Lecture

# WHAT CAN *BROWN*® DO FOR YOU?: NEUTRAL PRINCIPLES AND THE STRUGGLE OVER THE EQUAL PROTECTION CLAUSE

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This is a story about two of the most influential texts in American constitutional law. The first, the Supreme Court's decision in *Brown v. Board of Education*[1] striking down de jure segregation of public schools, has become the most revered opinion in the Court's history—the most "super-duper," to use Senator Arlen Specter's phrase,[2] of all the Court's precedents. The second, Professor Herbert Wechsler's *Harvard Law Review* article, *Toward Neutral Principles of Constitutional Law*,[3] has become the second-most-cited law review article in American history.[4] The final pages of *Neutral Principles* are

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1. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

2. Senator Specter used this phrase to refer to *Roe v. Wade*, 410 U.S. 113 (1973), during the confirmation hearings for Chief Justice Roberts, in light of the Court's having had numerous opportunities to overrule it. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 145 (2005) (statement of Sen. Specter, Chairman, S. Comm. on the Judiciary), *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html; *cf.* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 543 (1999) ("Today, *Brown v. Board of Education*, which was a controversial decision in 1954 (and perhaps an unthinkable one in 1896), is the third rail of judicial nomination: touch it and you die." (footnote omitted)).

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

4. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 759–60 (1996) (noting that Professor Wechsler's article is the second most often cited article after R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)). *Brown* is nowhere near the most often cited opinion in Supreme Court history. That distinction goes to

in fact devoted to arguing that *Brown* cannot be squared with the demands of principled adjudication.[5]

Over time, the relationship between *Brown* and *Neutral Principles* has changed dramatically. If *Neutral Principles* were remembered primarily as an attack on *Brown* as an unprincipled decision, it would never have had such staying power.[6] *Neutral Principles* would then be so firmly on the wrong side of history that citing it for the proposition that adjudication should rest on reason and principle would be like citing *Dred Scott v. Sandford*[7] for the proposition that "when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court."[8]

But that is not how *Neutral Principles* is remembered. It is remembered instead for its title—it may have begun the practice of starting articles with the word "toward" (which suggests in a falsely modest way that the author is not quite getting all the way there)—and for its general statement of the features that make judicial review legitimate in a democracy.[9] Its analysis of the decision in *Brown* has largely been forgotten.[10] And precisely because the tension between

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the otherwise forgettable *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321 (1906), a citation to which appears at the top of the slip copy of the syllabus to every Supreme Court opinion to remind readers that the syllabus "constitutes no part of the opinion of the Court but has been prepared . . . for the convenience of the reader." Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2120 (1995) (alteration in original).

5. Wechsler, *supra* note 3, at 31–34.

6. *See* David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065, 1071–73 (2008) (describing how Wechsler's critique—although "infamous for being obtuse"—contains the seeds of an important challenge to how courts adjudicate constitutional cases).

7. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

8. *Id.* at 401–02. It is probably safer simply to quote FED. R. CIV. P. 8(a): "A pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court's jurisdiction . . . ."

9. *See* Wechsler, *supra* note 3, at 16–20.

10. For reasons that I discuss, attention to the relationship between *Brown* and *Neutral Principles* was revived by the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007); *see also, e.g.*, Goodwin Liu, *"History Will Be Heard": An Appraisal of the* Seattle/Louisville *Decision*, 2 HARVARD L. & POL'Y REV. 53, 64–65 (2008) (likening Wechsler's treatment of *Brown* in *Neutral Principles* to the plurality opinion in *Parents Involved*); Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 91 (2007) ("The prevailing opinion in *Parents Involved* is . . . clearly Wechslerian. Exactly like Wechsler, the prevailing opinion purported to be balanced and fair-minded—that is what the allusion to the legacy of *Brown* clearly expresses. Nonetheless, like Wechsler, the Court ignored the asymmetry between exclusion and inclusion . . . .").

*Neutral Principles* the article and *Brown* the decision has been forgotten, the Supreme Court treats *Brown* as the apotheosis of "neutral principles," in particular, of a principle of race neutrality or colorblindness as the essence of the Fourteenth Amendment's Equal Protection Clause. Neutral principles the idea, if not *Neutral Principles* the article, seems to be winning the struggle to claim *Brown* for itself.

*Brown* occupies a peculiar position within constitutional interpretation. The Rehnquist and Roberts Courts have devoted pages upon pages of their opinions to plumbing the meaning that constitutional provisions possessed at the time of their framing and ratification.[11] Although the contemporary fixation on originalism arose from conservative resistance to decisions by the Warren and Burger Courts,[12] professed fidelity to some form of "original meaning" or "original understanding" now seems firmly in the ascendancy. For instance, Professor Jack Balkin has sought to show how constitutional protection of a woman's ability to terminate her pregnancy is consistent with the original meaning of the Fourteenth Amendment,[13] and Douglas Kendall has founded a progressive think tank devoted to "honest textualism and principled originalism."[14] But

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11. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2789–804 (2008) (discussing the original understanding of the language contained in the Second Amendment); Boumediene v. Bush, 128 S. Ct. 2229, 2244–51 (2008) (discussing the scope of the writ of habeas corpus as understood in 1789). Justice Thomas, in particular, has often argued for a repudiation of existing interpretations because they do not accord with what he sees as a constitutional provision's original meaning. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring) (arguing that "the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools" despite a long line of cases recognizing that students possess some level of constitutional protection); Gonzales v. Raich, 545 U.S. 1, 58, 58–66 (2005) (Thomas, J., dissenting) (arguing that congressional power under the Commerce Clause should be returned to an eighteenth-century understanding of "commerce" as standing "in contrast to productive activities like manufacturing and agriculture").

12. *See* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997) ("Originalism is an ism, a conservative ideology that emerged in reaction against the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court, originalism as we know it did not exist." (emphasis omitted)).

13. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 *passim* (2007).

14. *See* Constitutional Accountability Ctr., What Is Constitutional Accountability?, http://www.theusconstitution.org/page.php?id=91 (last visited Jan. 27, 2008).

In a forthcoming book, Professor Goodwin Liu, Professor Christopher Schroeder and I argue that while the original application of constitutional provisions is *one* important source for contemporary interpretation, other sources—such as constitutional structure and development, changed public understanding, and the interaction of constitutional principles with current

whatever originalism means with respect to other constitutional issues, when it comes to the Equal Protection Clause and its application to questions of race-conscious government action, the Court seldom looks back beyond *Brown*.[15] Put simply, the Court has abandoned "Framers' originalism" in favor of "*Brown* originalism," in which Justices claim fidelity, not to what the Equal Protection Clause meant in 1868, but rather to what the Supreme Court meant in 1954.

*Brown* itself took a complex stance with respect to originalist interpretation. In Part I of this Essay, I explore that stance. Although Chief Justice Warren's opinion for the Court rejected the narrowest form of originalism, which asks how the framers of a constitutional provision would have decided a specific issue had it been posed to them at the time,[16] it did anchor its approach in a different form of original understanding—one that focused on the history out of which the Fourteenth Amendment had emerged. I suggest that Wechsler's critique of *Brown* lost sight of that history and accordingly failed to see how *Brown*'s commitment to racial inclusiveness reflected principled adjudication.

Part II then turns to the interplay of neutrality and originalism in the Supreme Court's controversial desegregation decision, *Parents Involved in Community Schools v. Seattle School District No. 1*.[17] Chief Justice Roberts's opinion for the Court invokes *Brown* but follows Wechsler. The *Parents Involved* Court took *Brown* to require a symmetrical reading of the Equal Protection Clause: all race-conscious government action, whether it serves to segregate or to integrate civic institutions, is equally suspect. But in requiring this high level of generality, the Roberts Court, like Wechsler, has

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conditions—are also critical. *See* GOODWIN LIU, PAMELA S. KARLAN, & CHRISTOPHER SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (forthcoming 2009).

15. For an attempt to discuss the Reconstruction-era understanding of the government's role in providing or encouraging racially integrated education, see Brief of Historians as Amici Curiae in Support of Respondents at 6–15, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915), 2006 WL 2922647.

16. Attorney General Meese's 1985 address to the American Bar Association, which in some important ways signaled the emergence of the modern focus on originalism, called for a "Jurisprudence of Original Intention." *See* Edwin Meese III, U.S. Att'y Gen., Address to the American Bar Association (July 9, 1985), *available at* http://www.fed-soc.org/resources/id.49/default.asp. Jack Balkin refers to this approach as "original expected application" interpretation: it "asks how people living at the time the text was adopted would have expected it would be applied." Balkin, *supra* note 13, at 296.

17. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

adopted an understanding of neutral principles that fundamentally undermines the Fourteenth Amendment's commitment to full civic inclusion. And it does so by claiming *Brown* for itself in a striking way—relying on a distorted version of what the litigants argued, rather than what the Court decided.

## I. *BROWN* AND WECHSLER

*Brown* involved challenges by black public school students to official policies mandating separate schools for black and white pupils.[18] When the case first was argued, in October Term 1952, the Court found itself deeply divided.[19] Aware that "a close vote would likely be a disaster for Court and country alike,"[20] the Court set the cases for reargument in the next Term, asking the parties to address, among other things, the following three questions:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
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> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
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> > (*a*) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
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> > (*b*) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
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> 3. On the assumption that the answers to questions 2 (*a*) and (*b*) do not dispose of the issue, is it within the judicial power, in construing

18. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 486–88 (1954).

19. For two detailed accounts of this process, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 292–312 (2004); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 582–616 (1975).

20. KLUGER, *supra* note 19, at 614.

> the Amendment, to abolish segregation in public schools?[21]

At first blush, these questions might suggest that the Justices were originalists of some stripe. But the two leading accounts of the Justices' deliberations show that these questions were a "pretense" devised by Justice Felix Frankfurter to avoid the appearance of stalling while the Justices tried to reach consensus.[22] And far from relying on the results of this originalist inquiry,[23] the Court's opinion instead declared that

> [i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[24]

To say that the Supreme Court in *Brown* sidestepped how the framers of the Fourteenth Amendment acted or thought about school segregation, however, is not to say that the Court ignored contemporaneous understanding of the amendment altogether. To the contrary, Chief Justice Warren's opinion for the Court explicitly hearkened back to its earliest decisions concerning the Reconstruction amendments, which had located their meaning in the particular history of black slavery and emancipation.[25] In 1873, *The Slaughterhouse Cases*[26] declared that

> no one can fail to be impressed with the one pervading purpose found in [the Reconstruction amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and

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21. Brown v. Bd. of Educ., 345 U.S. 972, 972 (1953).

22. KLARMAN, *supra* note 19, at 301; KLUGER, *supra* note 19, at 614–16.

23. Justice Frankfurter's law clerk, Alexander Bickel, had reported to him after a summer of reading the legislative history of the Fourteenth Amendment that "it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting." KLARMAN, *supra* note 19, at 304. *See generally* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (setting out Professor Bickel's understanding of the legislative history). The Court apparently agreed with this understanding.

24. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 492–93 (1954).

25. *See id.* at 490 n.5.

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

> firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[27]

Thus, although the Court recognized that the Reconstruction amendments might be read more broadly to include, for example, forms of involuntary servitude beyond chattel slavery, it concluded that

> what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.[28]

Similarly, the passage from *Strauder v. West Virginia*[29] on which Chief Justice Warren relied stated that "[t]he words of the [Fourteenth A]mendment" were directed at "discriminations" against black individuals, which the *Strauder* Court described as "steps towards reducing them to the condition of a subject race."[30] Put in contemporary terms, the first opinions construing the Fourteenth Amendment had treated it as a prohibition on racial subordination and had recognized its aspiration that blacks become full members of civic society.

It was in light of that understanding that the Court turned to the constitutionality of public school segregation.[31] To separate black school children "from others of similar age and qualifications solely because of their race," the Court declared, "generates 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."[32] Precisely because "the policy of separating the races is usually interpreted as

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27. *Id.* at 71.

28. *Id.* at 72.

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

30. *Id.* at 307–08.

31. Professor Klarman's discussion of the Court's internal discussion confirms this point. *See* KLARMAN, *supra* note 19, at 302 (noting that Chief Justice Warren opened the discussion by stating that the Court could uphold segregation "only" on the premise, rejected by the Fourteenth Amendment, "that the Negro race is inferior").

32. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954).

denoting the inferiority of the negro group,"[33] segregated educational facilities "are inherently unequal" and violate the Equal Protection Clause.[34]

As I read *Brown*, the evil at which the decision was directed was not an arbitrary or irrelevant use of race to separate similar children from one another—as would have been the case had a school system assigned children to different schools on the basis of astrological signs or blood type.[35] Rather, the problem was an invidious use of race: school segregation reinforced blacks' subordinate status and perpetuated the exclusion from mainstream institutions that dated back to the time of slavery.

So it is something of a puzzle to then read Professor Wechsler's account of *Brown* in *Neutral Principles*. Wechsler sought to enter two ongoing debates, one over the legitimacy of judicial review and the nature of principled adjudication and the other over the Supreme Court's recent decisions, particularly in the school segregation cases. Wechsler's starting point, set out near the beginning of his article, is that courts function solely as an (illegitimate) "naked power organ" when they decide cases based on the identity of the parties before them.[36] Thus, Wechsler condemns the person who "disapproves of a [judicial] decision when all he knows is that it has sustained a claim put forward by a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist."[37] To be sure, Wechsler is making an important point: in a wide variety of cases, the identity of the litigant should not matter. It is hard to imagine a justification, for example, for denying compensatory damages to plaintiffs in medical malpractice cases because they are segregationists or Communists.[38] But there is also a wide array of cases in which the

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33. *Id.* (quoting a lower court opinion).

34. *Id.* at 495.

35. The canonical citation for the proposition that racial classifications are constitutionally suspect is *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Although the Court cited *Korematsu* in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."), in which it struck down racial segregation of public schools in the District of Columbia as a violation of the due process clause of the Fifth Amendment, it did not cite *Korematsu* or discuss what has come to be known as the anticlassification principle in *Brown* itself.

36. Wechsler, *supra* note 3, at 12.

37. *Id.*

38. *Cf.* Munn v. Algee, 924 F.2d 568 (5th Cir. 1991) (reviewing a wrongful death case involving a Jehovah's Witness in which the defendant essentially argued that the victim's

identity of a litigant or injured party *does* matter. The Federal Sentencing Guidelines, for example, recommend that judges take into account whether a victim is vulnerable or was selected because of the victim's race, religion, ethnicity, gender, disability, or sexual orientation,[39] and sentencing courts often take into account a defendant's age when deciding an appropriate sentence.[40] Sometimes, the litigant's identity is the hinge on which the entire case turns. For example, statutes such as Title VII,[41] the Age Discrimination in Employment Act,[42] and the Civil Service Reform Act[43] reject the doctrine of at-will employment entirely on the basis of an employee's status. They treat decisions to hire, fire, or promote employees on the basis of their race, sex, political beliefs, or age[44] differently from decisions to take personnel actions on the basis of employees' performances or even such irrelevant factors as their choice of college football team to support.[45]

Wechsler treats the Supreme Court's decision in *Brown* as one preferring the claims of blacks over the claims of segregationists because of the identity of the litigants. He rejects the idea that "racial segregation" can be, "in principle, a denial of equality to the minority

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religion should preclude her executor from recovering).

39. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 3A1.1 (2007) ("Hate Crime Motivation or Vulnerable Victim"). Indeed, many hate-crime statutes turn on the identity of the victim.

40. *See, e.g.*, Gall v. United States, 128 S. Ct. 586, 593 (2007) (discussing the district court's decision in setting the defendant's sentence to take into account, among other things, "his age at the time of the offense conduct" (quoting Joint Appendix at 117, *Gall*, 128 S. Ct. 586 (No. 06-7949), 2007 WL 3071558)).

41. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

42. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2006).

43. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

44. *See* 5 U.S.C. § 2301(b)(2) (providing that federal employees should be evaluated "without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition"); 29 U.S.C. § 623 (prohibiting discrimination against workers on the basis of age); 42 U.S.C. § 2000e-2 (prohibiting discrimination on the basis of race, color, sex, or national origin).

45. Similarly, the Fifteenth Amendment, which prohibits denial of the right to vote "on account of race," turns entirely on whether the challenged disenfranchisement was because of the plaintiff's race. If the plaintiff was excluded for some other reason, the amendment is not implicated. *See* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 23 (1959) (responding to Wechsler's criticism of the *White Primary Cases*, in which Wechsler asks whether their rationale would prevent a religiously based party from excluding nonbelievers by pointing out that "the fifteenth amendment speaks only to racial distinctions").

against whom it is directed[,] that is, the group that is not dominant politically and, therefore, does not make the choice involved,"[46] because he forgets that that is the principle embodied in the Equal Protection Clause. Because of his insistence on a kind of formal symmetry, Wechsler denies that racial nonsubordination can *be* a principle. How, he asks, can racial nonsubordination be a *neutral* value?[47]

In one sense, I do not understand Wechsler's problem. As Professor John Hart Ely later remarked, "there are neutral principles of every hue. (How about 'No racial segregation, ever?')."[48] But one need not even go that far. To be sure, saying that the Constitution forbids creating racial out-groups is not neutral with respect to *race*: it treats differentiation among individuals on the basis of race differently from differentiation based on other factors, such as talent or ability to pay. In that sense, as then-Professor Louis Pollak explained in one of the first responses to Wechsler's article, the decisive constitutional principle underlying *Brown* is "in a vital sense not neutral."[49] But that nonneutrality is a product of constitutional choices—most explicitly in the Fifteenth Amendment, but implicitly in the Fourteenth as well—rather than judicial willfulness or will. The Reconstruction amendments were "fashioned to one major end," namely, "the full emancipation" of black Americans.[50] Still, within the category of racial groups, a nonsubordination principle *can* be neutral, even in Wechsler's terms: the government can be prohibited from treating *any* racially defined group as subordinate or inferior. As a matter of American history, blacks have been the primary beneficiaries of the nonsubordination principle, but that position is entirely contingent: the Equal Protection Clause also protects Hispanics, Asian Americans, and Native Americans against discrimination on the basis of race or ancestry.[51]

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46. Wechsler, *supra* note 3, at 33.

47. Wechsler argues that the position that "racial segregation is, in principle, a denial of equality to the minority against whom it is directed . . . . presents problems" because, among other things, "is there not a point in *Plessy*" that that is just the construction that minorities choose to put on it? *Id.*

48. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 55 (1980); *see also* Strauss, *supra* note 6, at 1070–71 (arguing that Wechsler was incorrect in claiming that *Brown* could not be justified with neutral principles).

49. Pollak, *supra* note 45, at 31.

50. *Id.*

51. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 478 (1954) (stating that "[t]he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is,

Because Wechsler thought nonsubordination could not serve as a neutral principle, he found himself casting around for some other principle that could apply to the injury suffered by black persons subjected to Jim Crow, and he latched onto the idea that the problem with segregation was not that it discriminates against black people but that it denies all people the right to associate across racial lines. His embrace of the right to associate as the core value at issue in *Brown* produced perhaps the most notorious passage in *Neutral Principles*:

> I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied. 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.[52]

To paraphrase Professor Charles Black's masterful 1960 response to Wechsler, here is where the curves of self-satisfaction and obtuseness "intersect at their respective maxima."[53] Like Professor Black, "I think we ought to exercise one of the sovereign prerogatives of philosophers – that of laughter."[54]

Only because Wechsler identified the relevant constitutional principle as a right of association was he confronted with the problem he found himself unable to solve: finding a principled way for courts to choose between those who wished to associate (that is, black schoolchildren seeking to attend white schools) and those who wished not to associate (namely, whites who found integration "unpleasant or repugnant."[55]) If instead he had treated the central issue as one of equal civic status, rather than equal government accommodation of

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based upon differences between 'white' and Negro," but also reaches discrimination against Mexican Americans); Oyama v. California, 332 U.S. 633, 640–44 (1948) (holding that California's Alien Land Law denied equal protection to citizens of Japanese descent by making it harder for them to own land than it was for individuals whose parents were "American, Russian, Chinese, or English").

52. Wechsler, *supra* note 3, at 34. For stinging recent exegesis of this passage, see Liu, *supra* note 10, at 64–65; Nussbaum, *supra* note 10, at 28–30.

53. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 422 n.8 (1960) (stating that "[t]he curves of callousness and stupidity intersect at their respective maxima" in the statement that if segregation communicates a belief in black inferiority this is "solely because the colored race chooses to put that construction upon it" (emphasis omitted) (quoting Plessy v. Ferguson, 163 U.S. 537, 551 (1896))).

54. *Id.* at 424.

55. Wechsler, *supra* note 3, at 34.

individual preference, Wechsler would have had no real difficulty in deciding that whites' desire to subordinate blacks and blacks' desires for equality were constitutionally different from one another.

But whether or not *Brown* was principled in the sense that Wechsler used that term in *Neutral Principles*, the decision marks the Supreme Court's greatest triumph. It transformed equal protection from what Justice Oliver Wendell Holmes derisively once called the "usual last resort of constitutional arguments"[56] into a bedrock principle of constitutional law. Not for nothing did the Court later choose the Equal Protection Clause as its vehicle for remaking the American political system in the reapportionment cases or as the justification for resolving the presidential election of 2000.[57] Precisely because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself. A constitutional theory that cannot produce the result reached in *Brown*—the condemnation of de jure Jim Crow—is a constitutional theory without traction. Even Robert Bork, whose judicial nomination foundered in no small part because of his article *Neutral Principles and Some First Amendment Problems*[58]—an homage in important ways to Wechsler's argument—has noted that any constitutional "theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*."[59]

## II. SHADES OF *BROWN*: THE ROBERTS COURT AND *PARENTS INVOLVED*

The imperative of keeping faith with *Brown* is all the more pressing when it comes to cases involving school desegregation. So one of the most striking aspects of the Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* was the struggle among the Justices over what *Brown* meant. The policies at issue in *Parents Involved* were promulgated by elected

56. Buck v. Bell, 274 U.S. 200, 208 (1927).

57. *See* Pamela S. Karlan, *Equal Protection:* Bush v. Gore *and the Making of a Precedent*, *in* THE UNFINISHED ELECTION OF 2000, at 159, 194–95 (Jack N. Rakove ed., 2001).

58. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

59. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 77 (1990); *see also* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383 *passim* (2000) (describing *Brown*'s apotheosis).

local school boards in Seattle, Washington, and Louisville, Kentucky.[60] To produce racially integrated schools in the face of continued residential segregation, each school board took race into account in some pupil assignments.[61] The Supreme Court, by a 5–4 vote, held that both policies were unconstitutional.[62]

Before *Parents Involved*, the Court had not given plenary consideration to the question of public school desegregation in a dozen years.[63] That hiatus was significant because, in the interim, the Court had taken a fairly decisive stance on an interpretive issue posed, but not resolved, by the opinion in *Brown*: what is the central meaning of the Equal Protection Clause. In his foundational article, *Groups and the Equal Protection Clause*,[64] Professor Owen Fiss identified two principles that might drive interpretations of the clause: the "antidiscrimination principle" and the "group-disadvantaging principle."[65] The former principle, often referred to as an "anticlassification" principle,[66] sees the evil to which the clause is addressed as the government's classification and subsequent differential treatment of individuals along racial lines. It is embodied in the view that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[67] This principle calls for symmetry

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60. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2824 (2007) (Breyer, J., dissenting) (describing the policies as reflecting the view of "democratically elected school boards . . . as to how best to include people of all races in one America").

61. *Id.* at 2746 (majority opinion). For details of the Seattle plan, see *id.* at 2746–48. For details of the Louisville plan, see *id.* at 2749–50.

62. *Id.* at 2746.

63. As far as I can tell, the Court's most recent decisions had been in *Missouri v. Jenkins*, 515 U.S. 70 (1995), and *Freeman v. Pitts*, 503 U.S. 467 (1992). Both of those cases had turned primarily on the question of the federal courts' power to remedy continued racial isolation in the schools. *Jenkins*, 515 U.S. at 101 (directing that "the District Court should apply our three-part test from *Freeman v. Pitts*" when "deciding whether a previously segregated district has achieved partially unitary status"); *Freeman*, 503 U.S. at 491 (holding that "[a] court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power" and articulating three "factors which must inform the sound discretion of the court").

64. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

65. *Id.* at 108.

66. *E.g.*, Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1711 (2005).

67. *Parents Involved*, 127 S. Ct. at 2757 (Roberts, C.J., announcing the judgment of the Court) (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

in the treatment of individuals. Although Wechsler might have some quibbles with its status as a neutral principle, it avoids, at the very least, Wechsler's criticism of decisions that turn on the characteristics of the litigants. Under the antidiscrimination/anticlassification principle, *all* individuals enjoy identical protection against adverse treatment.

By contrast, the group-disadvantaging principle, often referred to as an "anticaste" or "antisubordination" principle, sees the Equal Protection Clause as directed toward laws that perpetuate the historical exclusion of racial groups from full civic participation. It sees a "constitutional asymmetry" between government action that "seeks to *exclude* and that which seeks to *include* members of minority races."[68]

At the time of *Brown*, the Court did not need to pick between the two principles because both demanded the same result. Moreover, the doctrinal framework of equal protection analysis was then far less structured. Although *Korematsu v. United States*[69] had held that government action resting on race-based distinctions faced "the most rigid scrutiny,"[70] strict scrutiny as a doctrinal category did not emerge until the mid-1960s.[71] And it was not until its decisions in *City of Richmond v. J. A. Croson Co.*[72] and *Adarand Constructors, Inc. v. Pena*[73]—both cases involving the distinctive practice of competitive bidding for government contracts—that the Court embraced the rule that all governmental uses of race were subject to strict scrutiny.[74] So *Parents Involved* marked the first time that the Court returned to the issue in *Brown*—the assignment of children to public schools—in the context of contemporary colorblind constitutionalism.

I have discussed the integration of *Brown* into modern equal protection doctrine in *Parents Involved* in some depth elsewhere and will not rehearse it here.[75] Rather, I want to concentrate on how the Justices deployed *Brown* in making their arguments.

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68. *Id.* at 2815 (Breyer, J., dissenting).

69. Korematsu v. United States, 323 U.S. 214 (1944).

70. *Id.* at 216.

71. *See* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1569–70 (2002).

72. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

73. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

74. *See id.* at 235; *Croson*, 488 U.S. at 493–94.

75. *See* Pamela S. Karlan, *The Law of Small Numbers:* Gonzales v. Carhart, Parents

Like the ghost of Hamlet's father, *Brown* the opinion makes only a very few, albeit critical, appearances in the Court's opinion. Although *Brown*—and what the promise of *Brown* was—looms over the entire case, it is not until the antepenultimate page of the slip opinion announcing the judgment that the Chief Justice actually *cites* the Supreme Court's initial 1954 decision in *Brown*.[76] And then, in the course of explaining why *Brown* supports an anticlassification approach, he quotes only a fragment of a single sentence from the opinion. Referring to segregation, the Chief Justice writes that "[t]he impact is greater when it has the sanction of the law."[77] The Chief Justice quotes that fragment, which actually involves a quotation of the district court's opinion, to support his claim that "[i]t was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954."[78] But re-placed in its context, the quotation from *Brown* shows how the *Parents Involved* Court posed a false choice. The sentence immediately preceding the quoted fragment reads, "Segregation of white and colored children in public schools has a detrimental effect *upon the colored children.*"[79] And the remainder of the quoted sentence itself drives this point home: "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."[80] The vice to which the *Brown* Court was pointing was neither the provision of inferior tangible facilities nor the simple separation of groups. It was subordination. The reduction of a direct quotation from *Brown* to a single misleading sentence fragment illustrates the problem the *Parents Involved* Court faced in trying to enlist *Brown* in the ranks of anticlassification decisions: all of the ringing language in the Court's initial opinion sounded in antisubordination. The Court's attempt to support the

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Involved in Community Schools*, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1385–91 (2008).

76. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007) (Roberts, C.J., announcing the judgment of the Court). Somewhat earlier, the Court quotes from the second opinion in the *Brown* litigation, the remedial decision handed down a year later. *See id.* at 2765 (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955)). For a discussion of that reference, see *infra* text accompanying notes 83–84.

77. *Parents Involved*, 127 S. Ct. at 2767 (alteration in original) (quoting Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954)).

78. *Id.*

79. *Brown I*, 347 U.S. at 494 (emphasis added) (quoting a lower court opinion).

80. *Id.*

anticlassification principle by relying on the Court's second opinion in *Brown*—the 1955 remedial opinion often referred to as *Brown II*[81] is even more disingenuous. In concluding that "the Equal Protection Clause 'protect[s] *persons*, not *groups*,'"[82] Chief Justice Roberts wrote that

> [t]his fundamental principle goes back, in this context, to *Brown* itself. See *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis" (emphasis added)).[83]

But the quoted language, taken in context, was not addressing the nature of the plaintiffs' rights; rather it was focusing on how to balance the plaintiffs' right to attend desegregated schools "as soon as practicable"—the language the decision in *Parents Involved* omits by using ellipses—against the school systems' interests in managing the transition to constitutional compliance.[84] Whether the plaintiffs' "personal interest" stems from an anticlassification principle or a group-disadvantaging principle is beside the point. *Brown II* was a remedial opinion.

Given that the language in the *Brown* opinions provided little ammunition for the Court's position, Chief Justice Roberts's opinion and Justice Clarence Thomas's concurrence took another extraordinary step in their attempt to claim ownership of *Brown*: they relied not on what the *Court* said but on what counsel for the plaintiffs had argued. Asserting that the answer to the question "which side is more faithful to the heritage of *Brown* . . . could not have been clearer,"[85] the Chief Justice quoted from the oral argument:

> As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause

81. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

82. *Parents Involved*, 127 S. Ct. at 2765 (Roberts, C.J., announcing the judgment of the Court) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

83. *Id.*

84. *See Brown II*, 349 U.S. at 300.

85. *Parents Involved*, 127 S. Ct. at 2767 (Roberts, C.J., announcing the judgment of the Court).

> of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[86]

He saw "no ambiguity in that statement": "What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?"[87]

But as Justice Holmes long ago remarked, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[88] The lawyer who made the statement on which the Chief Justice relied, Robert Carter, was speaking in 1952 in the context of pervasive Jim Crow, under which racial assignment produced racially segregated schools that had the purpose and effect of denying black children the educational opportunities the majority provided to itself. He and all the lawyers for the plaintiffs in the consolidated cases before the Court were either staff attorneys or cooperating counsel for the National Association for the Advancement of Colored People, a group long dedicated not to abstract principles of colorblindness but to full civic integration of black Americans.[89] When Carter, who is now a

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86. *Id.* at 2767–68 (quoting Transcript of Oral Argument at 7, *Brown I*, 347 U.S. 483 (No. 1)).

87. *Id.* at 2768. Justice Thomas was even more lavish in his quotations from and citations to the oral arguments and briefs in *Brown*. *See id.* at 2782–86 (Thomas, J., concurring).

88. Towne v. Eisner, 245 U.S. 418, 425 (1918).

89. Justice Thomas asserted the opposite:

> Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." And my view was the rallying cry for the lawyers who litigated *Brown*.

*Parents Involved*, 127 S. Ct. at 2782 (Thomas, J., concurring) (citations omitted) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Justice Thomas cited several of the briefs filed in *Brown* as well as Judge Constance Baker Motley's statement at the Court's memorial proceedings for Justice Thurgood Marshall that the "Bible" to which Marshall had turned as a lawyer was Justice Harlan's dissent. *Id.* But as Professor Goodwin Liu shows, Harlan's view is far more nuanced than the anticlassification view propounded by Justice Thomas. *See* Liu, *supra* note 10, at 55–60 (proposing that Justice "Harlan's declaration that '[o]ur Constitution is color-blind' does not clearly state a categorical principle against classification by race" but rather means that "the Constitution does not permit government to validate or perpetuate a race-based system of social hierarchy").

And as Professor Liu also emphasizes, although Justice Harlan's ringing phrase still has resonance, his dissent in *Plessy* is hardly a model for contemporary equal protection law. *See id.* at 54–56 (noting that Harlan "besmirched" his dissent by "attempting to underscore the

distinguished federal judge, was asked for his reaction to the Chief Justice's reliance on his oral argument, he responded sharply: "'All that race was used for at that point in time was to deny equal opportunity to black people,' Judge Carter said of the 1950s. 'It's to stand that argument on its head to use race the way they use [it] now.'"[90]

The message of *Brown* for the Chief Justice and his three conservative colleagues is a symmetrical one: "Before *Brown*," the Court explained, "schoolchildren were told where they could and could not go to school based on the color of their skin."[91] As Justice Stevens noted in dissent, there is a troubling deracination to that account, which bears a startling resemblance to Wechsler's account of his lunch with Charles Hamilton Houston:[92]

> This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The

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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" (quoting *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting))). And whatever the lawyers who litigated *Brown* may have thought about that one phrase from Harlan's dissent, surely they would not have embraced the first three sentences of the paragraph in which it appears:

> 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.

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

90. Adam Liptak, *News Analysis: The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, at A24. The other surviving lawyer who had argued for the schoolchildren in the consolidated cases "called the chief justice's interpretation 'preposterous.'" *Id.*

As I suggest elsewhere, Judge Carter's reaction is reminiscent of the classic scene in Woody Allen's *Annie Hall* in which Allen's character

> is standing in line outside a movie theater and overhears the man behind him spouting off about Marshall McLuhan's views of television. [Allen] declares: "You don't know anything about Marshall McLuhan's work," to which the man replies, "Really? Really? I happen to teach a class at Columbia called TV, Media and Culture, so I think that my insights into Mr. McLuhan, well, have a great deal of validity." At that moment Woody says, "Oh, that's funny, because I happen to have Mr. McLuhan right here," and McLuhan says, "I heard, I heard what you were saying. You, you know nothing of my work. How you ever got to teach a course in anything is totally amazing."

Karlan, *supra* note 75, at 1395–96.

91. *Parents Involved*, 127 S. Ct. at 2768 (Roberts, C.J., announcing the judgment of the Court).

92. *See* Wechsler, *supra* note 3, at 34 (observing, based on the difficulty Wechsler and Houston, an African American, encountered when trying to have lunch in a segregated District of Columbia, that "the Southern white also pays heavily for segregation").

> 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.[93]

For Justice Stevens, "a rigid adherence to tiers of scrutiny"—a hallmark of the anticlassification approach—"obscures *Brown*'s clear message."[94]

Although Justice Breyer's dissent, like the Chief Justice's opinion, ends with a discussion of "the hope and promise of *Brown*,"[95] Justice Breyer, unlike the Chief, anchored his opinion in the original animating concern of the Fourteenth Amendment. Rather than citing *Brown* itself, he cited the two cases on which the *Brown* Court had relied for its understanding that the "basic objective" of the Equal Protection Clause was to "bring into American society as full members those whom the Nation had previously held in slavery."[96] By looking back before *Brown*, Justice Breyer was able to see that *Brown* was directed at policies that did far more than simply classify children on the basis of skin color; "they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination."[97]

In his written dissent, Justice Breyer then referred to *Brown* as "this Court's finest hour" because *Brown* challenged and helped to change that history.[98] Perhaps remembering Winston Churchill's famous use of that phrase at the beginning of the Battle of Britain,[99]

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93. *Parents Involved*, 127 S. Ct. at 2798 (Stevens, J., dissenting) (alteration in original).

94. *Id.* at 2799.

95. *Id.* at 2836 (Breyer, J., dissenting).

96. *Id.* at 2815 (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873)); *see also id.* ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] . . . we mean the freedom of the slave race." (quoting *The Slaughter-House Cases*, 83 U.S. at 71)); Strauder v. West Virginia, 100 U.S. 303, 306 (1880) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy.").

97. *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting). Thus, it was "a cruel distortion of history" to "equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined)." *Id.*

98. *Id.*

99. Winston S. Churchill, Their Finest Hour, Speech Before the House of Commons (June 18, 1940), *in* BLOOD, SWEAT AND TEARS 305, 314 (1941).

> I expect that the Battle of Britain is about to begin. Upon this battle depends the survival of Christian civilization. Upon it depends our own British life, and the long continuity of our institutions and our Empire. The whole fury and might of the enemy

when things looked especially dark, Justice Breyer, in his oral dissent, elaborated, with respect to the majority's treatment of the precedent since *Brown*, that "[i]t is not often in the law that so few have so quickly changed so much."[100] In *Parents Involved*, the majority claimed *Brown* for a tamed and minimal view of the Fourteenth Amendment as simply a bar on race-based classifications and not a promise of full civic inclusion.

* * *

In the dark comedy, *The Merchant of Venice*, Antonio warns "Mark you this, Bassanio— / The devil can cite Scripture for his purpose."[101] *Brown* is, in an important sense, our national scripture. But in *Parents Involved*, the Court wrenched *Brown* free of its original context. It adopted a reading of *Brown* that would have been unrecognizable to the participants whose words it invoked, and in service of a vision of deracinated neutrality that *Brown*'s critics, and not its champions, had advanced. Responding to the Chief Justice's invocation of *Brown* to support his claim that "history will be heard,"[102] Justice Stevens trenchantly quoted back to the Chief his

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> must very soon be turned on us. Hitler knows that he will have to break us in this Island or lose the war. If we can stand up to him, all Europe may be free and the life of the world may move forward into broad, sunlit uplands. But if we fail, then the whole world, including the United States, including all that we have known and cared for, will sink into the abyss of a new Dark Age made more sinister, and perhaps more protracted, by the lights of perverted science. Let us therefore brace ourselves to our duties, and so bear ourselves that, if the British Empire and its Commonwealth last for a thousand years, men will still say, "This was their finest hour."

*Id.*

100. The sentence does not appear in Justice Breyer's written dissent, but can be heard in the dissent he read from the bench. Oral Opinion of Justice Breyer at 19:03, 32:54–33:03, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion; *cf.* Winston S. Churchill, The War Situation I, Speech Before the House of Commons (Aug. 20, 1940), *in* BLOOD, SWEAT AND TEARS, *supra* note 99, at 341, 347–48.

> The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge and mortal danger, are turning the tide of the World War by their prowess and by their devotion. Never in the field of human conflict was so much owed by so many to so few.

*Id.*

For an extensive discussion of the function of oral dissents, with particular emphasis on Justice Breyer's dissent in *Parents Involved*, see Lani Guinier, *The Supreme Court, 2008 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 6, 7–13 (2008).

101. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act I, sc. 3.

102. *Parents Involved*, 127 S. Ct. at 2767 (Roberts, C.J., announcing the judgment of the Court).

dissenting statement earlier in the Term that "[i]t is a familiar adage that history is written by the victors."[103] If Americans are going to live in a world of *Brown* originalism, then it is at least worth remembering that *Brown* rested, not on the forms of neutrality that Herbert Wechsler and the *Parents Involved* majority embraced, but on a far richer vision of an integrated society.

103. *Id.* at 2798 (Stevens, J., dissenting) (quoting Brewer v. Quarterman, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting)).