

## *Brown v. Board of Education* 50 Years Later: What Makes for Greatness in a Legal Opinion?

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### I. INTRODUCTION

Each entering class at Loyola University Chicago School of Law is required to take an intensive week-long introductory course that is called “Fundamentals of the American Legal System.” Professor Henry Rose and I are in charge of the session entitled “The Role of Lawyers in Society.” The purpose of this session is to focus beginning students on the positive impact that resourceful, committed lawyers can have on the greater society. To illustrate this point, Professor Rose and I have the students read *Plessy v. Ferguson*<sup>1</sup> and *Brown v. Board of Education*<sup>2</sup> in tandem. In *Plessy*, decided in 1896, the Supreme Court held that the Fourteenth Amendment guarantee of equal protection was not violated by a Louisiana statute that required railroad companies to maintain “separate-but-equal” accommodations for Blacks and Whites.<sup>3</sup> In support of what came to be known as the “separate-but-equal” doctrine, the *Plessy* Court noted that the very Congress that had approved the Fourteenth Amendment had itself *required* segregation of the races in the District of Columbia public schools.<sup>4</sup> In *Brown*, some six decades later and some fifty years ago, the Supreme Court reversed course by

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1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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

3. *Plessy*, 163 U.S. at 548–52.

4. *Id.* at 544–45 (citing *Roberts v. City of Boston*, 5 Cush. 198 (1850)). “It was held [in *Roberts v. City of Boston*] that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes and colors . . . . Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia . . . .” *Id.* at 544–45.

holding that state-sanctioned racial segregation of public schools violated the equal-protection principle. In the words of the Court: “[w]e conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>5</sup>

Before I discuss *Brown* with the first-year students, we show them the upbeat documentary, *The Road to Brown*,<sup>6</sup> which praises the *Brown* decision to the high heavens in the course of laying well-deserved accolades at the feet of the hearty corps of NAACP Legal Defense Fund Lawyers (Charles Hamilton Houston and Thurgood Marshall, in particular) who so ably argued *Brown*.<sup>7</sup> In the course of lecturing our first-year students about *Brown* and the judicial process, I add to the stream of encomia flowing from the documentary by invoking Norman Amaker’s<sup>8</sup> imagery of *Brown* setting off “a chain reaction in society equivalent to that of nuclear fission.”<sup>9</sup> This explosion, I go on to say, ended in the absolute obliteration of the shanties of American apartheid that defiled the legal landscape of this country for far too long. Next I quote the following observation by Theodore Shaw, a lawyer currently with the NAACP Legal Defense Fund: “[f]or African-Americans, [*Brown*] divides American history into a B.C. and an A.D.”<sup>10</sup>

Indeed, for many (including me) *Brown* has become an honest-to-goodness “American icon.”<sup>11</sup> This is not to say, however, that over the

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5. *Brown*, 347 U.S. at 495.

6. THE ROAD TO BROWN: THE UNTOLD STORY OF THE MAN WHO KILLED JIM CROW (California Newsreel 1990).

7. See *id.* (chronicling the history of Jim Crow laws and praising how Charles Hamilton Houston utilized his legal education to institute social justice and to train Thurgood Marshall and the NAACP to “kill Jim Crow”). For a book that masterfully details the work done by Charles Hamilton Houston, Thurgood Marshall, and the other attorneys whose labors culminated in the *Brown* case, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (1976).

8. Norman C. Amaker was a legend in the Civil Rights Movement who graced the classrooms of the Loyola University Chicago School of Law for almost twenty-five years. For tributes to Professor Amaker, see Drew Days III, *A Tribute to Norman Amaker*, 33 LOY. U. CHI. L.J. 539 (2002), and Neil G. Williams, *Remarks Upon Accepting the First Norman C. Amaker Award of Excellence on January 24, 2002*, *id.* at 537.

9. Norman C. Amaker, *Life, History and the Constitution in the Struggle for Racial Equality*, in BLESSINGS OF LIBERTY: THE CONSTITUTION AND THE PRACTICE OF LAW 11 (A.L.I./A.B.A. Committee on Continuing Professional Education, June 1988).

10. Quoted in Adam Cohen, *The Supreme Struggle*, N.Y. TIMES, Jan. 18, 2004, at 4A-24.

11. See, e.g., Jordan Steiker, *American Icon: Does it Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 305 (2002) (book review) (citing book editor’s view that *Brown* has “achieved . . . [an] iconic status”); Ronald S. Sullivan Jr., *Multiple Ironies: Brown at 50*, 47 HOW. L.J. 29, 29–30 (2003) (noting *Brown* as a “beloved legal and political icon”).

years the *Brown* decision has been free of controversies and criticism,<sup>12</sup> although I must admit that for purposes of my introductory session I steer away from those controversies and criticisms of *Brown*. After all, one of the goals of the session is to get neophyte law students in a positive frame of mind regarding the study and practice of law. Therefore, I now welcome the opportunity to delve into some of these purported shortcomings of *Brown*. For the sake of organization, I will first discuss those criticisms of *Brown* that are leveled most directly at the opinion itself and its reasoning.<sup>13</sup> I will establish a framework for discussing criticisms of the case by means of a brief overview of the Court's reasoning in *Brown*. Then I will briefly discuss the perceived shortcomings regarding *Brown*'s legacy.<sup>14</sup>

The Court assumed with regard to the four cases decided under the *Brown* moniker<sup>15</sup> that the Black "schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."<sup>16</sup> Accordingly, were the Court to apply the *Plessy* "separate-but-equal" analysis only to those tangible factors, the plaintiffs would have been granted no relief.<sup>17</sup> In line with the NAACP Legal Defense Fund's carefully crafted strategy, Chief Justice Warren characterized the question before the Court as follows: "[d]oes segregation of children in public schools solely on the basis of race, even though the physical

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12. See, e.g., Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 803 n.40, 804 n.44 (2002) (describing some of the political and jurisprudential criticisms of *Brown*); Sullivan, *supra* note 11, at 32-35 (discussing the problematic nature of the "vocabulary of black inferiority" in *Brown*); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959) (describing some of the arguments advanced by *Brown*'s critics in the 1950s and questioning whether "there is a basis in neutral principles" for the holding in *Brown*). See generally JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 68 (2001) (summarizing some of the concerns expressed by liberal and conservative critics of *Brown*).

13. See *infra* Part II (discussing criticisms that the *Brown* opinion rests on the assumption that Blacks are inherently inferior).

14. See *infra* Parts V and VI (addressing criticisms of the current education system as a result of the two *Brown* opinions).

15. *Briggs v. Elliott*, 348 U.S. 210 (1954) (originating in the state of South Carolina), *Davis v. County Sch. Bd. of Prince Edward County*, 348 U.S. 210 (1954) (originating in the state of Virginia), and *Gebhart v. Belton*, 348 U.S. 886 (1954) (originating in the State of Delaware), were consolidated with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (originating in the state of Kansas). Furthermore, the same day it issued *Brown*, the Court decided *Bolling v. Sharpe*, 347 U.S. 497 (1954), a case in which it invoked the Fifth Amendment's Due Process Clause to outlaw segregation in the District of Columbia school system.

16. *Brown*, 347 U.S. at 492.

17. See *id.* (stating that instead of focusing on tangible factors the Court "must look instead to the effect of segregation itself on public education").

facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”<sup>18</sup> The Court, therefore, felt the need to take into account intangible factors.<sup>19</sup> In the course of this examination, the Court emphasized the importance of education in modern society.<sup>20</sup> According to the Court:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.<sup>21</sup>

The intangible harm cited by the Court has been the focal point for much of the criticism of the case. Using words destined for controversy,<sup>22</sup> the Court went on to reason that state-sponsored segregation harmed African-American children by generating in them “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.”<sup>23</sup>

Chief Justice Warren then proceeded to quote findings from the opinion of the three judges who felt then-existing law compelled them to rule against the *Brown* plaintiffs when the case was heard in federal district courts, even though the judges had grave misgivings about segregation’s effect on Black children:<sup>24</sup>

Segregation of white and colored children in public schools has a detrimental effect on the colored children. The impact is greater when it has the sanction of 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.

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18. *Id.* at 493.

19. *Id.* (citing *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950)). In *McLaurin*, the Court considered intangible factors such as a student’s “ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” *Id.*

20. *Brown*, 347 U.S. at 493. Stating that:

Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

*Id.*

21. *Id.*

22. See, e.g., ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 214 (2002) (describing controversy over *Brown*’s use of social science evidence of psychological harm to black school children); Sullivan, *supra* note 11, at 32–38 (criticizing the “vocabulary of black inferiority” in *Brown* and *Plessy*).

23. *Brown*, 347 U.S. at 494.

24. The *Brown* case, originating in Kansas, was decided by a three-judge district court panel. *Id.* at 486 n.1.

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.<sup>25</sup>

In distinguishing *Plessy*, the Supreme Court noted that “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.”<sup>26</sup> Chief Justice Warren supported the latter observation with the famous (some might say infamous) footnote eleven.<sup>27</sup> The first authority cited in footnote eleven was a study done by Kenneth and Mamie Clark, two African-American psychologists.<sup>28</sup> In the study, the Clarks showed Southern black children pictures of dolls of various hues.<sup>29</sup> They would then ask the children questions such as which of the dolls were “nice” or which of the dolls were “bad.”<sup>30</sup> Most of the

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25. *Id.* at 494 (parenthesis in original).

26. *Id.* It is after this sentence that footnote 11 is inserted. *Id.* Footnote 11 includes citations to six social science studies generated in the years ranging from 1944–1952 regarding how Blacks and children are negatively impacted by environmental factors such as segregation. See Mody, *supra* note 12, at 802 n.33 (describing scope of six studies). Cf. KLUGER, *supra* note 7, at 354 (describing Clark expert testimony in *Briggs v. Elliot* (one of the *Brown* cases) in which Kenneth Clark concludes that segregation had negative effects on both “victims of segregation” and on the segregating group).

27. *Brown*, 347 U.S. at 494 n.11. See COTTROL ET AL., *supra* note 22, at 214 (noting that critics of the Court’s use of controversial social science evidence in footnote 11 actually helped the Court resolve an issue older than *Plessy*); KLUGER, *supra* note 7, at 706–07 (detailing how Justice Warren “thought the point [footnote 11] made was the antithesis of what was said in *Plessy*” but how the sources he listed “provoked at least mild concern among several members of the Court” and how the need not to offend “seemed to make the inclusion of footnote #11 forceless and therefore gratuitously obnoxious”); Mody, *supra* note 12, at 801 (quoting proposition that footnote 11 is perhaps “the most dispute-laden footnote in American constitutional law”).

28. See *Brown*, 347 U.S. at 494 n.11 (citing K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Mid-century White House Conference on Children and Youth 1950)); Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 602–11 (Eleanor E. Maccoby et al. eds., 3d ed. 1958) (publishing formal article in which Clarks describe their research); KLUGER, *supra* note 7, at 353–57 (describing Clark expert testimony in *Briggs v. Elliot* in which Clark concludes that segregation had negative effects on both “victims of segregation” and on the segregating group).

29. Clark & Clark, *supra* note 28, at 602. See COTTROL ET AL., *supra* note 22, at 124–25 (summarizing Clark’s study *Segregation as a Factor on the Racial Identification of Negro Pre-School Children* in which the black dolls were consistently chosen as the “bad” doll and the white dolls as the “nice” dolls); KLUGER, *supra* note 7, at 353–57 (detailing the testimony of Kenneth Clark during which he described the testing method of showing dolls to children, asking questions, and then concluding that segregation had a detrimental effect on black children); PATTERSON, *supra* note 12, at 43–45 (recounting the influence of Clark’s studies among lawyers and how Clark performed the same test, only with drawings instead of dolls, to verify his initial findings before he testified at the district court case in Charleston).

30. Clark & Clark, *supra* note 28, at 602. See PATTERSON, *supra* note 12, at 43–44

Black children would choose pictures of White dolls in relation to positive characteristics and pictures of Black dolls in relation to negative characteristics.<sup>31</sup> Based on these observations, Kenneth Clark reasoned that the self-image of Black children was being negatively impacted by segregation in the South.<sup>32</sup>

## II. CRITICISMS OF THE *BROWN I* OPINION

Over the years many critics have faulted *Brown* for of the Court's apparent reliance on the Clark research in finding constitutional harm.<sup>33</sup> Some sociologists have questioned the methodology that the Clarks used in their research.<sup>34</sup> Since I am not a social scientist, I will not dare venture to address those concerns. But I will deal with several of the critiques of the legal methodology employed by the Court in *Brown*. Not surprisingly, arch-segregationists quickly and eagerly seized the

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(describing methodology used by the Clarks); KLUGER, *supra* note 7, at 354 (summarizing expert testimony by Kenneth Clark in *Briggs v. Elliott* (one of the *Brown* cases) in which he described his research).

31. Clark & Clark, *supra* note 28, at 608–11; see PATTERSON, *supra* note 12, at 43–44 (summarizing the results of Clark's research); COTTROL ET AL., *supra* note 22, at 124–25 (describing Clark's research and findings); KLUGER, *supra* note 7, at 353–57 (summarizing Kenneth Clark's findings and expert testimony in *Briggs v. Elliott* (one of the *Brown* cases in which he described his)).

32. See KLUGER, *supra* note 7, at 354 (quoting expert testimony by Kenneth Clark in *Briggs v. Elliott* (one of the *Brown* cases) in which Clark cites consensus among social scientists "that segregation definitely has negative effects on the personalities of those individuals who are victims of segregation"). Clark goes on to say the following based on his research: "[T]he conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities." *Id.* See also PATTERSON, *supra* note 12, at 44 (also quoting language from Clark's testimony in *Briggs v. Elliott* to the effect that segregated Black school children had been "definitely harmed in the development of their personalities"); COTTROL ET AL., *supra* note 22, at 125 (observing Clark concluded his studies were proof of "self-rejection, one of the negative effects of racism on children at the early stages of their development").

33. See PATTERSON, *supra* note 12, at 44–45 (summarizing criticisms of Kenneth Clark's findings and methodology); COTTROL ET AL., *supra* note 22, at 214 (describing concerns by some that the Court's "reliance on social science evidence left the school desegregation decision on shaky constitutional grounds, changeable with new social science data or methodologies"); KLUGER, *supra* note 7, at 356–57 (describing arguments that support proposition that Kenneth Clark's "findings were, at the very least, highly ambiguous and open to sharply varying interpretations"); *Id.* at 710 (quoting Alexander Bickel as saying "It was a mistake to do it in this way. If you're going to invoke sociology and psychology, do it right. Invoking Kenneth Clark was a mistake because of the vulnerability of the doll tests."); Sullivan, *supra* note 11, at 46 (arguing that the legal theory drove the social science conclusions in Clark's studies, as opposed to the reverse).

34. See KLUGER, *supra* note 7, at 355–56 (describing criticisms of Clark research by prominent social scientists); PATTERSON, *supra* note 12, at 44–45 (summarizing criticisms of Clark research and methodology).

opportunity to use the Clark studies as ammunition for attacking *Brown*.<sup>35</sup> However, Herbert Wechsler, one of his generation's most respected legal scholars, famously lamented that the Court had allowed the freedom-of-association rights of Whites to be trumped by something other than what Professor Wechsler would deem a "neutral principle."<sup>36</sup> In response to Professor Wechsler's misgivings, I echo Norman Amaker's observation that "never in our history as a people have any of us, black or white, been 'neutral' on the matter of race. It has been, and remains, the great overriding issue throughout all our history, in all our law, in all our institutions."<sup>37</sup>

Interestingly, some of the most vitriolic complaints have come from within the Black community.<sup>38</sup> This was the case even as the NAACP Legal Defense Fund was making the decision to present the Clark studies to courts hearing desegregation cases.<sup>39</sup> With regard to the use of the Clark studies, the venerable William Coleman, then part of the Legal Defense Fund team, is said to have exclaimed: "Jesus Christ. Those damned dolls! I thought it was a joke."<sup>40</sup> Shortly after the issuance of the *Brown* decision, the great writer Zora Neale Hurston took offense at what she perceived to be *Brown*'s assumption that Black institutions are inherently inferior.<sup>41</sup> She viewed the *Brown* decision itself as stigmatizing and insulting to those who taught at and ran Black schools.<sup>42</sup> Commenting on the *Missouri v. Jenkins*<sup>43</sup> litigation, Justice

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35. See PATTERSON, *supra* note 12, at 69 (describing attacks on *Brown*'s use of social science research by "defenders of segregation"); Mody, *supra* note 12, at 803 n.40 (citing sources in which segregation proponents argued against *Brown*'s result in part because of Court's reliance on social science evidence).

36. Wechsler, *supra* note 12, at 17, 32–34 (questioning whether the judgment "really turned on the facts").

37. Norman C. Amaker, *Remark: The Haunting Presence of the Opinion in Brown v. Board of Education*, 20 S. ILL. U. L.J. 3, 6–7 (1995) (responding to commentator Herbert Wechsler's critique of the *Brown* decision as lacking in neutrality).

38. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); Sullivan, *supra* note 7, *passim*; COTTROL ET AL., *supra* note 22, at 44–45 (summarizing Black critics' concerns that "[s]tudies such as Clark's . . . aimed to demonstrate the nasty consequences of White racism in American society but had the unintended effect of demeaning black people").

39. COTTROL ET AL., *supra* note 22, at 44 (noting that Jack Greenberg, Spottswood Robinson, and William Coleman questioned Thurgood Marshall's decision to introduce the Clark research into evidence).

40. PATTERSON, *supra* note 12, at 44.

41. *Id.* at xxvi–xxvii (describing Hurston's views and quoting her concerns that "forcible association" would undermine the "self-respect" of Black people). An African-American who wrote four novels and two books of folklore, Hurston is regarded as one of the pre-eminent writers of the twentieth century. See <http://authors.aalbc.com/zoraneal.htm> (last visited Sept. 12, 2004) (summarizing Hurston's life and literary accomplishments).

42. PATTERSON, *supra* note 12, at 44. (stating that Zora Neale Hurston expressed reservations

Clarence Thomas followed in the Zora Neale Hurston tradition by taking umbrage at the notion that “any school that is black is inferior, and that blacks cannot succeed without the company of whites.”<sup>44</sup> Justice Thomas went on to say, “[t]he theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development . . . not only relies upon questionable social science research rather than constitutional principle but it also rests on an assumption of black inferiority.”<sup>45</sup> In an article recently published in the *Howard Law Review*, Ronald Sullivan continues the broadside by Black critics, arguing that “[a]ny benefits . . . derived from the *Brown* holding must be measured against its premises—the vocabulary of black inferiority. For all of *Brown*’s victories, we are left to ask: at what cost?”<sup>46</sup> As far as Sullivan and the other Black detractors of *Brown* are concerned, “the Court and the litigants made the wrong choice . . . . [T]he Court could and should have reached the same conclusion, without reliance on the vocabulary of black inferiority.”<sup>47</sup>

To address *Brown*’s perceived shortcomings, several prominent law professors in recent years have undertaken to rewrite *Brown* the way they think it should have been written.<sup>48</sup> In 2001, for example, Professor Jack Balkin edited a book in which nine leading scholars engaged in the enterprise of “rewriting” the *Brown* decision.<sup>49</sup> Admittedly, *Brown* is by no means perfect. One of the great advantages we exercise as academics is the freedom to imagine the world of law as it should be, free of the bothersome limitations that judges and

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about the decision at the time it was rendered).

43. 515 U.S. 70 (1995).

44. PATTERSON, *supra* note 12, at 200–01.

45. *Id.* at 201.

46. Sullivan, *supra* note 11, at 49.

47. *Id.*

48. In fact, an example of this type of undertaking appears in this issue of the Loyola University Chicago Law Journal. See generally Kevin Brown, *The Hypothetical Opinion in Grutter v. Bollinger from the Perspective of the Road Not Taken in Brown v. Board of Education*, 36 LOY. U. CHI. L.J. \_\_\_\_\_ (2004) (drafting an “opinion” of *Brown* the way he felt it should have been written). [NOTE TO HALLORAN: THIS WILL NEED TO BE FILLED IN ONCE YOU HAVE ALL THE PAGE NUMBERS SET -cmcs]

49. WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) [hereinafter WHAT BROWN SHOULD HAVE SAID]. The editor states that the point of the exercise was “to rethink the meaning of America’s constitutional commitment to equality in our time.” *Id.* at x. Later in the volume the editor goes on to observe “[t]he underlying theoretical justification of *Brown* is important fifty years later because of the ongoing controversy over whether the underlying principle of constitutional equality is anti-classification or anti-subordination.”

practicing lawyers often have to confront in the real world.<sup>50</sup> Regarding the various scholarly efforts to rewrite *Brown*, one wonders whether any of these admittedly well-crafted, beautifully written opinions that (for the most part) oh-so-assiduously avoid relying on theories of psychological harm to Black school children<sup>51</sup> would have garnered the votes of all nine Justices in 1954 America.<sup>52</sup>

By one head count, the *Brown* plaintiffs would have prevailed by a bare majority (five to four) if the case had been decided immediately after oral arguments first took place in December 1952.<sup>53</sup> Justice Felix Frankfurter intuited that if there were any prayer that the Court's decision would be obeyed in the South, then the decision needed to be as close to unanimous as possible.<sup>54</sup> In order to buy time, Justice Frankfurter convinced his colleagues to hear new sets of oral arguments during the next term directed to the vexing question as to what the intent of the drafters of the Fourteenth Amendment may have been regarding

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50. See Amaker, *supra* note 37, at 13–14 (describing the “wide gulf between the real life responsibility of a judge to write an opinion deciding momentous constitutional questions” and “an opinion written in hindsight without such responsibility,” but noting “this does not mean that opinions that decide our most important constitutional questions are beyond criticism”).

51. See Sullivan, *supra* note 11, at 37–38 (praising efforts by academics to re-write *Brown* in ways that avoid relying on psychic harm suffered by Black school children); WHAT BROWN SHOULD HAVE SAID, *supra* note 49, at 52 (editor noting that “[m]any of the contributors to this book eschew Warren’s tack of relying on social science evidence” and that he chose to say “nothing about these studies, relying instead on the history of Jim Crow as evidence that segregation was a subordinating practice”). But see WHAT BROWN SHOULD HAVE SAID, *supra* note 49 at 209 (explaining why John Hart Ely, in his rewrite of *Brown*, chose to retain *Brown*’s language regarding harm to the “hearts and minds” of Black children in his rewrite of the opinion, but avoided relying on the sources in footnote 11 because they “either went entirely to a different point . . . or were methodologically unsound on their face . . .”); *id.* at 147 (noting that Catherine MacKinnon, in her rewrite of *Brown*, acknowledged that “injuries to equality typically do inflict, inter alia, psychic harm” but argued that the “violation of law . . . lies not in the children’s response to the state practice but in the practice itself”).

52. See Amaker, *supra* note 37, at 3, 14 (emphasizing that the 1954 Court was composed of “white males of diverse background and imperfect understanding” and noting the need for “criticism [to] take into account the real world of the adversary process . . .”). Cf. WHAT BROWN SHOULD HAVE SAID, *supra* note 49, at 35 (describing Justice Warren’s goal of writing the opinion in a way that not even one of his colleagues, particularly one from the South, would write a dissent in the case).

53. See COTTRILL ET AL., *supra* note 22, at 163–65 (identifying the four likely dissenters as Chief Justice Vinson, and Justices Reed, Jackson, and Clark and describing the different considerations that probably would have spurred these Justices to vote against school desegregation had *Brown* been decided in the 1952 term); PATTERSON, *supra* note 12, at 56 (speculating on the political and social pressures that would have affected the decision of the Court had it chosen to act in 1952).

54. See COTTRILL ET AL., *supra* note 22, at 163 (explaining how anything less than a unanimous vote would invite uncertainty, recrimination or rebellion from the segregationist South).

school segregation and the proper role of the courts in addressing it.<sup>55</sup> After all, as had been noted in *Plessy*, the very Congress that approved the Fourteenth Amendment itself directed separation of Black and White children in the District of Columbia public school system.<sup>56</sup> Compounding the predicament of anyone who might want to predicate the *Brown* decision on the views of the drafters of the Fourteenth Amendment was the reality that in nineteenth-century America segregation was a common practice in many Northern school districts.<sup>57</sup> In September 1953, near the start of the Supreme Court's next term, an event happened that Frankfurter is reputed to have said proved the existence of God: Chief Justice Vinson, who scholars believe would have voted against the *Brown* plaintiffs, passed away.<sup>58</sup>

Earl Warren, the former Governor of California and a former vice presidential candidate, was named the new Chief Justice.<sup>59</sup> Fortunately, Chief Justice Warren was a supporter of the *Brown* plaintiffs, and he shared Justice Frankfurter's concerns that a less-than-unanimous decision would have a difficult time gaining public acceptance.<sup>60</sup> However, drafting an opinion that would garner the votes of all nine Justices was a daunting task.<sup>61</sup> Upon entering the 1953–54 term, there were still three Justices apparently poised to vote against the *Brown* plaintiffs.<sup>62</sup> Among the three likely holdouts was Justice Stanley Reed.<sup>63</sup> In the 1952–53 term, although Justice Reed, who resided with

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55. See *id.* at 143–44, 166–67 (listing the five questions submitted for re-argument and analyzing Justice Frankfurter's concerns with the application of the Fourteenth Amendment to school segregation).

56. See *Plessy v. Ferguson*, 163 U.S. 537, 545; COTTROL ET AL., *supra* note 22, at 147 (describing how John Davis emphasized the historical segregation of D.C. schools in his arguments on behalf of the defendants). *But see* WHAT BROWN SHOULD HAVE SAID, *supra* note 49, at 160–65 (discussing how Michael W. McConnell, in an opinion rewriting *Brown*, argued that debates and votes on the Sumner-Butler bill show that the Reconstruction-era Congress understood the Fourteenth Amendment to bar segregation).

57. See *Plessy*, 163 U.S. at 544–45; *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850) (upholding racial segregation in the Boston public-school system); COTTROL ET AL., *supra* note 19, at 17–18 (describing how *Roberts* laid the foundation for *Plessy* some 46 years later).

58. See COTTROL ET AL., *supra* note 22, at 145 (examining the impact of Chief Justice Vinson's sudden death and the appointment of his successor, Earl Warren); PATTERSON, *supra* note 12, at 57 (discussing the effect of Vinson's death on the outcome of the case).

59. See PATTERSON, *supra* note 12, at 59–60 (highlighting Warren's career and his moderately liberal political background which many African-Americans found appealing).

60. See COTTROL ET AL., *supra* note 22, at 174–75 (stating that if the decision would not be unanimous, Chief Justice Warren at least hoped he might gain a consensus on remedy).

61. See *id.* at 175–76 (describing the uncertainty of the Justices' intentions to write either concurring or dissenting opinions).

62. See *id.* at 163 (discussing the reasons Justices Reed, Jackson and Clark would vote against desegregation).

63. See *id.* at 163 (discussing Justice Reed's documented history of racial biases and his firm

his wife at Washington's Mayflower Hotel,<sup>64</sup> joined his brethren in unanimously upholding a statute that outlawed segregated restaurants in Washington, D.C.,<sup>65</sup> he is reported to have remarked: "Why—why, this means that a nigra can walk into the restaurant at the Mayflower and sit down to eat at the table right next to Mrs. Reed."<sup>66</sup> Given the range of the Justices' views on matters of race, the Court's unanimity in *Brown* verged on being a miracle.<sup>67</sup> *Brown* stands as a monument to Justice Frankfurter's sheer determination,<sup>68</sup> Chief Justice Warren's political acumen,<sup>69</sup> and the willingness of all nine Justices to compromise<sup>70</sup> so that the Court could speak with a unanimous voice in terms everyone could understand.<sup>71</sup>

### III. BROWN: THE RIGHT DECISION FOR THE RIGHT REASONS

On balance, given the practical realities of the time, I believe that the litigation strategy of the NAACP Legal Defense Fund, including its presentation of the psychological studies, was a *coup de maître*. I attempt to illustrate this point to entering first-year students by likening the efforts of the lawyers arguing *Brown* to those of the attorney in the movie *A Time to Kill*.<sup>72</sup> In that movie, a ten-year-old African-American character Carl Lee Hailey, played by Samuel L. Jackson, goes into a rage and guns down two white men who brutally raped and tortured his

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belief that the framers of the Constitution did not intend to require school integration).

64. PATTERSON, *supra* note 12, at 55.

65. See *D.C. v. John R. Thompson Co.*, 346 U.S. 100 (1953) (holding that where the federal Constitution is involved, legislation which prohibits discrimination on the basis of race in use of facilities serving a public function is within the state's police powers).

66. PATTERSON, *supra* note 12, at 55.

67. See Amaker, *supra* note 37, at 3 (observing that the *Brown* Court was composed of "white males of diverse background and imperfect understanding"); WHAT BROWN SHOULD HAVE SAID, *supra* note 49, at 35 (describing Warren's fear that a Southerner might write and dissent and observing that "a unanimous opinion seemed like an impossible dream until Warren became Chief Justice").

68. See COTTROL ET AL., *supra* note 22, at 163–75 (detailing Justice Frankfurter's behind-the-scenes efforts to procure unanimity in *Brown*).

69. See PATTERSON, *supra* note 12, at 60 (detailing how Chief Justice Warren went about mending "a badly fractured Court"); COTTROL ET AL., *supra* note 22, at 176 (explaining how Chief Justice Warren convinced Justice Reed to join the other Justices in making *Brown* unanimous).

70. See COTTROL ET AL., *supra* note 22, at 175–76 (detailing how Justice Jackson dropped plans to issue a concurring opinion and how Justice Reed eventually decided to join the other Justices in making *Brown* unanimous).

71. See KLUGER, *supra* note 7, at 699 (describing a memorandum in which Chief Justice Warren told other Justices that the opinion "should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory").

72. *A TIME TO KILL* (Warner Bros. 1996).

young daughter.<sup>73</sup> At the black defendant's instigation, his attorney turns the tide in his client's favor by having the all-White jury visualize the details of the circumstances surrounding the young girl's rape. In closing, the attorney says to the jury: "Now imagine that she was white."<sup>74</sup> At that point, the Carl Lee Hailey and his daughter cease in the eyes of the jury to be mere abstractions; they cease to be, paraphrasing the title of Ralph Ellison's masterpiece, *Invisible Men*, that is, outsiders subsisting at the periphery of the White world.<sup>75</sup> Rather, as reflected in their verdict, the people sitting on that jury now saw the Haileys as fellow members of the broader human community who had suffered a wrong with which they themselves could identify.<sup>76</sup>

Getting a court to take into account the human reality in which laws are applied is the essence of good lawyering. Flawed though it may have been, the evidence of psychological harm in *Brown* was instrumental in getting nine White males, some of whom were Southerners, steeped in the traditions, mores, and values of that region at that peculiar time in our history, to identify with the human toll exacted by school segregation.<sup>77</sup> This evidence may have caused the Justices to think how they might have felt if the victims in *Brown* had been their children or grandchildren.

Near the end of his life and his time on the Court, Justice Marshall no doubt was aware of the mounting criticism of the litigation strategy he had pursued in *Brown*.<sup>78</sup> In 1991, the Court decided *Board of Education of Oklahoma City v. Dowell*,<sup>79</sup> a case that set the stage for the dissolution of desegregation decrees across the country when it could be

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73. *Id.*

74. *Id.* (emphasis added).

75. See RALPH ELLISON, *INVISIBLE MAN* (1947) (chronicling the travels of the book's main character, a young, nameless Black man, as he experiences racial intolerance in America and comes to the realization that he is invisible in that people choose to look through him, either consciously or subconsciously).

76. See *A TIME TO KILL* (Warner Bros. 1996) (reflecting the response of the jury when persuaded to envision the crime as victimizing a person of their own race and noting responses of emotional identification with the defendant). Cf. Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill a Mockingbird*, 117 HARV. L. REV. 1682, 1697-98 (2004) (describing a passage in *TO KILL A MOCKINGBIRD* (1960) in which Atticus Finch sets "aside his 'arid professional detachment' to appeal directly to the hearts and emotions of the jury").

77. Cf. *supra* notes 62-70 (describing Justice Reed's initial reluctance to vote for school desegregation and how Chief Justice Warren eventually convinced him to join his brethren in making *Brown* unanimous); KLUGER, *supra* note 7, at 711-12 (stating that his clerk recalls that Justice Reed shed tears after *Brown* was read from the bench and that he considered *Brown* to be the most important case decided while he sat on the Supreme Court).

78. PATTERSON, *supra* note 12, at 201 (describing spectrum of Black critics who, in the 1990s, publicly challenged Marshall's integrationist approach).

79. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

shown that school districts had eliminated “vestiges” of prior acts of intentional discrimination to the extent “practicable.”<sup>80</sup> As it turned out, *Dowell* was the last school desegregation case that Justice Marshall would hear on the Court.<sup>81</sup> Indeed, he must have realized that *Dowell* would be his final opportunity to make an official pronouncement concerning the efficacy of his life’s work. Justice Marshall seized the occasion to fire a salvo at *Brown*’s critics by filing a dissent in which he brazenly quoted the passage from *Brown* that cited the psychological harm segregated schools caused Black children.<sup>82</sup> To the bitter end, Justice Marshall believed, in Norman Amaker’s words, that *Brown* was “decided right and for the right reasons.”<sup>83</sup>

#### IV. *BROWN* PLUS FIFTY:

##### A PERSONAL REFLECTION ON GROWING UP IN THE JIM CROW SOUTH

On a personal note, and perhaps at the risk of appearing anachronistic, I would like to share my own feelings about *Brown*’s assertion that the psyches of Black school children were imprinted with a sense of inferiority as a consequence of state-sponsored segregation. I was a Black child who grew up in the South during the segregation era, albeit (fortunately) at a point in time when old Jim Crow was drawing his last breaths. Until I was six years old, we stayed with my grandmother in Gainesville, Florida. I can remember “White only” and “Colored only” signs. Indeed, one of my earliest childhood memories is drinking particularly nasty tasting water from a “Colored” water fountain in Jacksonville, Florida. I remember thinking to myself whether the water would have been as pungent if I had been allowed to drink from the White fountain. Subsequently, after my family moved to Atlanta, I remember the anger that swept over my mother and father, both proud professionals, and the humiliation I felt, when on a trip between Gainesville and Atlanta, a road-side restaurant refused to serve my family. Even in 1960s Atlanta I remember suffering the indignity of Black people having to enter public buildings from side entrances and being forced to sit in specially cordoned-off balcony seats. I attended all-Black public elementary schools in Atlanta, and I still remember often having to use books, which from their markings, clearly were hand-me-downs from White elementary schools. In 1969, as a direct

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80. *Id.* at 249–50.

81. See PATTERSON, *supra* note 12, at 198 (stating that “Marshall’s dissent was his last opinion in a school case”).

82. *Dowell*, 498 U.S. at 252, 257–59 (Marshall, J. dissenting).

83. Amaker, *supra* note 37, at 5.

consequence of the *Brown* decision, I was afforded the opportunity to attend Grady High School, one of the premier predominantly White high schools in the Atlanta Public School System. Under a desegregation order, students who would be a member of the race that was in the majority at their neighborhood high school were given the option of transferring to a school in which their race would be in the minority. To be honest (and I am aware that this is not fashionable), although I certainly looked forward to the opportunity, I was scared at the prospect of attending Grady. I remember that some in my own community told me that although I was considered “smart” in an all-Black setting there was no way I could compete with the “smart” White kids at Grady. Even if I had not been told this, the world of segregation that surrounded me had already caused me to internalize this sentiment. In this regard, *Brown* and its footnote eleven capture my life experience with chilling accuracy. I entered Grady High School questioning my academic ability. When I graduated valedictorian several years later, I was finally liberated from this nagging self-doubt spawned by my early childhood confrontations with Jim Crow segregation.

Whatever its methodological faults may have been, the Clarks’ psychological research rings true to my personal life experiences.<sup>84</sup> However, I do not believe that by admitting that the state-sanctioned apartheid of my youth caused me to have doubts about myself and my abilities that I am somehow giving aid and succor to the notion of “black inferiority.”<sup>85</sup> I feel that honestly and openly grappling with these feelings of self-doubt is an affirmation of my humanity, not my inferiority. Accordingly, by accepting the NAACP team’s invitation to acknowledge the psychological harm suffered by many Black school children in the South, the Court was not saying African-Americans are in fact inferior. Rather, in my mind, the Court was seeing the children as full-fledged human beings who succumbed (as many people of flesh and blood predictably would) to the messages the system was intended to convey.<sup>86</sup>

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84. See *supra* notes 33–34 and accompanying text (describing criticisms of Clark research’s methodology). By no means am I claiming, to use Ronald Sullivan’s words, that segregated schools are “inevitably the cause of irreparable psychic harm to black children.” Sullivan, *supra* note 11, at 46. I’m sure that some of my contemporaries in segregated schools in the South were able to “resist feelings of inferiority.” *Id.* at 39. My perception, however, is that my response to the segregation surrounding me was not uncommon among those I knew growing up.

85. See Sullivan, *supra* note 11, at 49 (faulting the Court and the NAACP litigation team for using the “vocabulary of black inferiority”).

86. See WHAT BROWN SHOULD HAVE SAID, *supra* note 49, at 147. The book quotes Catherine MacKinnon in her rewrite of *Brown*, who stated:

[W]hat the children were found to have thought and felt was simply what the practice,

V. AFTERMATH OF *BROWN I* AND *BROWN II*:  
A TALE OF RESEGREGATION AND DISAPPOINTMENT

Some skeptics contend that *Brown* would have been better decided if the Court had focused more on the illegitimacy of the external practices involved and less on what went on inside the minds of Black school children.<sup>87</sup> Quite arguably, this is precisely what the Court proceeded to do in subsequent equal-protection cases.<sup>88</sup> With regard to claims of State-sanctioned discrimination, the Court's Fourteenth Amendment jurisprudence shifted away from a focus on stigmatic injuries to victims to a focus on the perspectives of school boards and other State officials.<sup>89</sup> As Professor Linda Greene points out, this "perpetrator" perspective provided the framework for what many regard as a retreat from the spirit of *Brown* by insisting that courts can only stay involved in school desegregation cases when segregation and inequities are proven to be the results of intentional acts of discrimination.<sup>90</sup> Arguably, one of Justice Marshall's purposes in filing his last school-case dissent in the *Dowell* case was to highlight the consequences of shifting from a focus on the victims' injuries to the perspectives of State officials.<sup>91</sup> In effect, Justice Marshall was taking the position that there would not have been an argument for dissolving the Oklahoma City decree if the Court had continued to focus, as it had in *Brown*, on the harm done to Black children when their schools remained racially

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in social reality, meant: they were assumed inferior, their presence contaminating, to white children. The children's response is also one measure of what that practice, in reality, did to them: it imposed inferior status and often inferior education on them in life.

*Id.*

87. See, e.g., *id.* at 147 (observing Catharine MacKinnon's thoughts in her rewrite of *Brown* arguing that "[t]he equality injury, hence the violation of law in these cases, thus lies not in the children's response to the state practice but in the practice itself"); Sullivan, *supra* note 11, at 51 (praising Drew Days's rewrite of *Brown* with the following observations: "Whether, or to what degree, blacks may have been psychically damaged is of no constitutional moment. The injury was the act, or even the attempt, to damage black children's status as citizens.").

88. See generally Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121, 134 (David Kairys ed., 1990) (discussing impact of Supreme Court's movement away from a victim's perspective to a perspective focused on the intent of perpetrators of discriminatory acts).

89. See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 240-51 (1991) (discussing the dissolution of desegregation decrees and its impact on schools in light of resegregation trends).

90. Linda Greene, *From Brown to Grutter*, 36 *LOY. U. CHI. L.J.* \_\_\_\_, \_\_\_\_ (2004). See generally Freeman, *supra* note 88, at 134 (discussing Supreme Court's movement towards a perspective that focuses on the intent of perpetrators of discriminatory acts). **HALLORAN: FILL IN THIS PAGE NUMBER – cmcs]**

91. See *Dowell*, 498 U.S. at 265 (Marshall, J., dissenting) (observing that state, local officials, and the Board played a role "in creating self-perpetuating patterns of residential segregation").

identifiable.<sup>92</sup> Accordingly, from Marshall's vantage point, it was not the *Brown* Court's focus on injury to victims that retarded the development of equal-protection law; instead, subsequent shortcomings in this area of law were attributable to the Court's movement away from a victim's perspective.<sup>93</sup>

Admittedly, with regard to *Brown*'s legacy in the area of school desegregation, there is plenty of room for legitimate dissatisfaction. W.E.B. Du Bois once opined: "theoretically the Negro needs neither segregated schools nor mixed schools. What he needs is Education."<sup>94</sup> *Brown* is a disappointment if its impact is measured in terms of the extent of school desegregation in the America of the early twenty-first century. Quite arguably, *Brown* is an even greater failure if its impact is measured in terms of the quality of the education being received by most children of color in this country today.<sup>95</sup> Frustratingly, school desegregation came about slowly.<sup>96</sup> And, when some progress was finally being made, the country's schools began resegregating in ways that were beyond constitutional reach.<sup>97</sup> The Supreme Court itself must bear some responsibility for these developments.<sup>98</sup> In 1955, the Court followed its initial opinion in *Brown* with a second opinion, popularly known as *Brown II*.<sup>99</sup> In *Brown II*, the Court crafted perhaps the most unfortunate oxymoron in the history of our judiciary: desegregation, it said, was to proceed with "all deliberate speed."<sup>100</sup> *Brown II*'s choice

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92. Cf. PATTERSON, *supra* note 12, at 197 (describing exchange between Justice Marshall and Solicitor General Kenneth Starr during *Dowell* oral arguments).

93. Cf. Freeman, *supra* note 88, at 134 (discussing implications of a victim's versus a perpetrator's approach).

94. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

95. See, e.g., Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1599 (2003). Noting that:

As Professor Orfield documents, to a very large degree, education in the United States is racially segregated. By any measure, predominantly minority schools are not equal in their resources or their quality. Wealthy suburban school districts are almost exclusively white; poor inner city schools are often exclusively comprised of African-American and Hispanic students.

*Id.* For a citation to one of Professor Orfield's recent studies, see *infra* note 102.

96. See COTTRILL ET AL., *supra* note 22, at 204 (noting that "[t]en years after the *Brown* decision, only 1.2 percent of black students in the South attended schools with whites"); PATTERSON, *supra* note 12, at 113 (noting similar numbers).

97. See PATTERSON, *supra* note 12, at 212-13 (noting that Supreme Court decisions, white flight, housing segregation, and other factors have contributed to the trend toward the resegregation of schools).

98. See CHEMERINSKY, *supra* note 95, *passim* (developing the argument that two major sets of Supreme Court cases have contributed to the resegregation of the nation's schools).

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

100. *Id.* at 301. See WHAT BROWN SHOULD HAVE SAID, *supra* note 49, at 213 (Cass Sunstein

of words was viewed by many Southern school boards as an open-ended invitation to resist, stall and delay—and resist, stall and delay they did.<sup>101</sup> As a result, school desegregation proceeded glacially in the decade after *Brown*. In 1964, ninety-eight percent of African-American school children in the South still attended schools that were all-Black.<sup>102</sup> James Patterson noted: “[v]irtually all southern black children who had entered the first grade in 1954 and who remained in southern schools graduated from all-black schools twelve years later.”<sup>103</sup> Even in 1968, over seventy-seven percent of southern Black children attended schools that were overwhelmingly populated by fellow students of color.<sup>104</sup> It was not until the Supreme Court decided cases such as *Green v. New Kent County*,<sup>105</sup> *Alexander v. Holmes County*<sup>106</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*<sup>107</sup> in the late 1960s and early 1970s that federal courts began aggressively pushing school districts, including some Northern districts, to desegregate.<sup>108</sup> As a consequence, integration statistics began to improve dramatically. By 1988, only twenty-four percent of the Black school children in the South attended intensely segregated schools (i.e., schools that were ninety percent or more minorities).<sup>109</sup> At that time, the progress being made in the South was considerably better than the progress being made in the rest of the country. In the Northeast, for example, forty-eight percent of Black children attended schools that were ninety percent or more minority in 1988,<sup>110</sup> whereas 41.8% of African-American public students in the Midwest were then attending intensely segregated schools.<sup>111</sup> Reflecting an erosion of the national commitment to

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quoting Justice Marshall in 1980s as saying, “After all these years, I’ve finally figured out what ‘all deliberate speed’ really means. S-l-o-w.”)

101. See PATTERSON, *supra* note 12, at 86–113 (discussing Southern resistance to desegregation).

102. GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 17 (Harvard Civil Rights Project, Jan. 2004).

103. PATTERSON, *supra* note 12, at 113.

104. See ORFIELD & LEE, *supra* note 102, at 20 tbl.8 (observing that in 1968, 77.8% of Black students in the South attended a school that was 90–100% minority, while 80.9% attended a school that was 50–100% minority).

105. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

106. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

107. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

108. ORFIELD & LEE, *supra* note 102, at 17–18 (noting that in these three decisions, “the Supreme Court decided that desegregation must be thorough, comprehensive, [and] immediate”); PATTERSON, *supra* note 12, at 185 (noting desegregation statistics).

109. ORFIELD & LEE, *supra* note 102, at 20 tbl.8.

110. See *id.* at 20 tbl.8 (observing the trends of Black students in minority schools throughout various regions in the United States).

111. *Id.*

desegregation, the percentage of Black students attending heavily segregated schools has risen since 1988.<sup>112</sup> By 2001, thirty-one percent of Southern Black children attended intensely segregated schools, while 51.2% and 46.8% of their Northern and Midwestern counterparts, respectively, attended schools in which ninety percent or more of the pupils were students of color.<sup>113</sup> In fact, about seventy percent of all African-Americans attending public schools in 2001 were at schools in which minority students constituted a majority of the student body.<sup>114</sup>

Impacting these statistics is a trend that saw many schools, which were formerly all-White, go through a period in which they were meaningfully integrated only to end up virtually all-Black.<sup>115</sup> This resegregation of schools is troubling for proponents of integration not because, as Justice Thomas has argued, integrationists are driven by the fallacy that a Black child needs to sit next to a White child in order to learn.<sup>116</sup> Rather, as demonstrated in a report by the Harvard Civil Rights Project, there is a persistent correlation between concentrations of poverty and the degree to which students of color are segregated in public schools.<sup>117</sup> In a perfect world one might expect that schools with the highest concentrations of poor students would receive the greatest infusion of resources.<sup>118</sup> It is not unusual for the opposite to be the case

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112. *See id.* (observing that in all five geographic regions of the United States, the percentage of Black students in minority schools has increased from 1988 to 2001).

113. *Id.* Except for Michigan, the State of Illinois at sixty-one percent had the nation's highest concentration of Black students attending intensely segregated schools in 2001-02. *Id.* at 27 tbl.11. Michigan had 62.7%. *Id.*

114. *See id.* at 19 tbl.7 (noting that in 2001, 30.2% of students in White majority schools were Black).

115. *See, e.g.,* Julian E. Barnes, *Unequal Education*, U.S. NEWS & WORLD REP., Mar. 22-29, 2004, at 68 (describing resegregation of schools in Washington, D.C.); Dahleen Glanton, *South Sees Integration Slip Into Past: From White to Mixed to Black*, CHI. TRIB., May 17, 2004, at 1 (describing a pattern of resegregation in a suburban-Atlanta school district); Celeste Smith, *When Busing Ends*, N.Y. TIMES, Jan. 18, 2004, at 4A-30 (describing how a school in the Charlotte public school system is coping with resegregation).

116. *See supra* note 44 and accompanying text (challenging the notion that Black schools are inherently inferior and stating that Blacks do not need to be in schools with White children to succeed).

117. ORFIELD & LEE, *supra* note 102, at 21-22.

118. *See* PATTERSON, *supra* note 12, at 217 (explaining that “[b]lack children . . . are more likely than white children to bring severe academic and behavioral problems with them to the first grade, [and that] pupils such as these need more than equality of resources”); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 285 (1999) (stating “[g]reater needs require greater resources: Disadvantaged students simply cost more to educate, requiring additional educational programs and non-academic services such as health care and counseling”); Ellis Cose, *Brown v. Board: A Dream Deferred*, NEWSWEEK, May 17, 2004, at 54 (detailing that sixty-one percent of Whites, eighty-one percent of Hispanics and ninety-three percent of Blacks believe that schools should be funded at “whatever level it takes to raise minority-student achievement to an acceptable national standard”).

in the America of the early twenty-first century. All too often, the schools whose students have the greatest need receive the least support.<sup>119</sup> In many instances, therefore, schools in this country remain essentially separate and unequal.<sup>120</sup> Large numbers of poor Black and Latino school children find themselves disproportionately relegated to schools that are poorly funded and ill supported, while many of their White peers attend either private schools or well-funded suburban public schools in wealthier communities.<sup>121</sup> The disparity in the funding received by school districts within the same state is, in some cases, mind-boggling.<sup>122</sup> In Illinois, for example, one mostly White school district in Chicago's affluent northern suburbs spends more than \$13,000 per student, while one mostly Black school district in Chicago's southern suburbs spends less than \$7,000 per student.<sup>123</sup>

#### VI. *BROWN I*: STATE CONSTITUTIONAL CHALLENGES AND BRIDGING THE EDUCATIONAL GAP

To their credit, some litigants in recent years have preserved the spirit of *Brown* by seeking declarations that disparities in funding among school districts within a particular state violate the state's constitution.<sup>124</sup> While lawsuits have been successful in states such as New York,<sup>125</sup> the Illinois Supreme Court refused to recognize that

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119. See, e.g., Chemerinsky, *supra* note 95, at 1610-11, 1614-15 (describing substantial disparities in school funding and concluding that "American public education is characterized by wealthy white suburban schools spending a great deal on education surrounding much poorer African-American city schools that spend much less on education"); Cohen, *supra* note 10, at 4A-24 (observing that because resources of schools are often tied to their tax base, suburban schools have more resources than schools in poorer areas); Diane Rado, et al., *Still Separate, Unequal*, CHI. TRIB., May 9, 2004, at 1, 14-15 (describing under-funding of minority schools in Illinois).

120. See, e.g., Chemerinsky, *supra* note 95, *passim* (describing the trend toward resegregation and the Supreme Court cases contributing to the pattern); Cohen, *supra* note 10, at 4A-24 (noting the resegregation trend); Rado, et al., *supra* note 119, at 1 (describing what one academic calls "educational apartheid in Illinois").

121. See, e.g., Cose, *supra* note 118, at 54 (noting that only thirty-eight percent of Blacks believe their "schools have the resources necessary to provide a quality education"); Rado, et al., *supra* note 119, at 14-15 (describing racial disparities in Illinois public schools).

122. See, e.g., Rado, et al., *supra* note 119, at 14 (detailing disparities between funding of Illinois school districts).

123. See *id.* (discussing that in Northbrook School District 27 (85.5% White), spending is \$13,446 per student, while in Dolton School District 149 (nearly 100% Black), spending is \$6,977 per student).

124. See generally Paul J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000); Cohen, *supra* note 10, at 4A-24. But see Ryan, *supra* note 118, at 293 (contending "evidence indicates that increasing expenditures in racially and socioeconomically isolated schools has not in the past been a very effective strategy for assisting students" in part because resources may not have been "spent wisely").

125. See *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 349-50 (N.Y. 2003)

school children have a judicially enforceable right to a quality education under the Illinois Constitution.<sup>126</sup> The need to resort to arguments based on state constitutions arose because of two key rulings by the United States Supreme Court.<sup>127</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>128</sup> the Supreme Court declined to recognize wealth as a suspect class for purposes of the Fourteenth Amendment of the federal Constitution, thus leaving intact the stark difference in the meager resources available to schools in the district attended by Mr. Rodriguez's children and the relatively plentiful funding given to schools in affluent adjoining school districts remain in place.<sup>129</sup> Further exasperating proponents of integration, the Supreme Court ruled in *Milliken v. Bradley*<sup>130</sup> that desegregation decrees could only reach beyond the limits of an inner-city school district into the suburbs when it could be shown that the geographic boundaries separating school districts were themselves the product of intentional discrimination.<sup>131</sup> In many instances, the *Rodriguez* and *Milliken* decisions have had the effect of cordoning off wealthier suburban school districts as safe havens for White flight, thereby exacerbating the disparity between the quality of the education received by the haves and the have-nots in our society.<sup>132</sup>

Predictably, since they are disproportionately educated in poorer schools, on average students of color do not perform as well on standardized tests as Whites.<sup>133</sup> The gap in test scores persists to a lesser degree even when African-American and Latino children attend

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(holding that the school finance system violated the Education Article of the New York State Constitution).

126. See *Lewis v. Spagnolo*, 710 N.E.2d 798, 800 (Ill. 1999) (holding that despite the education clause of Illinois Constitution, "questions relating to the quality of a public school education are for the legislature, not the courts, to decide").

127. See *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

128. *Rodriguez*, 411 U.S. at 1.

129. See *id.* at 23–24 (discussing income levels of parents, resources available to schools, and education discrepancies).

130. *Milliken*, 418 U.S. at 717.

131. See *id.* at 744–45 (addressing the difficulty of implementing remedies for the problems plaguing schools with regard to recent racial segregation).

132. See COTTROL ET AL., *supra* note 22, at 207, 238 (discussing current resegregation trends); PATTERSON, *supra* note 12, at 198 (highlighting Supreme Court cases regarding school policy decisions and the recent problem of resegregation); Chemerinsky, *supra* note 95, at 1602–15 (discussing 1970s Supreme Court decisions, including *Rodriguez* and *Milliken*, and their contribution to resegregation and inequality in American public education).

133. COTTROL ET AL., *supra* note 22, at 239; PATTERSON, *supra* note 12, at 214–15; Barnes, *supra* note 115, at 68–69.

the same schools as White students.<sup>134</sup> In these cases, however, the test-score differential may be attributable, at least in part, to practices like academic tracking that sometimes end up segregating students along racial lines in the classrooms of supposedly “integrated” schools.<sup>135</sup> All too often, students of color are disproportionately under-represented in the honors classrooms of our public schools, while they are over-represented in special education and remedial courses.<sup>136</sup> Finding ways to close the racial gap in test scores is particularly important in light of the Supreme Court’s ruling in *Grutter v. Bollinger*.<sup>137</sup> Delivering the majority opinion of the Court in *Grutter*, Justice Sandra Day O’Connor upheld the use of affirmative action in university admissions with a caveat: She hopes that in twenty-five years the playing field will have leveled to the point that it will no longer be necessary to take an applicant’s race into account.<sup>138</sup> If the disparity between Black and White test scores is to be bridged in this relatively short period of time, we must make a serious commitment at the national level to ensure that each child is given a fair chance to obtain a quality education.<sup>139</sup> Such a commitment would demand an outlay of resources far beyond those presently allocated for public schools by the No Child Left Behind Act.<sup>140</sup> There is currently serious concern and debate over the proper use of tests to gauge student achievement across

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134. See PATTERSON, *supra* note 12, at 214–15 (discussing the relation between race and test scores, and illustrating that social class and parental educational levels do not fully explain gaps in test scores).

135. See Molly McDonough, *Making Brown Real*, A.B.A. J., April 2004, at 50 (showing that Black students are greatly underrepresented in honors programs, but are overly represented in discipline and special education).

136. See *id.* (stating that while Blacks are one-third of the population of a North Carolina high school, only three of 252 Black students are in honors courses, and that Blacks constitute fifty-six percent of children identified as learning disabled).

137. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that a law school may implement an admissions program tailored to obtain a diverse student body).

138. *Id.* at 343.

139. In order to foster the requisite national commitment to education, Congressman Jesse Jackson, Jr. proposes the adoption of a Constitutional amendment granting each child the right to “a public education of equal high quality.” See JESSE L. JACKSON, JR. & FRANK E. WATKINS, *A MORE PERFECT UNION: ADVANCING NEW AMERICAN RIGHTS* 330–49 (2001) (proposing a constitutional amendment to combat disparities in education).

140. 20 U.S.C. § 6301 (2000 & West Supp. 2004). See Derrick Z. Jackson, *50 years later: Money for war, rhetoric for kids*, CHI. TRIB., May 24, 2004, at 21.

The Center for Budget Priorities, a Washington think tank, . . . released a report that concluded that funding of [the] No Child Left Behind [Act] has in four years fallen \$32 billion below what Congress authorized . . . [and that] “this is a conservative estimate because it is unclear how much it will cost states and localities to meet all the new mandates in this law.”

*Id.*

the country.<sup>141</sup> The extent to which we are willing to make the investments needed to rectify a system that still consigns far too many school children of color to separate-and-unequal educations will be the ultimate test—a test of the type of society in which we live.

## VII. CONCLUSION

Despite the inequities I have just described, I decline to join those who have taken the occasion of its fiftieth anniversary to lay problems we are having today at the feet of the *Brown* decision itself.<sup>142</sup> I believe that the key to an appreciation of the special role *Brown* plays in our culture can be found in the passage in which the Court emphasized the need to look at all factors—tangible and intangible—in determining whether Black school children were being denied equal protection of the laws. In support of this approach, the Court referred to its prior decisions in *Sweatt v. Painter*<sup>143</sup> and *McLaurin v. Oklahoma*.<sup>144</sup>

In *Sweatt v. Painter*, . . . in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on “those qualities which are incapable of objective measurement but which make for greatness in a law school.” In *McLaurin v. Oklahoma State Regents*, . . . the Court, in requiring that a Negro admitted to a White graduate school be treated like all other students, again resorted to intangible considerations: “. . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”<sup>145</sup>

With regard to assessing the value of *Brown*, we need to engage in a similar exercise. If we limit our focus to objective measures of matters such as the degree to which the public schools of this country are meaningfully integrated, *Brown* admittedly falls woefully short.<sup>146</sup> It is when we shift our focus to include broader, “intangible” considerations

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141. See, e.g., PATTERSON, *supra* note 12, at 214–16 (describing racial gaps in test scores and discussing debate over whether gap is partly attributable to “flaws in the tests”); KLUGER, *supra* note 7, at 785–86 (describing the racial gap in test scores and the debate within the Black community whether standardized tests “fairly measure the totality of Black intelligence and cultural strength”).

142. See, e.g., BELL, *supra* note 38, at 10 (“*Brown v. Board of Education* was a dramatic instance of a remedy that promised to correct deficiencies in justice far deeper than the Supreme Court was able to understand”); Sullivan, *supra* note 11, at 49 (“Any benefits . . . derived from the *Brown* holding must be measured against its premises—the vocabulary of black inferiority. For all of *Brown*’s victories, we are left to ask: at what cost? My view is that the Court and the litigants made the wrong choice.”)

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

144. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

145. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

146. See *supra* notes 101–15 and accompanying text.

that we discover “what makes for greatness” in a legal opinion. *Brown*’s revolutionary approach to the Equal Protection Clause of the Constitution quickly expanded beyond public schools to reach State-sponsored discrimination in other venues.<sup>147</sup> In addition, *Brown* laid the moral and legal foundation of the civil rights laws that provide shelters of equality for people of color in this country, as well as for women, ethnic, and religious minorities, the physically challenged, those over forty, and increasingly, gays and lesbians. I would go so far as to say that, together with the Declaration of Independence, the Constitution itself, Lincoln’s Gettysburg Address, and Martin Luther King, Jr.’s “I Have a Dream” speech, the *Brown* decision is among the pantheon of essential writings that are fairly to be regarded as defining the essence of the American spirit.

A quotation in Shakespeare’s *Julius Caesar* comes to mind. At one point a question arises whether higher powers are at fault for the problems faced by Romans. And the response is: “[t]he fault . . . lies not in our stars, but in ourselves that we are underlings.”<sup>148</sup> To the extent we have some reservations, and some disappointments, regarding where we stand fifty years after *Brown*, the fault lies not with the stars. It does not lie in the firmament, the judicial heavens in which *Brown* now shines so brightly.<sup>149</sup> Rather the fault is with us, the subsequent generations who have failed to follow the path lit by *Brown*. The fault lies not with *Brown*, but with ourselves, that we are not yet the society we aspire to be.

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147. See COTTROL ET AL., *supra* note 22, at 240–243 (discussing *Brown*’s legal implications and the changes that have been made in race relations because African-Americans were willing to challenge the entrenched system of racism). See, e.g., *Browder v. Gayle*, 142 F. Supp. 707, 717 (C.D. Ala. 1956) (finding unconstitutional discrimination on buses), *aff’d* 352 U.S. 903 (1956); *Dawson v. Mayor of Baltimore*, 220 F.2d 386, 387 (4th Cir. 1955) (banning discrimination on public beaches), *aff’d* 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (outlawing discrimination on public golf courses).

148. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 1, sc. 2. Norman Amaker used this quotation in a footnote to the remarks he delivered at Southern Illinois University in commemoration of *Brown*’s fortieth anniversary. See Amaker, *supra* note 37, at 12. In the text associated with his footnote, Professor Amaker suggests that the “problem the critics, like Wechsler, have is not in the opinion but rather seems to lie elsewhere.” I thought it appropriate on the occasion of *Brown*’s fiftieth anniversary to elaborate on the nature of that “elsewhere” identified by Professor Amaker.

149. See Waldo E. Martin, Jr., *Preface to BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT* (Leon Friedman ed., 2004), at xvi (“[T]he tendency to equate the *Brown* decision with the whole of the history of integration, notably school integration, is flawed and misleading. In and of itself, that decision is neither responsible for the too-few subsequent moments of integration’s success nor the too-many subsequent moments of integration’s failure.”).