes among citizens." According to modern conservatives, the designation of racial groups by government—racial *clas*sification—creates impermissible "classes among citizens." But is this what Harlan meant?

It is instructive to consider the semantic parallels between the sentence "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens" and the two sentences preceding it. Although Harlan acknowledges and endorses the social fact of white supremacy, his point is that racial hierarchy has no place in the law. Thus he says that "there is in this country no superior, dominant, ruling class of citizens," and he then restates the point by saying "There is no caste here." Given this juxtaposition of the terms "class" and "caste," the impermissibility of "classes among citizens" asserted in the next sentence is plausibly and quite naturally read to mean the illegitimacy of racial caste.[14]

Further, the meaning of "Our Constitution is color-blind" is illuminated by Harlan's parallel use of the visual metaphor. The reference to colorblindness reprises his statement that "in *view* of the Constitution, in the *eyes* of the law, there is in this country no superior, dominant, ruling class of

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[13] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[14] Although "Our Constitution is color-blind" has been quoted several times by Supreme Court Justices, the quotation virtually never includes the preceding sentence "There is no caste here." In fact, at one point in his concurring opinion in *Seattle/Louisville*, Justice Thomas excises Harlan's reference to "caste" while keeping the surrounding words of the quotation. *See* 127 S. Ct. at 2787 (Thomas, J., concurring). I have found only one instance where a Justice quoting "Our Constitution is color-blind" included the reference to "caste": a 1961 opinion by Justice Douglas arguing that states may not enforce segregation at restaurants and lunch counters. *See* Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Douglas, J., concurring).

citizens."[15] In other words, the Constitution does not "see"—it cannot legitimize—the social fact of racial hierarchy. Thus, in context, Harlan's declaration that "Our Constitution is color-blind" does not clearly state a categorical principle against classification by race. It appears to simply restate the thesis of the preceding two sentences—i.e., the Constitution does not permit government to validate or perpetuate a race-based system of social hierarchy.[16] At the very least, the passage as a whole contains sufficient ambiguity that it cannot confidently be said to endorse colorblindness as we understand the concept today.

The modern reading of "Our Constitution is color-blind" is also belied by Harlan's other decisions and writings on race.[17] Although he never had occasion to examine race-conscious affirmative action, Harlan made clear that he regarded the Civil War Amendments as a coherent expression of anti-caste, anti-subordination principles to effectuate the newly won freedom and citizenship of black Americans. This theme appears in his *Plessy* dissent,[18] and it is developed even more forcefully in Harlan's lengthy dissent in *The Civil Rights Cases*,[19] the singular opinion in which he apparently took greatest pride.[20] Yet this anti-caste commitment was limited in important ways that reveal the absence of any transcendent devotion to colorblindness in Harlan's race jurisprudence.

For one thing, Harlan saw the principle of racial equality largely through the lens of national citizenship held in common by blacks and whites.[21] He famously besmirched his otherwise laudable dissent in *Plessy* by attempting to underscore the injustice of segregation to blacks with the observation that "a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana" cannot.[22] Further, as Gabriel Chin and Earl Maltz have shown, Harlan's record in cases involving discrimination against Chinese immi-

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[15] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (emphasis added).

[16] *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 994 (2007) (reading Harlan's dissent similarly).

[17] For perspectives on Harlan's race jurisprudence, see OWEN M. FISS, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. 8: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 362–72 (1993); LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 81–146 (1999); TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 138–62 (1995); Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter"?*, 32 AKRON L. REV. 629 (1999); Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U.L. REV. 973 (1996); and Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

[18] *Plessy*, 163 U.S. at 555–56, 559–60 (Harlan, J., dissenting).

[19] The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting); *see id.* at 62 ("If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant."). For a detailed exposition of Harlan's opinion, see Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

[20] *See* Westin, *supra* note 17, at 699.

[21] *See The Civil Rights Cases*, 109 U.S. at 43–60 (Harlan, J., dissenting).

[22] *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

grants was mixed and at times more reactionary than his contemporaries.[23] He joined the majority in *Yick Wo v. Hopkins*, striking down the discriminatory application of a local ordinance regulating commercial laundries.[24] But he voted to uphold facially race-based immigration policies in the notorious *Chinese Exclusion Cases*[25] and in *Fong Yue Ting v. United States*.[26] In *United States v. Wong Kim Ark*, which upheld birthright citizenship for a Chinese man born to non-citizen parents within the United States,[27] Harlan was the only Justice to join Chief Justice Fuller's dissent arguing that Congress has "the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens."[28] Although his votes in the latter cases cohered with his dedication to national power, it is notable that Harlan voted as he did, without qualification, in the face of opinions clearly condemning the racial classifications.[29]

Moreover, even in cases involving free blacks, Harlan did not approach the issue of racial discrimination by simply inquiring whether legislation or official conduct was race-conscious. His egalitarianism was not thoroughgoing or trans-substantive in the way that a rigorous rule of colorblindness would be. Instead, his vision of racial equality was nested within a substantive conception of civil rights. It applied specifically to "those fundamental rights that inhere in a state of freedom"[30] or (largely equivalent in Harlan's view) "the civil rights which are fundamental in *citizenship* in a republican government."[31] It was in this sphere of substantive rights that the denial of equality threatened to perpetuate the system of racial caste, and it was there that Harlan saw the Civil War Amendments as having their normative force.

In *The Civil Rights Cases*, for example, Harlan undertook a detailed examination of the public's "legal rights in the accommodations and advantages of public conveyances, inns, and places of public amusements" before

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[23] *See* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996); Maltz, *supra* note 17, at 999–1015.

[24] 118 U.S. 365 (1886); *see also* Baldwin v. Franks, 120 U.S. 678, 698–701 (1887) (Harlan, J., dissenting) (arguing for the validity of federal legislation criminalizing private conspiracies to deprive persons, including aliens, of their civil rights).

[25] 130 U.S. 581 (1889).

[26] 149 U.S. 698 (1893).

[27] 169 U.S. 649 (1898).

[28] *Id.* at 732 (Fuller, C.J., dissenting).

[29] *See id.* at 693 (majority opinion) ("The [Fourteenth Amendment Citizenship Clause], in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States."); *Fong Yue Ting*, 149 U.S. at 737–38 (Brewer, J., dissenting) (arguing that "[t]he expulsion of a race may be within the inherent powers of a despotism" but that our government "has no general power to banish" people "for no crime but that of their race and birthplace"). *But cf.* Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, the "Color-Blind" Constitution and the Meaning of His Dissents in the* Insular Cases *for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006) (arguing that Harlan's dissents defending the constitutional rights of persons, including Asians, in U.S. territories demonstrated a commitment to colorblindness).

[30] The Civil Rights Cases, 109 U.S. 3, 34 (1883) (Harlan, J., dissenting).

[31] *Id.* at 56 (emphasis in original).

concluding that Congress had power under the Thirteenth Amendment to prohibit racial discrimination in these venues.[32] And he characterized the enjoyment of public accommodations free of racial discrimination not as an entailment of equal protection of the laws, but as a fundamental right of national citizenship protected by the citizenship clauses of the Fourteenth Amendment.[33] Likewise, in *Plessy*, Harlan articulated his anti-caste thesis in the context of a fundamental right to enjoy "the power of locomotion"[34] as applied to use of a railroad, long regarded at common law as "a public highway" held "in trust for the public."[35]

By contrast, Harlan joined a unanimous Court in *Pace v. Alabama* to uphold a state statute punishing adultery and fornication more severely when committed by "'any white person and any negro'" together than when committed by members of the same race.[36] The Court's logic was that blacks and whites who commit the interracial offense are punished equally, as are blacks and whites who commit the intraracial offense.[37] Harlan's vote in *Pace*, decided in the same year as *The Civil Rights Cases*, is explainable on the ground that sexual autonomy was not generally regarded then as part of the sphere of fundamental rights.[38]

In addition, Harlan wrote the unanimous opinion in *Cumming v. Board of Education* upholding a racially separate and unequal scheme of public education.[39] In that case, the county school board in Augusta, Georgia, maintained segregated schools as required by the state constitution. In 1897, the county had two white high schools but decided to close the only black high school and use the facility to serve 300 black elementary schoolchildren "who were without an opportunity . . . to learn the alphabet and to read and write."[40] A group of black parents sued to enjoin the use of local taxes for the unequal system of high schools. In rejecting the claim, Harlan first noted that, because the pleadings did not challenge the requirement of racial segre-

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[32] *Id.* at 42–43.

[33] *See id.* at 46–50.

[34] *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting) (quoting Blackstone) (internal quotation marks and citation omitted). This reference echoes Harlan's discussion of "the right to locomotion" in *The Civil Rights Cases*, where he explained that "the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental in the state of freedom, established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom." 109 U.S. at 39 (Harlan, J., dissenting).

[35] *Plessy*, 163 U.S. at 553–54 (Harlan, J., dissenting) (internal quotation marks and citation omitted).

[36] 106 U.S. 583, 583 (1883) (quoting the Alabama statute).

[37] *See id.* at 585.

[38] *See* Maltz, *supra* note 17, at 992 ("[*Pace*] is entirely consistent with the theory that fundamental rights were at the core of [Harlan's] race discrimination jurisprudence. Neither adultery nor fornication generally were fundamental rights in nineteenth century jurisprudence . . . .").

[39] 175 U.S. 528 (1899). For an illuminating historical overview, see J. Morgan Kousser, *Separate But Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J.S. HIST. 17 (1980).

[40] *Cumming*, 175 U.S. at 544.

gation, "we need not consider that question in this case."[41] He then observed that the school board's decision "was in the interest of the greater number of colored children" and, on the record, evinced no hostility or discriminatory purpose toward black children.[42] Further, even if the board had erred, Harlan said, the relief requested would only deprive white children of a high school education without providing such education to black children.[43]

In *Cumming*, the inference of racial discrimination was particularly strong, since the school board's decision to close the black high school in order to serve more black elementary schoolchildren was a choice forced by the state requirement of racial segregation and by the board's implicit refusal to divert resources from white schools to add seats in black schools. But Harlan did not locate education within the sphere of civil rights to which robust norms of racial equality applied. He seemed to treat it as a social service program implicating the broad discretion of state and local authorities to allocate "the burdens and benefits of public taxation," not as the fundamental right that *Brown* described half a century later.[44] School administration, as he saw it, was an area of plenary local authority subject only to a requirement of reasonableness, much as the Court in *Plessy* regarded the regulation of public conveyances.[45] As such, the school board's decision to serve "the greater number of colored children" was a reasonable, even benign, way to manage the public fisc.[46]

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[41] *Id.* at 543.

[42] *Id.* at 544.

[43] *See id.*

[44] *Id.*; *cf.* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. . . . [Educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

[45] *See* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

[46] *Cumming*, 175 U.S. at 544; *see* FISS, *supra* note 17, at 368 ("The authority of localities to decide how to spend public funds was, in Harlan's mind, all-embracing . . . ."). This reading is vulnerable to historical evidence that Harlan was "[f]ully aware of the importance of public education in providing equal opportunities to poor whites and blacks" because he campaigned for equal school funding for blacks and whites as a Kentucky gubernatorial candidate in 1875. Kousser, *supra* note 39, at 38; *see also* YARBROUGH, *supra* note 17, at 143 (quoting an 1888 letter from Harlan to his son on the importance of education for blacks). In addition, many members of the Republican Congress in the 1870s and 1880s saw education as a fundamental right under a substantive conception of national citizenship exemplified by Harlan's dissent in *The Civil Rights Cases*. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 353–95 (2006). Given these facts, why did Harlan not situate education within the sphere of fundamental rights just as he did with transportation in *Plessy*?

As one biographer has argued, a plausible explanation is that Harlan, though committed to racial equality, also believed strongly in racial identity as evidenced by his assertions in *Plessy* that "[e]very true man has pride of race" and that the white race "will continue to be [dominant] for all time if it remains true to its great heritage." 163 U.S. at 554, 559; *see* PRZYBYSZEWSKI, *supra* note 17, at 81–117. Harlan "possibly did not come out clearly against single-race schooling because it was a way to preserve racial identity, not for the racist reason that a separate and unequal system of education would keep blacks down but for the racialist reason that schooling was a far more intimate activity than riding a streetcar and could lead to friendship and marriage." *Id.* at 100–01. This racialist logic also explains Harlan's vote in *Pace*, *see*

In sum, Harlan's approach to racial equality did not focus on the formal or procedural neutrality of government action per se. Instead, it was bottomed on, and limited by, his conception of the substantive rights comprising the essence of civil freedom and equal citizenship.[47] Of course, Harlan's positions in *Pace* and *Cumming* demonstrate his failure to acknowledge the ways in which sexual and educational mores contributed to the racial caste system. His efforts to reconceptualize the sphere of civil rights governed by equality-enhancing norms were imperfect and incomplete. But my main point is that Harlan's jurisprudence on race exhibited no overarching preoccupation with colorblindness. This much is clear when "Our Constitution is color-blind" is read with the surrounding words in his *Plessy* dissent and especially when that dissent is read with his other decisions on race. Instead of the modern notion of colorblindness, what emerges from Harlan's jurisprudence is a significant but partial commitment to eradicating racial caste in the enjoyment of substantive rights essential to equal citizenship.

II. The Perils of *Plessy*

If anything, the plurality opinion in *Seattle/Louisville* claims the jurisprudential legacy of the majority opinion in *Plessy*, not Justice Harlan's dissent. That legacy, as pertinent here, is the radical formalism of constitutional interpretation in the face of contrary social facts. Recall that *Plessy* dismissed the argument that "the enforced separation of the two races stamps the colored race with a badge of inferiority" with the disingenuous reasoning that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[48] In theory, "separate but equal" is a formula for equality if the social meaning of segregation is ignored.[49] But we do not regard equality of that sort as genuine legal equality precisely because the social meaning of segregation

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id. at 109–16, and, while circumscribing his opposition to racial caste, further illuminates the divergence between his outlook and modern notions of colorblindness.

[47] Professor Fiss contends that Harlan's opinions in *Plessy*, *Cumming*, and *Berea College v. Kentucky*, 211 U.S. 45, 58–70 (1908) (Harlan, J., dissenting) (attacking the validity of a state prohibition on operating a racially integrated private college, but reserving the issue of whether segregated public education is constitutional), together show that his primary concern was to protect liberty against excesses in the police power, not to vindicate a substantive principle of equality directly challenging the racial caste structure. *See* Fiss, *supra* note 17, at 365–72. Although Fiss is correct that those opinions speak of liberty, he underemphasizes the equality themes in Harlan's jurisprudence. In particular, Fiss does not explore the robust vision of substantive racial equality in Harlan's dissent in *The Civil Rights Cases*, with which the *Plessy* dissent is "thoroughly consistent." *Id.* at 362.

[48] *Plessy*, 163 U.S. at 551.

[49] In practice, of course, "separate but equal" often produced tangible inequality in facilities and resources beyond its intangible harms. But the principle was not toothless in forcing a modicum of equality in segregated school systems even at the time of *Plessy*. *See, e.g.*, Maddox v. Neal, 45 Ark. 121 (1885); Dawson v. Lee, 83 Ky. 49 (1885); Puitt v. Gaston County Comm'rs, 94 N.C. 709 (1885); Ward v. Flood, 48 Cal. 36 (1874).

cannot be ignored. To do so, as the Court did in *Plessy*, produces a legal absurdity.

Now consider the plurality opinion in *Seattle/Louisville*, which consciously places Joshua McDonald, the white first-grader in Louisville who was denied his first-choice school in 2002, on the same constitutional footing as Linda Brown, the black third-grader in Topeka who was relegated to an all-black school in 1950. As in *Brown*, "[w]hat do the racial classifications . . . here do," Chief Justice Roberts asks, "if not accord differential treatment on the basis of race?"[50] But this equation also ignores obvious social meanings. For Joshua McDonald, his school assignment was an inconvenience and perhaps a significant disappointment. By contrast, Linda Brown's school assignment was an expression of racial hostility, a public humiliation, and a badge of inferiority not only for her but for all black children. It blinks reality to assert that the nature and magnitude of these harms are equivalent.

Like the Court in *Plessy*, the plurality in *Seattle/Louisville* fails to honestly confront the social meaning of segregation—a failure especially striking given the plurality's professed fidelity to *Brown*. While proclaiming that "history will be heard,"[51] Chief Justice Roberts shows little interest in what *Brown* actually said about the meaning of segregation and why it is unconstitutional.

The plurality begins its treatment of *Brown* by mentioning that "government classification and separation on grounds of race themselves denoted inferiority."[52] But the idea that segregation denoted inferiority nowhere appears in the ensuing discussion, which culminates two paragraphs later in the claim that the violation in *Brown* was that "schoolchildren were told where they could and could not go to school based on the color of their skin."[53] The plurality opinion thus makes a subtle yet consequential shift, from its passing recognition that segregation denoted inferiority to the implicit suggestion that segregation harmed blacks and whites equally. The latter position echoes the state's argument in *Plessy* that segregation "prescribes a rule applicable alike to white and colored citizens."[54] Justice Harlan refuted this characterization, as Justice Stevens does in *Seattle/Louisville*, by pointing out the obvious.[55]

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[50] *Seattle/Louisville*, 127 S. Ct. at 2767.

[51] *Id.*

[52] *Id.* (citing *Brown*, 347 U.S. at 493–94).

[53] *Id.* at 2768.

[54] Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

[55] *See id.* ("Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary."); *Seattle/Louisville*, 127 S. Ct. at 2798 (Stevens, J., dissenting) ("The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.").

Tellingly, the forty-one-page plurality opinion in *Seattle/Louisville* contains only one quotation from *Brown*: a paltry sentence fragment: "The impact [of segregation] is greater when it has the sanction of the law"—that omits the crucial adjacent words locating the illegality of segregation in its detrimental effects on black children.[56] This inattention leads the plurality to identify the violation in 1954 as "differential treatment on the basis of race,"[57] again implying equal burdens on blacks and whites. But *Brown* did not speak of the violation that way. The Court nowhere used the term "colorblind" or availed itself of the familiar quotation from Harlan's dissent in *Plessy*. Instead, *Brown*'s most memorable utterance was its recognition that segregation harms black children by "generat[ing] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[58] The plurality's interpretation reduces this plain statement of why segregation is unconstitutional to mere dictum.

Further, the plurality extracts from *Brown* the simple requirement that school districts "'achieve a system of determining admission to the public schools *on a nonracial basis*.'"[59] This too distorts history. The quotation is not from *Brown* but from *Brown II*, and it is stated by the plurality three times[60] without any acknowledgment that the Court in later decisions required school districts to do much more than assign children to schools on a nonracial basis to comply with *Brown*. The plurality's reading of *Brown* hearkens back to the discredited 1955 dictum of the three-judge district court in *Briggs v. Elliott*,[61] which helped galvanize resistance to desegregation and

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[56] *Seattle/Louisville*, 127 S. Ct. at 2767 (plurality opinion) (quoting *Brown*, 347 U.S. at 494 (quoting the federal district court in the Kansas case)). The full quotation reads:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Brown, 347 U.S. at 494 (quoting the federal district court in the Kansas case).

[57] *Seattle/Louisville*, 127 S. Ct. at 2767 (plurality opinion). The plurality cleverly lifts this phrase from a brief on behalf of the plaintiffs in *Brown*, although the meaning the plurality assigns to it is clearly not what the *Brown* lawyers intended. *See* Adam Liptak, *The Same Words, But Differing Views*, N.Y. Times, June 29, 2007, at A24.

[58] *Brown*, 347 U.S. at 494.

[59] *Seattle/Louisville*, 127 S. Ct. at 2767 (quoting *Brown*, 349 U.S. at 300–01) (emphasis in original).

[60] *See id.* at 2767–68.

[61] 132 F. Supp. 776, 777 (D.S.C. 1955) ("What [*Brown*] 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 . . . 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.").

"set a standard for evasiveness by school districts throughout the South."[62] If the violation in *Brown* was simply the act of "legally separating children on the basis of race,"[63] then why was "admission to the public schools on a nonracial basis" not a sufficient remedy in New Kent County in 1968?[64] In Charlotte-Mecklenburg in 1971?[65] And in Denver in 1973?[66] To acknowledge this history is to recognize that segregation was primarily a problem not of racial classification, but of entrenched racial subordination—as Charles Black put it, "a massive intentional disadvantaging of the Negro race, as such, by state law."[67] The remedial cases in the wake of *Brown* did not seek to eliminate racial classification; they sought to eliminate the racial caste system in public education "root and branch."[68]

In refusing to confront the social meaning of segregation and its harm to black Americans, *Plessy* and the plurality opinion in *Seattle/Louisville* are cut from the same jurisprudential cloth. *Plessy* was anchored in a view of the law as a formal system hermetically sealed from social practices and understandings. Importantly, this view led the Court to deny not only the law's culpability in fostering racial hierarchy but also the law's authority to disestablish racial hierarchy. *Plessy* understood the former to imply the latter and explicitly rejected both:

> The argument [that *de jure* segregation stamps the colored race with a badge of inferiority] assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affini-

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[62] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 751 (Vintage Books 1977). The Supreme Court rejected the *Briggs* dictum when it invalidated freedom-of-choice plans that failed to achieve racially integrated schools. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968); *see also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200 n.11 (1973) (noting that *Green* rejected *Briggs*' interpretation of *Brown*).

[63] *Seattle/Louisville*, 127 S. Ct. at 2767 (plurality opinion).

[64] *See Green*, 391 U.S. at 437 ("[T]he fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system.").

[65] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971) (authorizing district courts to order a wide array of remedial measures, including busing, to integrate public schools).

[66] *See Keyes*, 413 U.S. at 214 (authorizing "all-out desegregation," not mere cessation of discrimination, to remedy intentional segregation).

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

[68] *Green*, 391 U.S. at 438; *see Swann*, 402 U.S. at 15. In an illuminating history of how anticlassification values displaced antisubordination values in modern equal protection doctrine, Reva Siegel concludes that "the anticlassification principle was not the ground of the *Brown* decision, but instead emerged from struggles over the decision's enforcement." Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1547 (2004).

> ties, a mutual appreciation of each other's merits, and a voluntary consent of individuals.[69]

When the Court went on to say that "[l]egislation is *powerless* to eradicate racial instincts,"[70] its meaning was twofold: first, that legislation to alter social relations would be ineffective, and second, that such legislation would be illegitimate.

By imposing a fictive yet impermeable boundary between law and social reality, *Plessy* fashioned both a shield to protect *de jure* segregation and, prophetically, a sword to invalidate legislation to bring the races together. For what is the underlying thesis of the plurality opinion in *Seattle/Louisville* if not a reaffirmation of this untenable view of the law? By all but ignoring what *de jure* segregation meant in social context, the plurality misconceives the nature of the constitutional harm, just as *Plessy* denied it altogether. And by taking a dim view of the law's role in structuring social relations and social equality, the plurality in *Seattle/Louisville*, like the Court in *Plessy*, withdraws the problem of *de facto* segregation from the domain of public concern and situates it exclusively in the private realm of associational freedom based on "natural affinities" and the "voluntary consent of individuals."

In these respects, the *Seattle/Louisville* plurality opinion bears the intellectual fingerprints of Herbert Wechsler and his famous article on "neutral principles,"[71] further revealing the plurality opinion's likeness to *Plessy*. At bottom, the rationale for constitutional parity between Joshua McDonald and Linda Brown lies in Professor Wechsler's argument that

> assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges *in the same way on any groups or races that may be involved*. . . . In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, *he did not suffer more than I* in knowing that we had to go to Union Station to lunch together during the recess.[72]

Wechsler was led to this view after concluding that the judgment in *Brown* cannot validly rest on judicial inquiry into the legislature's purpose in enacting segregation or the consequences of segregation for those affected by it.[73] Remarkably, as authority for this proposition, he said:

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[69] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
[70] *Id.* (emphasis added).
[71] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
[72] *Id.* at 34 (emphases added).
[73] *See id.* at 33.

> In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it"?[74]

Contrary to what Professor Wechsler suggests, the lesson of *Plessy* is that the seduction of "neutral principles" must be tempered by an honest accounting of relevant social facts. The Court in *Plessy* thought it was acting on neutral principles, and from a certain perspective, it was.[75] Its fundamental error was to equate neutrality with a jurisprudence of legal formalism isolated from social meaning. Wechsler's argument and, by extension, the plurality opinion in *Seattle/Louisville* fare no better. As with Joshua McDonald and Linda Brown, whatever mix of guilt, embarrassment, and inconvenience Wechsler experienced on his walk to Union Station bears no resemblance to the humiliation, hostility, and stigma directed at Charlie Houston by Jim Crow. By tracing its intellectual underpinnings to Wechsler's "neutral principles," we see in Chief Justice Roberts's opinion a strand of jurisprudence whose logic still flirts with *Plessy* and dodges the central meaning of *Brown*.

III. Realism, Legalism, and Justice Kennedy

So far I have argued that neither *Brown* nor Harlan's dissent in *Plessy* supports the principle of colorblindness advanced by the *Seattle/Louisville* plurality. But it is possible that the principle can be defended on other grounds. For example, one might argue that, although race-conscious measures were necessary to uproot the entrenched system of racial caste in the era of *Brown* and its progeny, the progress our nation has made toward racial equality and better race relations, however halting and imperfect, now causes the risks of race-conscious policies to outweigh their benefits.[76] Further, one might contend that demographic changes over the past thirty years—in particular, the increasing diversity of racial and ethnic groups in our society beyond blacks and whites—have multiplied the risks of racial

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[74] *Id.* (quoting *Plessy*, 163 U.S. at 551) (emphasis in original).

[75] *Plessy* claimed to be neutral in two ways. First, to support its assertion that blacks are themselves to blame for seeing segregation as a badge of inferiority, the Court argued that "the white race . . . would not acquiesce in [the] assumption" of inferiority if blacks were the dominant power in the legislature and enacted similar laws. *Plessy*, 163 U.S. at 551. Second, distinguishing between civil and political equality on one hand and social equality on the other, the Court said: "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane." *Id.* at 551–52.

[76] Justice O'Connor offered a forward-looking version of this argument when she said that continued progress in the number of minority students with high grades and test scores should make racial preferences in university admissions unnecessary "25 years from now." Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

classification beyond legally manageable limits.[77] Although such arguments have their own weaknesses,[78] they at least have the virtues of transparently engaging the social meaning of race and inviting an assessment of their validity by reference to social experience and reality. This mode of reasoning is preferable to simplistic legal formalisms such as "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[79]

In *Seattle/Louisville*, this jurisprudential approach splits Justice Kennedy from the Roberts plurality. His separate opinion recognizes the need for legal principle to be responsive to "the real world,"[80] and he appears genuinely troubled by segregation in the public schools.[81] This concern leads him to reject colorblindness and to recognize that school districts have a compelling interest in "avoiding racial isolation" and in "achiev[ing] a diverse student population."[82] At the same time, he limits the pursuit of these goals with two legal distinctions. First, school districts have less latitude to remedy *de facto* as opposed to *de jure* segregation.[83] Second, in remedying *de facto* segregation, districts may use zoning, school site selection, recruitment, and resource allocation in race-conscious ways, but they may not classify individual students by race absent an "extraordinary show-

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[77] This line of argument is developed in Justice Powell's depiction of the United States as "a Nation of minorities." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978) (opinion of Powell, J.); *see id.* at 295 ("Once the artificial line of a 'two-class theory' of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable.").

[78] For a less sanguine view of our nation's racial progress as a predicate for colorblindness, see *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) ("[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."). For an incisive critique of colorblindness as a theory that illegitimately reconceptualizes race as ethnic diversity instead of as a structurally embedded system of social hierarchy, see Haney-López, *supra* note 16. *See also* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

[79] Seattle/Louisville, 127 S. Ct. 2738, 2768 (2007) (plurality opinion).

[80] *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) ("[A]s an aspiration, Justice Harlan's axiom ['Our Constitution is colorblind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."); *id.* at 2791 ("Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution."); *id.* ("The enduring hope is that race should not matter; the reality is that too often it does.").

[81] *See id.* at 2797 ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."); *id.* ("The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.").

[82] *Id.*; *see id.* at 2791 ("To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.").

[83] *See id.* at 2794–96.

ing" of necessity.[84] As explained below, the first distinction is an unwarranted retreat to legal formalism, while the second is responsive to social understandings of race and segregation, but not in the way that Justice Kennedy describes.

A. De Jure *Versus* De Facto

Doctrinal efforts to distinguish school segregation sanctioned by state authority (*de jure*) from school segregation attributable to demographic forces and private choices (*de facto*) have been controversial at least since *Keyes v. School District No. 1*, where Justice Powell criticized the *de jure/de facto* distinction as a "legalism" detached from "present reality."[85] Powell's point was that state complicity is an ineluctable feature of school segregation, and "whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."[86] He also argued that it makes no sense to treat school districts that voluntarily end their segregative policies differently from districts that are judicially ordered to do so, since the lingering effects of the policies are often the same.[87] Further, Powell said, minority children are likely to perceive the same pernicious message from segregation, whether it is *de jure* or *de facto*.[88]

This realist perspective elaborated by Justice Powell, a former school board member, is not lost on his successor, Justice Kennedy. In *Seattle/Louisville*, Justice Kennedy observes:

> From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.[89]

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[84] *Id.* at 2796; *see id.* at 2792–93.

[85] 413 U.S. 189, 219 (1973) (Powell, J., concurring in part and dissenting in part).

[86] *Id.* at 227; *see id.* at 227–28, 234–35 (discussing myriad ways in which decisions by school officials can actively or passively produce segregation).

[87] *See id.* at 228–29.

[88] *See id.* at 229–30; *id.* at 230 n.14 ("'If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation.'" (quoting ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 119 (1970))).

[89] *Seattle/Louisville*, 127 S. Ct. at 2795; *cf.* Freeman v. Pitts, 503 U.S. 467, 495 (1992) (Kennedy, J.) ("In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.").

However, Justice Kennedy goes on to explain why the *de jure/de facto* distinction is important: "It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies."[90] Notably, the point is stated as a "concession" because it is an acknowledgment that the *de jure/de facto* distinction, in light of the passage quoted above, does not correspond to a true state of affairs as much as it serves the institutional purpose of keeping judicial power in check.

This purpose is evident in the doctrinal test for granting unitary status to previously *de jure* segregated districts. The test requires a showing that the district has "complied in good faith with the desegregation decree" and has eliminated "the vestiges of past discrimination . . . to the extent practicable."[91] The first element speaks to process, not remedial efficacy. The second speaks to remedial efficacy, but requires elimination of segregation's vestiges only "to the extent practicable." The notion of practicability, like the test as a whole, is informed by "the ultimate objective" of "return[ing] school districts to the control of local authorities."[92] As Justice Kennedy recognizes, a desire to restore local autonomy and to avoid "ongoing and never-ending supervision by the courts" largely motivates the doctrinal construction of the *de jure/de facto* distinction.[93]

What, then, is the rationale for converting a distinction whose primary function is to limit judicial supervision of school districts into a distinction that limits what school districts can do when free of judicial supervision? How can a distinction intended to facilitate local control simultaneously be used to frustrate local control? Justice Kennedy's answer is that the *de jure/de facto* distinction "serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications."[94] But this merely states the doctrine's result, not its justification. The important question is how accurately the distinction confines racially classificatory remedies to the true scope of *de jure* wrong.

The reality is that there is significant slippage between, on one hand, the doctrinal concept of *de jure* segregation intended to circumscribe the judicial role and, on the other hand, a purely substantive concept—let us call it "DE JURE segregation"—encompassing the true scope of unlawful segregative conduct and its social and educational vestiges.[95] By DE JURE segre-

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[90] *Seattle/Louisville*, 127 S. Ct. at 2796 (citing Milliken v. Bradley, 418 U.S. 717, 746 (1974)).

[91] Board of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991).

[92] *Freeman*, 503 U.S. at 489.

[93] *Id.* at 495; *see id.* at 489–90; *see also Seattle/Louisville*, 127 S. Ct. at 2824 (Breyer, J., dissenting) (noting that the Court's cases "rest the significance of a 'unitary' finding in part upon the wisdom and desirability of returning schools to local control").

[94] *Seattle/Louisville*, 127 S. Ct. at 2796.

[95] Readers will, I hope, indulge my use of different typefaces (*de jure* versus DE JURE) to label the two concepts. The distinction I am drawing is analogous to Larry Sager's distinction between the true scope of a constitutional norm and the limited scope of its judicial enforcement. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Judicial conflation of one concept for the other occurs in Section 5 cases like *Board of Trustees of the University of Alabama v. Garrett*, 531

gation, I mean not only the vestiges of unlawful segregation redressable by judicial decree, but also (*a*) the effects of unlawful but unadjudicated segregation and (*b*) the effects of adjudicated segregation not remediable by judicial decree. The contrast between the two concepts (*de jure* and DE JURE) is illustrated well by the Seattle and Louisville cases.

As the facts show, the Seattle student assignment plan grew out of efforts to remedy DE JURE segregation (i.e., unlawful segregation that formed the basis for a lawsuit) even though no court ever found the district to be *de jure* segregated (because the district adopted remedies before any lawsuit reached a judgment).[96] In Louisville, a federal district court determined in 2000 that the school district had eliminated the vestiges of *de jure* segregation insofar as it had achieved what was "practicable" within the bounds of judicial supervision.[97] But the voluntary continuation of the school district's integration plan served to remedy DE JURE segregation by preventing the resegregation of schools based on housing patterns shaped by unlawful discrimination in zoning, restrictive covenants, and placement of public housing.[98] In its finding of unitary status, the district court determined that racially segregated housing should not count as a vestige of *de jure* segregation because it is "impracticable" to achieve residential integration through a desegregation decree.[99] But that legal determination should not obscure the actual fact that housing segregation and school segregation arising from it continue to be vestiges of DE JURE segregation in need of remedy.

As the main fulcrum on which the constitutionality of individual racial classifications rests, the *de jure/de facto* distinction cannot bear the weight assigned to it. Justice Kennedy fails to explain why a legal concept used to limit the remedial powers of courts over school districts should now be used to limit the remedial prerogatives of school districts themselves. The result is a mismatch between a rule of judicial administration and the substantive goal of extirpating DE JURE segregation. Given the artificiality of the *de jure/de facto* distinction, it makes little sense to create a sharp discontinuity in the options available to school districts seeking to combat segregation. The better approach—one that is more responsive to social reality—is simply to calibrate the permissibility of race-conscious policies to the scope of

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U.S. 356 (2001), which limited the remedial power of Congress to attacking only conduct that a *court* would find violative of the Fourteenth Amendment under legal standards shaped by judicial restraint, the countermajoritarian difficulty, and other institutional, not substantive, considerations. *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

[96] *See id.* at 2802–06, 2810–11 (Breyer, J., dissenting).

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

[98] *See id.* at 371–73. A school district voluntarily seeking to remedy school segregation arising from unlawful acts of discrimination by other government entities is not attempting to remedy "societal discrimination." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989); *see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). It is attempting to remedy effects of "identified discrimination," *Croson*, 488 U.S. at 500, 505, that are no less particularized than if school segregation had been caused by the district itself.

[99] *Id.* at 374–75.

harm requiring redress at a given time. Just as the nature and extent of a district's race-conscious remedial measures should be tailored to the unremedied vestiges of *de jure* segregation during the course of a judicial decree, the nature and extent of such measures likewise should be tailored to the unremedied vestiges of DE JURE segregation when pursued as a voluntary policy.[100]

B. Permissible Race-Conscious Measures Versus Impermissible Individual Classifications

Let us suppose, contrary to Justice Kennedy, that the concept of DE JURE segregation marks the boundary of a school district's remedial interests. Let us further suppose that we are considering race-conscious student assignment in a district where no vestiges of DE JURE segregation remain. In this genuinely non-remedial context, what should we make of Justice Kennedy's distinction between individual racial classifications, which carry a heavy presumption of invalidity, and other race-conscious measures such as attendance zoning and school siting, which he says are unlikely even to trigger strict scrutiny?[101]

At a practical level, the distinction seems to elevate form over substance again, just as earlier distinctions between quotas and plus factors and between plus factors and point systems arguably did in the context of affirmative action.[102] Although the Court has long treated strategies such as zoning and school siting with the same scrutiny as individual racial classifications when adjudicating claims of *de jure* segregation,[103] here Justice Kennedy favors race-conscious strategies whose effects on student assignment, though possibly substantial, are diffuse, indirect, and difficult to isolate, while disfavoring individual racial classifications even if their total effects on student assignment are minimal. This distinction may encourage strategies that are "more acceptable to the public,"[104] but is there more that can be said in its defense?

Justice Kennedy's own explanation is intriguing. To his credit, his objection to individual racial classification does not misappropriate notions of

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[100] The Seattle and Louisville districts demonstrated this sort of tailoring in their use of progressively less robust race-conscious measures over time. *See Seattle/Louisville*, 127 S. Ct. at 2802–10 (Breyer, J., dissenting).

[101] *See id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

[102] *See* Gratz v. Bollinger, 539 U.S. 244, 270–73 (2003); *Bakke*, 438 U.S. at 315–18 (opinion of Powell, J.). *But cf. Gratz*, 539 U.S. at 295–96 (Souter, J., dissenting) (seeing no difference between using a point system to consider race and using race as a *Bakke*-type plus factor); *Bakke*, 438 U.S. at 378 (Brennan, J., concurring in the judgment in part and dissenting in part) (seeing no practical or constitutional difference between quotas and plus factors).

[103] *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198–203 (1973) (finding school district liable for *de jure* segregation based on race-conscious attendance zoning, school siting, school closing, and personnel assignment decisions).

[104] *Bakke*, 438 U.S. at 379 (Brennan, J., concurring in the judgment in part and dissenting in part) (arguing that the use of race as a plus factor should not be constitutionally favored over a racial quota simply because it is "more acceptable to the public").

group stigma, inferiority, or inequality at the heart of *Brown*. Instead, his objection appeals to personal liberty—not the freedom of association that Professor Wechsler worried about, but the freedom of self-definition without undue government coercion. The theme of self-determination runs through Justice Kennedy's opinion. The problem with individual classification, he says, is that it "tells each student he or she is to be defined by race."[105] "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change."[106] "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin."[107] This last sentence does not invoke the principle of colorblind equality advanced by the Roberts plurality so much as it summons the values of personal autonomy and self-determination from a case like *Lawrence v. Texas*.[108] Justice Kennedy's point is that classifying by race is not a matter of passive observation; it is something crude and reductionist that the government "does to you."[109] (Just ask Homer Plessy.[110])

Although there is merit to this concern, its applicability seems questionable in this context. The plaintiffs in *Seattle/Louisville* did not complain that the mere act of racial classification harmed their self-identity. They complained that they could not attend their first-choice school because of their race.[111] That is a complaint about differential treatment, not about classification itself. Moreover, the idea of self-definition does not justify a near-categorical ban on individual classifications so much as it suggests a requirement that school districts allow students to self-identify by race or, if they wish, not to identify at all.[112] Under a system of self-identification, a racial classi-

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[105] *Seattle/Louisville*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

[106] *Id.* at 2797.

[107] *Id.*

[108] *Cf.* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (Kennedy, J.) ("[T]here are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

[109] *See Seattle/Louisville*, 127 S. Ct. at 2792 (referring to "crude system of individual racial classifications"); *id.* at 2796 ("Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.").

[110] Although Plessy was seven-eighths white, the Court held that the terms "white" and "colored" are for each state to define. *See* Plessy v. Ferguson, 163 U.S. 537, 538, 552 (1896); *cf. Seattle/Louisville*, 127 S. Ct. at 2796–97 (Kennedy, J., concurring in part and concurring in the judgment) ("When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite?"); Metro Broad., Inc. v. FCC, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting).

[111] *See Seattle/Louisville*, 127 S. Ct. at 2748, 2750.

[112] The Seattle plan allowed students to self-identify their race, but if a student chose not to identify his or her race, the district assigned a racial classification based on a visual inspection of the student or parent. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1204 n.15 (9th Cir. 2005) (en banc) (Bea, J., dissenting). The latter process does seem problematic, although it is unclear how often it was used.

fication would not be "state-mandated," and an individual would not be "powerless to change" it.

Apart from concern for individual autonomy, however, there is a sense in which taking race into account at an aggregate instead of individual level seems more consonant with the goal of integrating public schools. One way to see this is to consider a school assignment plan that comports with Justice Kennedy's legal framework, such as the one in my local community. Like many cities, Berkeley has substantial residential segregation. Whites and Asians tend to live in the eastern hillside, while blacks and Latinos tend to live in the western flatland. For forty years, the Berkeley Unified School District has sought to integrate its elementary schools using a mix of strategies.[113] Its current assignment plan divides the district into three attendance zones, each running across the city from east to west in order to capture a racially diverse swath of students from the hills to the flats. Students have priority to attend the schools in their zone, and assignments are made through a lottery structured by parental choice, sibling priority, and diversity considerations.

The lottery process is designed to ensure socioeconomic and racial diversity in each elementary school. To achieve this, the assignment plan divides the district into 445 small neighborhoods, each roughly four to eight city blocks. For each neighborhood, the plan combines three factors—average household income, average level of parental education, and percentage of students of color—into a composite diversity measure. Based on that measure, each small neighborhood falls into one of three diversity categories. The choice-based lottery system strives to produce elementary schools with students from each diversity category in roughly equal proportion within a modest range of flexibility.

Consistent with Justice Kennedy's prescription, the Berkeley plan does not subject students to "differential treatment based on individual classifications."[114] Instead, school assignments take into account the socioeconomic and racial characteristics of the neighborhood where each student lives. The appeal of this approach lies in its focus on race as a structural feature of the social landscape, not as a personal attribute of an individual student. The element of race-consciousness in the plan responds directly to the social fact of residential segregation. Because race is treated as an aggregate phenomenon, no student is made individually "culpable" for being of a particular race. At an expressive level, the plan speaks to the collective character of

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[113] The Berkeley district has only one high school, so integration strategies are relevant only to elementary school assignments. The history of the Berkeley plan and its current parameters, discussed in this paragraph and the next, are thoughtfully detailed on the district's website at http://www.berkeley.net/index.php?page=student-assignment-plan.

[114] *Seattle/Louisville*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Thus, if two students of different races live in the same household, they would be treated the same under the plan's diversity measure. No decision turns on an individual student's own race.

the underlying problem that makes an integrative school assignment plan necessary in the first place.

Interestingly, the clunkiness of the options left open by Justice Kennedy may push school districts seeking racial integration to reevaluate their assignment policies in the wholesale, fundamental way that Berkeley has. In *Seattle/Louisville*, the Court criticized the individual racial classifications at issue for merely nibbling at the edges of overall school assignments.[115] A more systemic approach to integrating public schools would likely employ the full range of race-conscious strategies once used to keep schools segregated after *Brown*.[116] Because most racially diverse school districts are residentially segregated, the underlying approach of any vigorous effort to integrate public schools must be more comprehensive than sorting children one by one.

Conclusion

Law by its nature seeks to impose order on a less-than-orderly world. A degree of slippage between legal doctrine and social reality is an inevitable byproduct of law's normativity; lines must be drawn somewhere. But the legitimacy of law depends not only on its inner logic and coherence but also on its responsiveness to the actual conditions and historical understandings of the society it governs. Our public schools are still segregated, and they are still unequal. These facts cannot be wished away by formulaic concepts of legal equality. But they can be addressed through imaginative policies within a jurisprudence that acknowledges what four Justices in *Seattle/Louisville* would deny—namely, the past and present ways in which race structures inequality.

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[115] *See id.* 2759–60 (majority opinion). Although the Court says "we do not suggest that *greater* use of race would be preferable," *id.* at 2760, Justice Kennedy's opinion suggests that a race-conscious plan that potentially affects many assignments but does not use individual racial classifications would be permissible, *see id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

[116] *See supra* note 103. In Louisville, assignments based on individual classifications comprised only a small part of its overall integration plan. The primary element of the plan, unaffected by the Supreme Court's decision, is a set of carefully drawn, racially integrated attendance zones that structure initial assignments and school choice. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 842–43 (W.D. Ky. 2004).