

**IDENTIFYING THE *PLESSY* REMAINDER: STATE EXPLOITATION OF  
PRIVATE DISCRIMINATORY-IMPACT ACTIONS**

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This Article is for my late grandparents, Agnes Patricia Roberts Harrell, Otis Lee Harrell, Robertha Key Shaw, and Freddie Shaw, Jr., their parents, and my ancestors, known and unknown, whose struggle and yearning for freedom, education, and opportunity emanates through the words of this Article.

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## I. INTRODUCTION

Public education in the U.S. is arguably more racially segregated now than it was in 1954,<sup>1</sup> when the U.S. Supreme Court declared in *Brown v. Board of Education* “that in the field of public education the doctrine of

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1. Compare, e.g., Chase M. Billingham, *Within-District Racial Segregation and the Elusiveness of White Student Return to Urban Public Schools*, 54 URB. EDUC. 151, 160–64, 167–69 (2019) (linking declines in urban-public-school enrollment among white students to modest increases in urban-school racial segregation), Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RSCH. J. 1119, 1150–52 (2014) (arguing that gerrymandering of school attendance zones increases racial segregation in districts experiencing rapid racial or ethnic changes), and Dana N. Thompson Dorsey, *Segregation 2.0: The New Generation of School Segregation in the 21st Century*, 45 EDUC. & URB. SOC’Y 533, 534, 543–45 (2013) (coupling a statistical chronicle of the resegregation of the nation’s public schools with a charge to decisionmakers to make use of such social science data), with Sean F. Reardon & Ann Owens, *60 Years After Brown: Trends and Consequences of School Segregation*, 40 ANN. REV. SOCIO. 199, 214 (2014) (suggesting that evidence of re-segregation is sensitive to the type of segregation index employed and white-student non-participation in public schools, and not necessarily reflective of within-district resegregation).

‘separate but equal’ has no place.”<sup>2</sup> Although scholars may differ in the extent they believe that racial integration<sup>3</sup> might be necessary for educational equality,<sup>4</sup> most agree that educational segregation, whether imposed by law, socioeconomics, or happenstance, is not likely to reverse in any meaningful way in the near future.<sup>5</sup>

In the absence of a recognized federal right to education,<sup>6</sup> federal-court-supervised school desegregation has been, perhaps, the most viable vehicle

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2. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954), *supplemented*, *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955). Collectively, the two cases will be referred to as “*Brown*.”

3. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 477–78 (1976) (distinguishing between: “desegregation” processes, by which state-supported barriers to accessing opportunities are removed; and “integration” ideals, which require proximate access of Black students to white students in order to secure the same education states provide to white children); Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 798, 818–19 (1993) (highlighting the Court’s rhetorical shift from a focus on desegregation to a focus on quality education, which better acknowledges the Black community’s educational assets and pro-education attitudes) (first citing *Brown I*, 347 U.S. at 483; then citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

4. *Compare, e.g.*, Gary Orfield et al., *Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in Parents v. Seattle School District and Meredith v. Jefferson County*, 40 URB. REV. 96, 103–07 (2008) (arguing that racially integrated schools provide educational benefits to students while racially isolated schools impose educational harms), with Jerome E. Morris, *TROUBLING THE WATERS: FULFILLING THE PROMISE OF QUALITY PUBLIC SCHOOLING FOR BLACK CHILDREN* (2009) (questioning conventional histories of segregation-era Black schools as deficit-oriented and whether the alleged access-to-resources benefit associated with proximity to white students justified many Black students’ adverse experiences in majority-white schools).

5. *Cf.* Junfu Zhang, *Residential Segregation in an All-Integrationist World*, 54 J. ECON. BEHAV. & ORG. 533, 534–535, 549 (2004) (applying Markov-chain analyses to suggest that segregation is inevitable once instituted because the cost of deviating from relevant social norms is too costly for any single actor).

6. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”). *But see* Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1183 (2022) (arguing that a “public right” to education exists because education is a property interest protected by substantive due process); Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1075–76, 1089–90 (2019) (making an originalist argument that state provision of public education is foundational to “the concept of ordered liberty,” and is therefore fundamental); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 110–48 (2013) (arguing that the U.S. Constitution supports a positive right to a minimally adequate education); *see also* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330, 347–48 (2006) (contending that the Fourteenth Amendment Citizenship Clause assigns Congress a duty to establish a meaningful right to education); *see also* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 113 (arguing that a federally recognized right to education “is imperative to deal with the problems in American public schools”).

for students of color to access educational opportunities enjoyed by white students.<sup>7</sup> This phenomenon remains salient, almost to the point of truism, but not because of any inherent or behavioral differences among students by race or because of any benefits proximity to whiteness affords students of color.<sup>8</sup> Rather, the desegregation remedy is primarily a function of intractable political and socioeconomic realities that enable educational opportunity hoarding<sup>9</sup> by wealthier and whiter stakeholders at the expense of poorer Black<sup>10</sup> stakeholders and stakeholders of color.<sup>11</sup>

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7. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (“School boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”).

8. *Contra* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 273–75 (1966) (commonly called “The Coleman Report”) (attributing variation in students’ academic performance to part of the “ecology of educational disadvantage” fostered by minorities’ “cultural world,” and suggesting this is a handicap to be corrected through proper education among children from white cultures).

9. See CHARLES TILLY, DURABLE INEQUALITY 10 (1999) (defining “opportunity hoarding” as actions of “members of a categorically bounded network,” often elites, that acquire and confine access to valuable resources to in-group members to the exclusionary harm of out-group members).

10. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991) (capitalizing the term “Black” to signify a cultural group appropriately designated by a proper noun); Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/05/insider/capitalized-black.html> [<https://perma.cc/T6RM-RUN4>] (discussing capitalization of “Black” as recently becoming mainstream); see also Neil Gotanda, *A Critique of “Our Constitution is Color Blind,”* 44 STAN. L. REV. 1, 4 n.12 (1991) (declining to capitalize the term “white,” which has been vested with sociolegal aspects of property holding that inform historic and current inequality, whereas “Black” is originally a caste identifier of human beings who could be “owned” as property by the former but since recovered through ethnocultural liberation).

11. See John B. Diamond & Amanda E. Lewis, *Opportunity Hoarding and the Maintenance of “White” Educational Space*, AM. BEHAV. SCI. (forthcoming 2022) (describing myriad within- and between-school ways in which wealthier, white families hoard educational opportunities away from Black and poorer students); Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382 (2021) (indicting state laws that give meaning to school-district boundaries as a means for affluent, white schools to exist separately in racially and economically plural metropolitan areas); Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict between School Choice and Desegregation under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 57–58 (2017) (asserting that school-choice policies are incompatible with school-desegregation mandates and that they cannot be simultaneously implemented to successfully assure equal educational opportunities for Black students); Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 200–04 (2016) (describing school-district secession as a means for wealthier, white neighborhoods to hoard school resources from poorer neighborhoods of color); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1086–87 (2014) (indicting school choice, in both practice and rhetoric, as exercises of opportunity hoarding of quality public education away from the most vulnerable students of color who have few meaningful schooling options).

Since the Court's decisions in *Milliken v. Bradley*,<sup>12</sup> *Pasadena City Board of Education v. Spangler*,<sup>13</sup> *Oklahoma City Schools v. Dowell*,<sup>14</sup> *Freeman v. Pitts*,<sup>15</sup> and *Missouri v. Jenkins*,<sup>16</sup> each of which accelerated "unitary status"<sup>17</sup> determinations, equal protection through school desegregation has declined exponentially.<sup>18</sup> And, following *Parents Involved in Community Schools v. Seattle School District No. 1*, which forbade voluntary race-conscious school-desegregation practices by "unitary" districts,<sup>19</sup> the equal-protection avenue is arguably all but foreclosed.

And that is only with respect to public schools. Conditional upon the Court's continued recognition of substantive due process-protected liberty and property interests in independent-school education,<sup>20</sup> private schools will remain a viable harbor for families with means to choose more racially homogenous education options<sup>21</sup>—perhaps, even, at taxpayer expense.<sup>22</sup> As currently delimited, the state-action doctrine protects the states' exploitation

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12. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 752 (1974); *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 291 (1977).

13. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976).

14. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1992) (instructing federal courts, in overseeing desegregation, to "consider[ ] whether the vestiges of *de jure* segregation had been eliminated as far as practicable"). Compare this with the previous charge that discrimination "be eliminated root and branch." *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968).

15. *Freeman v. Pitts*, 503 U.S. 467, 489–99 (1992) (invoking local control as a *post hoc* consideration of the *Brown–Green* colloquy of cases); *id.* at 502–03 (Scalia, J., concurring).

16. *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (completing the shift from *Brown–Green* by charging "the District Court [to] bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'" (quoting *Freeman*, 503 U.S. at 489)).

17. "Unitary status" is a judicial determination that a formerly racially segregated, or "dual," system has sufficiently desegregated such that it both no longer has an obligation to employ remedial measures, see *Freeman*, 503 U.S. at 490–91, and may no longer employ remedial measures voluntarily, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (Parents Involved)*, 551 U.S. 707, 721 (2009).

18. See Jeremy E. Fiel & Yongjun Zhang, *With All Deliberate Speed: The Reversal of Court-Ordered School Desegregation, 1970–2013*, 124 AM. J. SOCIOLOG. 1685, 1689 fig.1, 1690 (2019) (describing time-trend data suggesting exponential increases in "unitary status" petitions following *Missouri v. Jenkins*).

19. *Parents Involved*, 551 U.S. at 721.

20. SEAN F. REARDON & JOHN T. YUN, PRIVATE SCHOOL RACIAL ENROLLMENT AND SEGREGATION 3–4, 16–17, 20–22 (2002) (demonstrating that private schools are more racially segregated than public schools, especially in the U.S. South and West).

21. *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002) (allowing families to use vouchers to pay tuition expenses to religious schools "as a result of the[ir] genuine and independent choices" does not violate Establishment Clause).

22. *Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2262–63 (2020) (holding that states providing subsidies for independent-school tuition cannot discriminate against religious schools, or families' choice in enrollment in such schools, without violating Free Exercise Clause).

of concerted, individual school choices that undermine equal protection.<sup>23</sup> In other words, the state-action doctrine upholds the very educational opportunity hoarding and public-school divestment *Brown* so forcefully intervened against almost seventy years ago.

This Article asserts that the states' equal-protection<sup>24</sup> and related civil-rights obligations<sup>25</sup> extend beyond simply ceasing to require racially segregated schools. They also include requirements to *avoid* policies and practices that are known to yield such school segregation and its educationally discriminatory sequelae. These include governmental actions that embrace, adopt, or even acquiesce to private actions that the state knows will have racially segregative, discriminatory, or unequal impacts on its provision of public education. Because equal protection is a command, this Article also asserts that avoidance alone is insufficient. The states also have an affirmative obligation to seek out and eradicate state practices and actions that contribute to their constitutionally offensive unequal, and racially discriminatory public-education milieu.

The *casus belli* for this argument is the unfinished work of overturning *Plessy v. Ferguson*.<sup>26</sup> *Plessy* wrongly established the plausibility of "separate but equal" as compatible with the Fourteenth Amendment.<sup>27</sup> There were at least three key components to *Plessy* that perverted equal-protection logic to allow for racial segregation of public transportation: 1) the existence of racially segregated public schools,<sup>28</sup> 2) *private white citizens' private preferences for racially segregated schools*,<sup>29</sup> and 3) the courts' continued endorsement of the states' maintenance of segregated public schools despite the Fourteenth Amendment.<sup>30</sup>

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23. See, e.g., *Zelman*, 536 U.S. at 652 ("Because . . . parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.")

24. U.S. CONST., amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

25. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race [or] color . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); see also Title II of the Equal Educational Opportunities Act, 20 U.S.C. § 1703 (flush language) to (a) ("No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools . . .").

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

27. *Id.* at 548.

28. *Id.* at 544-45.

29. *Id.* at 544.

30. *Id.*

*Brown*'s pronouncement that "[s]eparate educational facilities are inherently unequal"<sup>31</sup> only addressed the first and third components of *Plessy*. Neither *Brown* nor any subsequent case has fully overruled *Plessy* on the second: the states' embrace of private discrimination in substitution of its own. Neither *Brown* nor any of the following cases overturned the remaining mandate in *Plessy*: that states must provide *equal educational opportunity*. These cases simply invalidated public schools *segregated by the state* as plausibly equal. The *Brown* family of cases, both mandating and eventually undoing court-ordered school desegregation, was not concerned with the universality of the states' duty to provide equal educational opportunity. As Justice Lewis Powell wrote in his concurrence in *Keyes v. Denver*, "[t]he great contribution of *Brown I* was its holding in unmistakable terms that the Fourteenth Amendment forbids *state-compelled* or *state-authorized* segregation of public schools."<sup>32</sup>

We must identify and address "the *Plessy* remainder." The Fourteenth Amendment and civil-rights statutes should also forbid *state exploitation* of racialized school segregation, however it emerges. Governments should not be able to use administrative endorsements to disadvantage the educational opportunities of students of color. Claiming non-governmental causality, governments act when they allow practices such as: locating schools in racially isolated neighborhoods; committing to zoning patterns that group neighborhoods by race; allocating financial or curricular resources differently to schools of different racial and ethnic concentrations; enabling teacher-assignment practices that allow more highly-qualified, credentialed, veteran teachers to avoid placements among schools serving primarily students of color; or any number of practices that operate as a function of socioeconomic segregation plausibly caused by factors beyond the school's direct control. It should be immaterial whether the resulting discrimination, racism, or segregation is a function of factors beyond the school's direct control if the school is aware of the likelihood of those undesirable effects and elects a course of action anyway. Eliminating "the *Plessy* remainder" would go a long way toward disabling that advantage. Addressing the *Plessy* remainder in this manner also has the positive externality of excising latent doctrines flowing from that decision from our contemporary constitutional law of equal protection.<sup>33</sup>

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31. *Brown I*, 347 U.S. 483, 495 (1954).

32. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 220 (1973) (Powell, J., concurring) (emphasis added) (citing *Brown I*, 347 U.S. at 493–95).

33. *Plessy* is firmly part of the "anticanon," the set of infamous constitutional cases that latter-day scholars and jurists agree, for various reasons, that the Court decided wrongly and which should be rarely cited for affirmative support. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 442–46 (2011) (discussing how the "anticanonization" of *Plessy* facilitated

This Article presents a modest charge, long overdue, that accomplishes two important goals consistent with constitutional equal protection and statutory civil-rights laws. First, it theorizes as passive state action, the state's reliance on private actors to engage conduct the state itself could not perform without triggering civil-rights and equal-protection scrutiny.<sup>34</sup> Second, it proposes holding the state accountable for such passive state actions.<sup>35</sup> Even if the discriminatory actions-in-chief are themselves taken by third parties, the state's exploitation of the same involves conscious state decisions. Those decisions should constitute state action for constitutional purposes and negate the primary conceit of the "discriminatory impact" doctrine advanced to dampen related statutory claims.<sup>36</sup>

In that same *Keyes* concurrence, Justice Powell, the so-called "education justice,"<sup>37</sup> decried the *de jure* vs. *de facto* dichotomy as false, both as a matter of law and in its effect on students whose educational opportunities were compromised by school segregation.<sup>38</sup> "Public schools are creatures of the State," Justice Powell wrote, "and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."<sup>39</sup> In a separate concurrence, Justice William O. Douglas insightfully articulated, "it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies."<sup>40</sup> To update Justices Douglas and

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the canonization of Justice Harlan's dissent, including its controversial and inconsistently interpreted framing of our "color-blind constitution").

34. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (defining judicial enforcement of private agreements as state action); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) ("By its inaction, . . . [t]he State has so far insinuated itself into a position of interdependence with Eagle that it . . . cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."); *Evans v. Newton*, 382 U.S. 296 (1966) (finding a privately owned park sufficiently "entwined" with municipality for state-action purposes through public maintenance, control, and character of the park).

35. *Cf. Terry v. Adams*, 345 U.S. 461 (1953) (Clark, J., concurring) ("[T]he Fifteenth Amendment, as the Fourteenth, 'refers to exertions of state power in all forms' . . . [including the use of devices and strategies that] takes on those attributes of government which draw the Constitution's safeguards in play.") (quoting *Shelley*, 334 U.S. at 20.).

36. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that constitutional equal protection guarantees are not violated *per se* "solely because [a state action] has a racially disproportionate impact"); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce [its] regulations . . ."). *But see id.* at 308 (Stevens, J., dissenting) ("[T]he question [of] whether [Title VI] applies to disparate-impact claims has never been analyzed by this Court on the merits.").

37. *See generally* Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell, Jr.*, 29 *FORDHAM URB. L.J.* 683 (2001).

38. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 223–26 (1973) (Powell, J., concurring).

39. *Id.* at 227.

40. *Id.* at 216 (Douglas, J., concurring).



Powell's observations with the doctrinal developments of the intervening fifty years, one could—and should—assert that “there is no constitutional difference between *de jure* and *de facto* segregation when either is exploited by state actions or policies.”

Most of *Plessy* involved constitutional endorsement of governmental manipulation of social and cultural practices of racial segregation. Our work since then has imposed a duty to eradicate racial discrimination in public education “root and branch.”<sup>41</sup> Even as that charge has been diminished somewhat to eradicate racial discrimination “to the extent practicable”<sup>42</sup> and “consistent with sound educational practices,”<sup>43</sup> the Fourteenth Amendment imposes an affirmative duty on the state, its educational agencies, and its schools not to accomplish educational inequality through exploitation, if not acquiescence to private discriminatory actions. And so, curiously, by holding the states accountable to their obligations to address the “*Plessy* remainder,” we might yet preserve a meaningful right to equal educational opportunity.

This Article continues in Parts II and III in the form of two separate doctrinal proofs—Part II on *Brown* and Part III on *Plessy*—that identify *Brown* as having incompletely resolved the problem presented by *Plessy*. Having identified state exploitation of private discrimination as “the *Plessy* remainder,” the doctrinal detritus on which the Equal Protection Clause must be brought to bear, Part III articulates a skeletal approach for doing just that. And in so doing, it envisions a revived doctrinal pathway for equitable, if not equal, educational opportunity.

Part II discusses how *Brown* did not address the fullness of the educational segregation issues presented by its five cases. As is well known, the *Brown* decision collapsed the nuances of educational segregation presented, ignored the palpable due process issues presented, and in *Brown II*, fashioned a remedy targeted at ending state-compelled and state-authorized school desegregation. This Article directs the well-worn *Brown*-as-necessary-but-inadequate lens to a specific harm left unaddressed by the *Brown* cases: the detrimental educational effects of state endorsement of private actions that segregate schools.

Part III goes back to *Plessy* and identifies state exploitation of private racism as that consequential aspect of school segregation that the *Brown* cases left unaddressed. Here, the Article shows that the *Plessy* majority opinion identified and accepted all three school-segregation typologies—compulsion, authorization, and exploitation—as plausibly compatible with the Fourteenth Amendment conditional on the states' meeting their obligation under the

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41. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (discussing the scope of the *Brown II* remedy).

42. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991).

43. *United States v. Fordice*, 505 U.S. 717, 729 (1992).

eponymous clause to provide equal educational opportunity to its residents. As it turns out, the pre-*Plessy* creation of racially segregated public schools by states and localities, and the balance of the courts' ratification of the same, was essential to both the *Plessy* Court's understanding of the states' equal-protection obligation in public accommodations and common carriers and its theory that maintenance of "separate but equal" services could meet it. Of course, state-compelled racially segregated schools are no longer constitutionally permissible because of *Brown*<sup>44</sup> and *Green*,<sup>45</sup> and state-authorized racial segregation by and within schools should no longer be constitutionally feasible in light of *Parents Involved*.<sup>46</sup>

Part III suggests that what remains from *Plessy*, the state-exploitation of private actions that yield racially segregated schools, should also be impermissible because the state's obligation to provide equal educational opportunity endures. Whether the school board is the primary or secondary actor, or whether it is a passive actor, in causing racial segregation in schools should be irrelevant when it exploits private actions that result in racial segregation all the same. Motivated by these concerns, Part IV revisits *Griffin v. County School Board of Prince Edward County*<sup>47</sup> and Justices Douglas<sup>48</sup> and Powell's concurrences in *Keyes v. School District No. 1, Denver*, and finds inchoate support for a stronger state-action doctrine in constitutional equal-protection claims and a weakening of the intent-impact divide in statutory civil-rights claims. With development, these efforts could assist education stakeholders in holding the states accountable for embracing educational segregation in allocative and distributive policy.

## II. *BROWN* AS AN INCOMPLETE REVERSAL OF *PLESSY*

Like many journeys before it, the road to equal educational opportunity begins with *Brown v. Board of Education*, the landmark U.S. Supreme Court case that found racially segregated education unconstitutional under the Fourteenth Amendment.<sup>49</sup> However, in somewhat of an unpredictable departure, equal educational opportunity's pathway does not proceed from the well-worn dicta that articulate the spirit of *Brown I*: "education is perhaps the most important function of state and local

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44. *Brown I*, 347 U.S. 483, 495 (1954); *Brown II*, 349 U.S. 294, 301 (1955).

45. *Green*, 391 U.S. at 440.

46. *Parents Involved*, 551 U.S. 701, 747-48 (2007).

47. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 232-33 (1964).

48. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

49. *Brown I*, 347 U.S. at 495.

governments.”<sup>50</sup> The thesis of this Article neither concerns nor contemplates that truism; nor, more importantly, does it grapple directly with the remedial scope or authority announced in *Brown II*,<sup>51</sup> affirmed by *Green*,<sup>52</sup> and progressively repudiated from *Milliken*,<sup>53</sup> *Spangler*,<sup>54</sup> *Dowell*,<sup>55</sup> *Freeman*,<sup>56</sup> and *Jenkins*,<sup>57</sup> to *Parents Involved*.<sup>58</sup>

Instead, it illuminates the limited scope of the holding-bearing paragraph in *Brown I*, which states:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such

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50. *Id.* at 493; *see also* *Wisconsin v. Yoder*, 406 U.S. 205, 238 (1972) (White, J., concurring) (citing *Brown I*, 347 U.S. at 493) (expounding on the importance of the state’s interest in education); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) (citing *Brown I*, 347 U.S. at 493) (acknowledging the “vital role of education in a free society”); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (citing *Brown I*, 347 U.S. at 493) (using *Brown I* to contextualize “the property interest in educational benefits”); *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979) (citing *Brown I*, 347 U.S. at 493) (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests, long has been recognized by our decisions . . .”).

51. *Brown II*, 349 U.S. 294, 300–01 (1955).

52. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 436–37 (1968) (affirming *Brown II*’s remedial factors to create a “unitary, nonracial system of public education” and eliminate racially segregated school districts).

53. *Milliken I*, 418 U.S. 717, 746 (1974) (articulating the “constitutional right of the [Black] respondents residing in Detroit is to attend a unitary school system *in that district*” rather than in neighboring school districts (emphasis added)).

54. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 438 n.5 (1976) (relieving a school district’s desegregation plan from court supervision based on a short-term success of a student-assignment plan despite acknowledging school district’s failure to achieve unitary status in terms of hiring and promoting teachers and administrators). *But see id.* at 442–43 (Marshall, J., dissenting) (chastising the majority for finding faculty assignment irrelevant to a determination of unitary status).

55. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245–46, 250–51 (1991) (questioning the meaning of “unitary” and refusing to provide a definition to guide lower courts in their application of the *Brown II–Green* remedial factors).

56. *Freeman v. Pitts*, 503 U.S. 467, 490–92 (1992) (allowing for partial relief from school desegregation orders where a “good-faith commitment to the whole of the court’s decree” has been made despite persistent racial segregation in other areas).

57. *Missouri v. Jenkins*, 515 U.S. 70, 94 (1995) (“The District Court’s pursuit of ‘desegregative attractiveness’ is beyond the scope of its broad remedial authority.”).

58. *Parents Involved*, 551 U.S. 701, 721, 747–48 (2007) (prohibiting the use of race-conscious student assignment practices to ameliorate the effects of discrimination within school districts that are no longer remedying past segregation).

segregation also violates the Due Process Clause of the Fourteenth Amendment.<sup>59</sup>

First, it is important to remember that, despite the universality of its holding on educational segregation, there were different forms of school segregation and jurisdictional postures presented across the five *Brown I* cases. Each reflected a different variation either in how states sponsored school segregation to the harm of Black children or in how the courts responded to Black schoolchildren's claims.<sup>60</sup>

Two cases, *Briggs v. Elliott* and *Davis v. Prince Edward County*, involved unmistakable inequalities between the public schools that county school boards set aside for Black and white students.<sup>61</sup> Three-judge U.S. District Courts<sup>62</sup> in both *Davis* and *Briggs* upheld the constitutionality of educational segregation while acknowledging the existence of inequalities in physical plants, curricula, and transportation in violation of the "separate but equal" principle.<sup>63</sup> The appropriate remedy, thus, was to equalize the racially segregated schools as compliance with *Plessy* required.

In *Gebhart v. Belton*, the Supreme Court of Delaware found that state laws requiring segregation did not violate Fourteenth Amendment equal protection.<sup>64</sup> Nevertheless, under similar facts as *Briggs* and *Davis*, the state supreme court affirmed a different remedy: the complaining parties should be admitted to the otherwise all-white school.<sup>65</sup>

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59. *Brown I*, 347 U.S. 483, 495 (1954). This paragraph has, no doubt, been dissected and reassembled, lauded, critiqued, applied, and misapplied beyond measure. I acknowledge that this paragraph, perhaps above most others in U.S. constitutional law, holds key moments of departure—analytical, doctrinal, and logical points—that have become so rote that their import for schoolchildren's rights to education have faded. I engage in yet another exposition of the same, but for purposes of identifying what this holding left behind and chartering a pathway for finally accomplishing the fullness of *Brown's* majesty.

60. See, e.g., *Briggs v. Elliott (Briggs II)*, 103 F.Supp. 920, 923 (E.D.S.C. 1952) (responding to a lack of buses for Black schools, as well as pleas to abolish school segregation, the court granted an "[i]njunction directing the equalization of educational facilities"); *Bolling v. Sharpe*, 87 A.2d 862, 870 (Del. Ch. 1952) (granting Black children the right to attend a white school, but only until the state "can demonstrate that all the Constitutional inequalities have been removed").

61. *Briggs v. Elliott (Briggs I)*, 98 F. Supp. 529, 531 (E.D.S.C. 1951); *Davis v. Cnty. Sch. Bd.*, 103 F.Supp. 337, 340–41 (E.D. Va. 1952).

62. Any actions filed in federal court between June 25, 1948 and August 12, 1976, which sought "interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality" were referred to a three-judge U.S. District Court, one judge of which had to be a U.S. appellate judge. FORMER 28 U.S.C. § 2281, repealed by PUB. L. 94-381 (1976).

63. *Briggs II*, 103 F.Supp. at 922–23; *Davis*, 103 F.Supp. at 340–41. *But see Briggs I*, 98 F.Supp. at 548 (Waring, J., dissenting) ("Segregation is per se inequality.").

64. *Gebhart v. Belton*, 91 A.2d 137, 142 (Del. 1952).

65. *Id.* at 149.

Substantive inequalities were not as apparent in the fourth case, *Brown v. Board of Education of Topeka*, and racial segregation was only enforced in the elementary grades.<sup>66</sup> In *Topeka*, attorneys advanced the argument that “segregation in itself constitutes an inferiority in educational opportunities offered to [Blacks] and that all of this is in violation of the due process guaranteed them by the Fourteenth Amendment.”<sup>67</sup> *Topeka* was essential to attacking the *Plessy* doctrine itself.

The *Brown* cases were the culmination of decades of efforts to enforce the states’ duty to provide Black students equal educational opportunities by attacking *Plessy*’s presumption of racially separate equality and *Cumming v. Richmond County*’s presumption of state impunity in educational decision-making,<sup>68</sup> in both cases contingent on the states’ duty to provide Black students equal educational opportunities. The *Brown* cases were well-positioned to situate public education within the Court’s due process liberty doctrine on education. The importance of *Topeka*’s due process arguments, in particular, came into sharper relief after the U.S. Supreme Court certified the fifth case, *Bolling v. Sharpe*.<sup>69</sup> Because the Fourteenth Amendment does not textually apply to the federal district,<sup>70</sup> any plausible constitutional relief could only come from a finding that educational segregation also offends Fifth Amendment due process. Thus, the already attractive substantive due process approach became necessary for subject-matter jurisdiction.<sup>71</sup>

Despite the Court’s otherwise general repudiation of *Lochner*-era substantive due process,<sup>72</sup> *education* as a liberty interest protected by substantive due process had strengthened by extension to First Amendment

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66. *Brown v. Bd. of Educ. (Topeka)*, 98 F. Supp. 797, 797–98 (D. Kan. 1951), *rev’d sub nom. Brown II*, 349 U.S. 294 (1955).

67. *Id.* at 798; *see also* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA* 404–24 (1975) (discussing the *Topeka* attorneys’ due process advocacy at the District Court, the intentionality of U.S. Appellate Judge Walter A. Huxman’s due process at the District Court, and the intentionality of U.S. Appellate Judge Walter A. Huxman’s due process findings to preserve the issue on appeal).

68. *Cumming v. Bd. of Educ.*, 175 U.S. 528, 544–45 (1899).

69. *Bolling v. Sharpe*, 344 U.S. 873, 873 (1952) (granting certiorari).

70. Textually, the Constitution does not require the *federal* government to provide equal protection under the law. That requirement appears only in the eponymous Fourteenth Amendment clause and binds only the *states*. Compare U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”), with *id.* amend. XIV, § 1 (“Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

71. *See* KLUGER, *supra* note 67, at 521–22, 559–60.

72. *See, e.g., West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (recognizing Washington’s minimum-wage law as a valid qualification on employees’ due process-protected liberty interest to contract as the effective end of the *Lochner* era of substantive due process jurisprudence).

liberties to avoid compelled political speech<sup>73</sup> or religious instruction in school settings<sup>74</sup>—even if these prohibitions limited the state’s otherwise free hand in the day-to-day operations of its schools. Juxtaposed against the considerable judicial restraint shown to declaring “separate but equal” unconstitutional on equal protection grounds,<sup>75</sup> the Court’s relatively consistent endorsement of the educational liberty doctrine made advocacy on those grounds seem promising. At the time, a due process liberty approach seemed complementary to a plausible pathway forward, if not complementary essential to the equal protection claims.<sup>76</sup>

The parties understood this moment and briefed the issues well,<sup>77</sup> particularly in *Bolling*.<sup>78</sup> Liberally citing the McReynolds substantive-liberty doctrine,<sup>79</sup> the minor Black petitioners in *Bolling* identified their “rights to enjoy the educational opportunities provided in the District of Columbia unrestricted by reason of their race” as within the “right of the individual” “to acquire useful knowledge.”<sup>80</sup> Their parents analogized the “liberty of

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73. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). I speak of “First Amendment liberty” and not “First Amendment right” to acknowledge the fine doctrinal pathway by which the Fourteenth Amendment incorporates and applies the Bill of Rights to protect speech and related rights as liberties of which the states may not arbitrarily deprive an individual without due process of law.

74. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (holding church–state partnerships to provide religious instruction during “released time” in public schools unconstitutional). *But see Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (upholding daily “released time” for off-campus religious instruction for students).

75. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (concluding “[n]or need we reach petitioner’s contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation” in a case where the state did not provide Black students with a separate law school).

76. See KLUGER, *supra* note 67, at 521–22, 559–60.

77. See Statement as to Jurisdiction at 12, *Topeka*, 98 F. Supp. 797 (D. Kan. 1951) (No. 436), *rev’d sub nom. Brown II*, 349 U.S. 294 (1955) (“Chapter 72-1724 of General Statutes of Kansas, 1949, is clearly an arbitrary and unreasonable exercise of state power in violation of the guarantees of the Fourteenth Amendment . . .”).

78. See Brief for Petitioners at 13, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 413), 1952 WL 47278, at \*13; Brief for Petitioners on Reargument at 55, *Bolling*, 347 U.S. 497 (No. 8), 1953 WL 48693, at \*55 (“[I]t is submitted that the educational rights asserted by Petitioners have been judicially determined to be fundamental rights.”).

79. Justice James Clark McReynolds alone authored the canon of substantive liberty as a due process constraint on state decision-making in education. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that rights to teach and engage with a teacher for education are liberty interests protected by the Fourteenth Amendment); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925) (upholding rights to operate an independent school as a property interest protected by the Fourteenth Amendment); *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927) (using Fifth Amendment-protected liberty and property interests to outlaw legislative act of U.S. territory).

80. Brief for Petitioners, *supra* note 78, at 13 (emphasis omitted).

parents . . . to direct the upbringing and education of children under their control”— recognized in both *Meyer v. Nebraska* and *Pierce v. Society of Sisters*—to their right to enroll their children in public schools “unrestricted by reason of race.”<sup>81</sup> Not only did segregating schools by race, and disallowing choice by those means, have no legitimate educational purpose, the petitioners pointed out that segregation directly conflicted with such purpose.<sup>82</sup> Maintaining such barriers to “liberty of choice,” they submitted, was an unreasonable regulation beyond the state’s police power.<sup>83</sup> Acknowledging that the *Meyer* and *Pierce* decisions they relied upon involved Fourteenth Amendment-protected educational rights, the *Bolling* petitioners cited *Tokushige* on point, establishing that “[i]t is clear . . . that these rights are similarly protected by the Fifth Amendment from unreasonable or arbitrary Federal restrictions.”<sup>84</sup>

The state respondents sought to distinguish petitioners’ reliance on *Meyer*, *Pierce*, and *Tokushige*. The McReynolds doctrine, in their estimation, involved complete denials of liberty—of the rights to teach, to operate independent schools, and to learn modern languages.<sup>85</sup> On the other hand, the respondents claimed that racial segregation did not actually deprive Black students of an education.<sup>86</sup>

Punctuating their argument, the states cited none other than Justice McReynolds, who was still on the Court when the Justices heard its first desegregation case, *Missouri ex rel. Gaines v. Canada*.<sup>87</sup> In *Gaines*, Missouri sought to keep Black students from enrolling in the University of Missouri’s law school. Because the state did not provide a law school for Black students, it offered to pay their tuition to attend law school in a neighboring state. Six of the Justices held that Missouri’s approach did not meet the separate but equal standard because it denied to Black residents the same privilege the state

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81. *Id.* at 13–14.

82. Brief for Petitioners on Reargument, *supra* note 78, at 64.

83. *Id.* at 65.

84. Brief for Petitioners, *supra* note 78, at 15 (“Those fundamental rights of the individual . . . are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers [of Hawai’i].”).

85. Brief for Respondents at 21, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 413), 1952 WL 47280, at \*21.

86. *Id.* at 22.

87. *Id.* at 21. Justice McReynolds notably dissented in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Unlike the *Gaines* majority, which distinguished the facts of that case from *Cumming*, McReynolds cited *Cumming* affirmatively for the proposition that the federal government could not intervene in the states’ management of education “except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.” *Id.* at 353 (McReynolds, J., dissenting) (quoting *Cumming v. Bd. of Educ.*, 175 U.S. 528, 545 (1899)).

offered to white residents.<sup>88</sup> The relevant duty, according to the *Gaines* majority, was the establishment of the same educational opportunities irrespective of race.<sup>89</sup>

The *Brown* Court balked. Despite the petitioners' well-briefed argument that racial segregation constrained students', parents', and teachers' school choices in contravention of their educational liberties, the Court did not engage the due process issues at all.<sup>90</sup> If the issue became couched in liberty, then, in a best-case scenario, the Court would have to decide among the parties' competing liberty interests. In a worse scenario, it might have to decide in favor of the parties' common liberty interest *in favor of continued segregation*. This is because many Black people would have also chosen continued segregation, albeit modified by more equalized opportunities. Segregation facilitated autonomy for Black schools, complete with Black teachers and administrators devoted to the cause of Black students' education.<sup>91</sup>

The white segregationist District school board seized on this common perspective in their briefs: desegregation would "destroy" the "monument" of "separate but equal schools for colored children."<sup>92</sup> Not only could racial segregation serve a legitimate educational purpose, in their estimation there was consensus that it did. In support of this point, the District respondents cited preeminent Black educators like W.E.B. DuBois, who lamented the cost to Black schoolchildren of token desegregation. The states argued that Black children were better served in schools "where they are wanted."<sup>93</sup>

Instead of engaging with either due process perspective, the Court opted for rhetoric largely devoid of doctrinal statements:

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88. *Gaines*, 305 U.S. at 349–50. The *Gaines* Court appears to distinguish this scenario from that in *Cumming*, but without additional comment. *See id.* at 344–45.

89. *Id.* at 349.

90. *See Brown I*, 347 U.S. 483, 495 (1954) (avoiding the question of education as a fundamental right and framing the relevant issue as only involving equal protection).

91. *See* Brief for Respondents, *supra* note 85, at 26–27; *cf.* Vanessa Siddle Walker, *Valued Segregated Schools for African American Children in the South, 1935–1969: A Review of Common Themes and Characteristics*, 70 REV. EDUC. RSCH. 253, 264–65 (2000) (reexamining strengths and successes of Black educators in all-Black schools despite constraints of de jure segregation).

92. Brief for Respondents, *supra* note 85, at 25; *cf.* Vanessa Siddle Walker, *THEIR HIGHEST POTENTIAL: AN AFRICAN AMERICAN SCHOOL COMMUNITY IN THE SEGREGATED SOUTH* 3–4 (1996) (comparing the adverse impacts of desegregation on Black schools and the education of Black students to the quality of education and community adhesion Black schools and students experienced during the *de jure* segregation era). *But see* Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 45–46 (cautioning against hagiographic historical revisionism of *de jure* segregation-era Black schools and education).

93. Brief for Respondents, *supra* note 85, at 24 (quoting W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 330–31 (1935)).



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. Today it 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>94</sup>

For all its poetic majesty, this paragraph performs no work toward affirming education as a liberty interest protected by substantive due process, whether for good, bad, or indifferent reason.<sup>95</sup>

The Court's evasiveness extended to its Fifth Amendment due-process-cum-equal-protection analysis in *Bolling*. Rather than discuss any substantive life, liberty, or property interests that racialized educational segregation might injure, *Bolling* spoke only abstractly about "[l]iberty under law [as] the full range of conduct which the individual is free to pursue."<sup>96</sup> Heralding what many call the "reverse incorporation doctrine,"<sup>97</sup> the Justices unanimously found that "[s]egregation in public education" violates the Fifth Amendment Due Process Clause because it "is not reasonably related to any proper governmental objective,"<sup>98</sup> not because of any substantive liberty interest one might have in public education.

But, for all its faults, in that last sentence of the famous *Brown I* paragraph, the Court articulated the relevant foundational duty: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>99</sup>

*Brown* overturned the assumption of plausible equality through segregation,<sup>100</sup> but it did not fully overturn *Plessy*, as Part II elaborates. This

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94. *Brown I*, 347 U.S. at 493.

95. *Cf. infra* Part IV (for a discussion teasing out various liberty interests involved in "school choice," "school assignment," and "teacher assignment").

96. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

97. *Accord* Buckley v. Valeo, 424 U.S. 1, 93 (1976) (summarizing the principle that would later be termed "reverse incorporation": "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

98. *Bolling*, 347 U.S. at 500.

99. *Brown I*, 347 U.S. at 493.

100. *See id.* at 495.

is because there was an intermediate step between *Plessy*'s accurate articulation of governmental duty to equal protection and its approval of "separate but equal" in accomplishment of the same. That step is the state exploitation of private segregative decisions in education (and elsewhere).<sup>101</sup> This is the *Plessy* remainder that *Brown* did not engage, that proved to be catastrophic in *Griffin*,<sup>102</sup> and unless we eliminate it entirely, will continue to provide a way for the states to evade their obligation to provide equal public educational opportunities to all students irrespective of their race.

### III. AN AUTOPSY OF *PLESSY* IN LIGHT OF *BROWN*

#### A. Which Fourteenth Amendment Doctrine?

*Plessy v. Ferguson*'s infamous decision proceeded under the now well-known presumption that "separate but equal" public services did not offend Fourteenth Amendment guarantees of equal protection.<sup>103</sup> In a case involving railcar segregation that assigned Black passengers to inferior passage, the *Plessy* petitioners<sup>104</sup> combatted this presumption by appeal without differentiation to the rights-protecting provisions of the Fourteenth Amendment.<sup>105</sup> Petitioners persuasively argued that separation of white and "colored"<sup>106</sup> passengers was unequal treatment per se and would yield

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101. See *Plessy v. Ferguson*, 163 U.S. 537, 548–49 (1896); *id.* at 552 (Harlan, J., dissenting).

102. See *infra* Section IV.A.

103. *Plessy*, 163 U.S. at 548–49, 550–51.

104. Although Homer Plessy was the only named petitioner in the U.S. Supreme Court case, I intentionally refer to the *Plessy* plaintiffs because Mr. Plessy acted on behalf of and in concert with other members of the Citizens' Committee of New Orleans to test rail-passenger segregation. See CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION, 29–30, 41 (1988).

105. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). The rights-protecting provisions—the "Privileges and Immunities," "Due Process," and "Equal Protection" clauses—are written by way of prohibition, *in seriatim*, against excesses of state authority. By contrast, the Citizenship Clause "carrie[s] with it an entitlement to certain legal rights, including the right to equal treatment at the hands of government." Ryan C. Williams, ORIGINALISM AND THE OTHER DESEGREGATION DECISION, 99 VA. L. REV. 494, 585 (2013).

106. Except when necessary—see, e.g., *infra* notes 195–198—I use the term "Black" somewhat anachronistically and universally to refer to people of African descent residing in the Americas. The preferred term *de jour* was "colored," later "Negro," which, although preserved for historic reasons in the names of legacy organizations—e.g., the National Association for the

demonstratively unequal treatment by private providers of public accommodations. According to their theory of the case, the state's role in allowing state-regulated, but private railway operators to act in this manner elevated otherwise private discrimination and its consequences to state action. This was unlawful because the Fourteenth Amendment Equal Protection Clause did not allow states to discriminate against citizens on the basis of race.

1. *Where Privileges and Immunities Were Not Enough and Substantive Due Process Had Yet to Emerge*

Historical evidence suggests that the *Plessy* plaintiffs knew this was a less-than-ideal strategy on many counts, but one that was conditioned by the then-pervasive Fourteenth Amendment doctrine that regarded many public services, particularly privately provided ones, as “privileges” defined and assigned solely by the states under their respective laws.<sup>107</sup> The gradual recognition of access to public accommodations as involving interests plausibly protectable by the Due Process Clause had yet to begin.<sup>108</sup> As Louisianans had learned in *Slaughter-House Cases*, the federal high court considered all state-provided public services not explicitly required by the U.S. Constitution to be *state* privileges outside the Court's competency to evaluate.<sup>109</sup>

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Advancement of Colored People and the United Negro College Fund—have since fallen largely into disfavor. See Tom W. Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American,”* 56 PUB. OP. Q. 496, 498–99 (1992). One of its modern-day counterparts, “people of color,” might more accurately describe Homer Plessy. See *infra* note 138. But, when forced to identify within the binary post-Reconstruction racism (previously unknown to coastal Creole Louisiana) as “white” or “non-white,” Mr. Plessy himself elected to be known publicly and legally as “non-white,” or what we now more frequently term “Black.” See sources cited *supra* note 10.

107. See *Plessy*, 163 U.S. at 547 (“Positive rights and privileges are undoubtedly secured by the [F]ourteenth [A]mendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges . . .”).

108. In light of the Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2257 (2022), the continued salience of much of the substantive due process-protected liberty canon is questioned. Beyond rights to abortion care, rights to same-sex marriage, contraception, and engagement in private intimate relations are possibly under threat. See *id.* at 2301 (Thomas, J., concurring). At the same time, the opinion appears to distinguish rights to make educational decisions from rights under threat, ostensibly because educational decisions do not involve “critical moral question[s].” *Id.* at 2301, 2258 (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

109. The Court in *Slaughter-House Cases* articulated a distinction between privileges and immunities of citizens of the United States, which are explicitly referenced in the Fourteenth Amendment, and those of citizens of states, which are not. See *Slaughter-House Cases*, 83 U.S. 36, 74–76 (1872). Because the Amendment speaks differently of state and federal citizenship and of citizens and persons in its various protections, a reading of section one that limits its

## 2. *The Reluctant Commerce Clause*

Due process being unavailable, and a viable privileges-and-immunities claim having been foreclosed, petitioners' third-best pathway to a federal constitutional claim was through the Commerce Clause. Unlike modern-day Commerce Clause<sup>110</sup> claims, which focus on the appropriateness of Congress's exercise of its authority,<sup>111</sup> "[one] primary use of the Clause [then] was to preclude the kind of discriminatory state legislation that had once been permissible."<sup>112</sup> But it was not by assertion of an *individual rights* claim; the derivative statutory claim that would allow such an event had not yet been validated.<sup>113</sup> Rather, a successful petitioner would need to point to a state action that usurped federal authority by regulating within a policy domain exclusive to Congress. Under such an approach neither the substance of the regulation nor its potentially discriminatory consequences were relevant to the Court's analysis. And so, the postbellum Commerce Clause doctrine could enjoin states from racial discriminatory actions, even when such actions were carried out by private actors.<sup>114</sup>

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protections to *privileges and immunities of citizens of the United States* could not guard against state regulations of state privileges to carry out a profession. *Id.* at 77–80; U.S. CONST. amend. XIV, § 1 (regarding the "Citizenship Clause").

110. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

111. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (upholding Congress's authority to prohibit local marijuana cultivation pursuant to the Commerce Clause); *U.S. v. Morrison*, 529 U.S. 598, 617–19 (2000) (invalidating provisions of the Violence Against Women Act of 1994 that established a federal cause of action for gender-motivated violence as beyond the scope of the Commerce Clause); *U.S. v. Lopez*, 514 U.S. 549, 567–68 (1995) (finding that Congress exceeded its Commerce Clause authority in the Gun-Free School Zones Act of 1990 by regulating guns that did not necessarily move in interstate commerce).

112. *Raich*, 545 U.S. at 16; *see also Lopez*, 514 U.S. at 568 (Kennedy, J., concurring) ("[F]or almost a century after the adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate."); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 261 (1964) (upholding Congress's Commerce Clause authority to enact Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), et seq.).

113. *See generally Heart of Atlanta Motel*, 379 U.S. at 245–49 (outlining the Title II provision of the 1964 Civil Rights Act, which provided statutory relief for discriminatory encroachment of individual rights via Congressional exercise of the Commerce Clause).

114. *But see Louisville, New Orleans & Tex. Ry. Co. v. Mississippi*, 133 U.S. 587, 591 (1890) (upholding a state law imposing racial discrimination on a privately operated common carrier, based on the reasoning that the state law only impacted intrastate passengers, thus avoiding the postbellum Commerce Clause doctrine).

*Hall v. DeCuir* proved an example of the latter.<sup>115</sup> The respondent in the eponymous case, Josephine DeCuir, was a *personne de couleur libre*,<sup>116</sup> a Creole of partial African ancestry who was free before the Civil War.<sup>117</sup> Herself a slaveholder, Mme. DeCuir had fled Louisiana to France during the Civil War, where, allegedly, she had enjoyed the social treatment of any white woman of similar economic means.<sup>118</sup> After the war, she returned to a Louisiana that was quickly collapsing the middle of a three-tiered racial hierarchy into the binary white/non-white racial classification system more typical of the non-Francophone American South.<sup>119</sup> Twice while traveling on boats on the Mississippi River, but within Louisiana, she had paid first-class passage, but was excluded from whites-only accommodations and assigned to inferior accommodations set aside for Black passengers.<sup>120</sup> Between her trips, Louisiana's Reconstruction-era legislature had passed a constitutional provision providing that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character,"<sup>121</sup> and enacted a statute pursuant thereto that prohibited "discrimination on account of race and color" and gave injured persons a right of action to recover damages.<sup>122</sup>

Mme. DeCuir successfully sued the boat captain under that law. In awarding damages, the Supreme Court of Louisiana observed that the operative provisions of the state's anti-discrimination statute "was enacted solely to protect the newly enfranchised citizens of the United States, *within the limits of Louisiana*, from the effects of prejudices against them."<sup>123</sup> Because of this intrastate character, the state high court held that "[i]t does not, in any manner, affect the commercial interest of any State or foreign nation or of the citizens thereof," and was, therefore, not in violation of the Commerce Clause.<sup>124</sup>

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115. See *Hall v. DeCuir*, 95 U.S. 485 (1877).

116. The appropriate English-language demonym for Mme. DeCuir and many Louisiana Creole like her is *gens de couleur libre*, or "free people of color." See Katy Reckdahl, *Descendants Tell Stories of Free People of Color*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/arts/free-people-of-color-museum-new-orleans.html> [<https://perma.cc/DT4A-78UX>]. Occupying a liminal space between the Black-white binary typical of most of the slaveholding American South, the social, if not legal, acceptance of *gens de couleur* as a categorical third was a legacy of Louisiana's French and Spanish colonial heritage maintained by its maritime proximity to Latin America.

117. MIA BAY, TRAVELING BLACK: A STORY OF RACE AND RESISTANCE 41–43 (2021).

118. *Id.*; see also Rebecca J. Scott, *Discerning a Dignitary Offense: The Concept of Equal "Public Rights" During Reconstruction*, 38 L. & HIST. REV. 519, 543 (2020).

119. See Whitney Nell Stewart, *Fashioning Frenchness: Gens de Couleur Libres and the Cultural Struggle for Power in Antebellum New Orleans*, 51 J. SOC. HIST. 526, 527 (2018).

120. BAY, *supra* note 117.

121. *Hall v. DeCuir*, 95 U.S. 485, 491 (1877) (Clifford, J., concurring).

122. *Id.* at 487.

123. *DeCuir v. Benson*, 27 La. Ann. 1, 4 (1875) (emphasis added).

124. *Id.* at 4–5.

The Louisiana justices further found that the state statute did not violate Fourteenth Amendment due process, the common carrier having sustained no property violation by the state's enforcement of a reasonable regulation to take due care and deliver all passengers without discriminating against them.<sup>125</sup> The majority also concluded that the captain denied Mme. DeCuir's right to access the ladies' first-class cabin in violation of her civil and political rights guaranteed by the Citizenship and Privileges and Immunities Clauses of the Fourteenth Amendment.<sup>126</sup> Importantly, the court held:

That the common carrier may make reasonable rules and regulations for the government of the passengers on board his boat or vessel is admitted, but it can not be pretended that a regulation, which is founded on prejudice and which is in violation of law, is reasonable.<sup>127</sup>

The U.S. Supreme Court reversed.<sup>128</sup> The ship at issue was sailing between New Orleans and Vicksburg, Mississippi, and so, Mme. DeCuir's having limited her own travel within the state of Louisiana was irrelevant to the boat having been engaged in interstate commerce over the waters of the Mississippi River.<sup>129</sup> Chief Justice Morrison Waite's opinion for the Court ignored segregation and inequality issues altogether, "confin[ing its] decision to the statute in its effect upon foreign and inter-state commerce, expressing no opinion as to its validity in any other respect."<sup>130</sup>

Justice Nathan Clifford's concurring opinion did not.<sup>131</sup> Going well beyond the scope of either Louisiana Supreme Court Justice William Wyly's dissent in *DeCuir* or Chief Justice Waite's *Hall* opinion, Justice Clifford limited the passenger's right to "suitable accommodations as the room and means at the disposal of the carrier enable [the ship captain] to supply,"<sup>132</sup> ostensibly empowering the carrier to provide unequal accommodations if he

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125. *Id.* at 5.

126. *See id.* at 6. Notably, the Equal Protection Clause was neither cited nor referenced, the common carrier in question having been privately owned and operated. *Id.* at 2.

127. *Id.* at 6.

128. *Hall v. DeCuir*, 95 U.S. 485, 491 (1877).

129. *See id.* at 489–90 (finding regulation of passenger boats on the Mississippi to involve interstate commerce sufficient to enjoin Louisiana anti-segregation laws); *cf.* *Louisville, New Orleans & Tex. Ry. Co. v. Mississippi*, 133 U.S. 587, 591 (1890) ("If it be a matter respecting wholly commerce within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the federal constitution . . . . [to enforce Mississippi laws that require] trains within the state [to have] attached a separate car for colored passengers.").

130. *Hall*, 95 U.S. at 490–91.

131. *See id.* at 491–92 (Clifford, J., concurring).

132. *Id.* at 504 (emphasis added).

deemed such accommodations the extent of the means which he could—or would—supply a given passenger. To further evade the equal protection question—this time on segregation and not equality of accommodations—he turned to social and cultural tastes. But those alone were insufficient to maneuver around the law. To support his finding that “the laws of the United States do not require the master of a steamer to put persons in the same apartment who would be repulsive or disagreeable to each other,” Justice Clifford turned to “[q]uestions of a kindred character . . . which support these views in a course of reasoning entirely satisfactory and conclusive”;<sup>133</sup> that is, the canon of cases supporting racial segregation in *public education*.<sup>134</sup>

Both by reference and in his analysis, Justice Clifford makes it quite clear that he would have upheld segregated common carriage—if Congress had been the author of the segregation and not a state.<sup>135</sup> His governing maxim was that “[s]ubstantial equality of right is the law of the State and of the United States; but equality does not mean identity . . . .”<sup>136</sup> Educational segregation as a matter of legally endorsed social and cultural taste proved the fulcrum in *Hall*.

It would prove dispositive in *Plessy*, too. In shades of Mme. DeCuir’s saga, the *Plessy* Court quickly dispatched with the idea that a man of color<sup>137</sup> could sufficiently possess (enough) whiteness such that he could identify

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133. *Id.* at 503–04.

134. *See id.* at 504–06.

135. *Id.* at 500–01 (“Governed by the laws of Congress, it is clear that a steamer carrying passengers may have separate cabins and dining saloons for white persons and persons of color, for the plain reason that the laws of Congress contain nothing to prohibit such an arrangement.”).

136. *Id.* at 503.

137. Like Josephine DeCuir, Homer Plessy was a *gen de couleur libre*, by the unique-within-the-U.S. Louisiana classifications of race; that is, Mr. Plessy was a free man of color. *See* Reckdahl, *supra* note 116; *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896). Plessy was phenotypically more similar to white Louisianans than most multiracial Louisianans. *See id.* His ability to “pass” for white became essential to establishing the facts of this case. Had he been unable to “pass” for white, he would have never been able to purchase the ticket, nor would he have had the opportunity to declare that he was “colored,” as Louisiana’s postbellum laws declared him to be. *Id.* (“[P]etitioner was seven eighths Caucasian and one-eighth African blood; [and] the mixture of colored blood was not discernable in him . . . .”). His apparent whiteness provided the factual basis for his Thirteenth Amendment challenge against state enforcement of racial classifications as an impermissible badge of slavery. *See id.* at 551 (“[P]laintiff’s argument [assumes] that the enforced separation of the two races stamps the colored race with a badge of inferiority.”); *id.* at 562 (Harlan, J., dissenting) (“The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution.”). It was separately the basis of his Fourteenth Amendment claim for whiteness as property. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1749 (1993) (acting as a foundational article in the discussion of Homer Plessy’s claim to whiteness as status property); LOFGREN, *supra* note 104, at 55.

dignity, reputation, status, or transaction in whiteness as his property.<sup>138</sup> By this measure, both Mr. Plessy's Fourteenth Amendment due process claim and his Thirteenth Amendment claim that racial segregation was a badge of slavery failed.<sup>139</sup> The Court had adopted the *Louisville* precedent to enable state laws that required passenger segregation within their states,<sup>140</sup> despite having previously denied enforcement of Mrs. DeCuir's state-law civil rights claim in *Hall* on what we might now call dormant Commerce Clause grounds.

*B. Equal Protection: Plessy's "Last Resort of Constitutional Argument"?*

And so, Fourteenth Amendment equal protection remained the only viable federal constitutional doctrine potentially available to the *Plessy* petitioners. The strongest precedent in their favor was *Yick Wo v. Hopkins*, a case that invalidated a facially neutral city ordinance banning the operation of wooden laundries on equal protection grounds because it had been unequally enforced against Chinese residents.<sup>141</sup> Acknowledging that the Court had applied the principle to invalidate similarly inequitable exercises of state police power in defiance of the Fourteenth Amendment, the *Plessy* Court reduced the question to:

whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.<sup>142</sup>

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138. *Plessy*, 163 U.S. at 549 ("If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called "property." Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.").

139. *See id.* at 550–52.

140. *See id.* at 547–48.

141. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (explaining that laws enacted to the detriment and aggravation of a particular group are constitutionally invalid). The *Yick Wo* Court held that a law that is facially "impartial in appearance" still violates the Fourteenth Amendment "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . ." *Id.*

142. *Plessy*, 163 U.S. at 550 (emphasis added).



1. *Tradition and Taste over Logic and Law: How Plessy's Equal Protection Claim Failed*

The *Plessy* petitioners' equal protection challenge, of course, failed; this is well known. Less well known is why. Even lesser known are the distinct segregation and inequality logics that undergird the *Plessy* outcome. Segregation logics, from *Plessy* through *Brown* onward to *Parents Involved*, focus on classification, promoting legal distinctions devoid of inherent meaning. The fiction according to those logics is that one projects one's own meaning to the classification; that the law itself is neutral, agnostic, and, with respect to race, "color-blind" to sociocultural castes that the classification creates or reifies.<sup>143</sup> Conditional on a perversely context-deficient reading of the Equal Protection Clause and civil rights statutes, adherence to these logics would disallow *any* governmental policy that relies on racial classification under the presumption that *the classification itself* is constitutionally offensive. Without attention to inequality,<sup>144</sup> the classification orientation of segregation logics enables the quip Chief Justice Roberts used to conclude *Parents Involved*: "The way to stop discriminati[on] on the basis of race is to stop discriminating on the basis of race."<sup>145</sup>

Inequality logics, on the other hand, require attention to *whether* governments use racial classifications, and if so, *how*, and in either event *to what ends*. Concerned with anti-subordination, properly addressing inequality would disallow invidious uses of racial classifications, but enable ameliorative and reparative uses.<sup>146</sup> More importantly, the anti-subordinationist approach dispenses with the idea of constitutional color-blindness<sup>147</sup> in a society where law and culture are iterative, if not symbiotic.

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143. *Id.* at 559 (Harlan, J., dissenting). The so-called "great dissenter" introduced the idea that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* While his dissent lamented the majority's "conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race," his opinion is no triumph either for anti-subordination or eradication of social inequality. *Id.* The premise of his dissent would have endorsed governmental agnosticism towards, even exploitation of, extant inequality. The paragraph in which he introduces his "great dissent" begins with the following two sentences: "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." *Id.*

144. *See, e.g., Brown I*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are *inherently unequal*." (emphasis added)).

145. *Parents Involved*, 551 U.S. 701, 748 (2007) (plurality opinion).

146. *Compare, e.g., id., with id.*, at 864 (Breyer, J., dissenting) ("The Equal Protection Clause . . . has always distinguished in practice between state action that excludes and thereby subordinates [people of color] and state action that seeks to bring together people of all races.").

147. *See generally* Gotanda, *supra* note 10 (providing a seminal exposition in color-blind constitutionalism and critical race theory).

These logics allow critique and intervention against ostensibly “neutral” state actions or “agnostic” state inactions that have intended or expected racially disparate effects.

Because of the nature of the *Plessy* petitioners’ claims, the Court had to attend to both logics, even if only to dismiss the inequality in favor of classification. Here is where school segregation proved invaluable to the Justices seeking to validate “separate but equal” as compatible with the Equal Protection Clause. Justice Henry Billings Brown wrote:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.<sup>148</sup>

For the *Plessy* Court, the persistence of school segregation despite nearly thirty years of the Fourteenth Amendment represented the apex of valuing common custom, tradition, and white families’ preference for excluding Black children from their schools over the legal equal protection obligation the Constitution imposed on the states. In an impressive string-citation of cases, the *Plessy* court affirmed (and enabled the extension of) “Jim Crow” laws by reference to cases that affirm state and local powers to determine where to provide educational services, how to fund schools, how to develop and delineate school zones, how to assign students to schools through residence zones, how to classify children, whether classification effects exclusion, and even the quality of education states have obligated themselves to provide—in other words, the very educational services whose racially disparate and discriminatory allocations remain at issue today.<sup>149</sup> Without exception, the educational segregation at issue in the cited state-court cases resulted from white families, schoolchildren, and leaders’ exercise of local authority to

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148. *Plessy*, 163 U.S. at 544.

149. *Id.* at 544–45.

systematically exclude Black schoolchildren from public schools, in each case to meet white families' social expectations, and not those of Black families.<sup>150</sup> Even more so than the state regulation of interstate transportation at issue in *Plessy*, the provision of public schools was unmistakably *state* action. And so, to the extent that the states were able to make lawful private discriminatory tastes without offending the Fourteenth Amendment, certainly they could allow private actors to operate their own business without concern for constitutional violation.

Thus, as this subpart elaborates in serial case study, the plausibility of constitutionally compliant racial segregation in *Plessy* is contingent entirely on recognizing the state's actions codifying and enforcing separation as acquiescent to existing private social tastes that would inevitably manifest in how private individuals sorted themselves in schools. Without identifying private tastes as the root cause of student and teacher assignment and differences in school support, the state could not escape constitutionally suspect<sup>151</sup> agency, and therefore liability, for the apparent classification and any resulting discriminations that could emerge pursuant thereto. In other words, the state would be responsible in full to the Fourteenth Amendment for its regulations and enforcement actions that yielded the disputed actions. In addition to its constitutional textual and contextual flaws, this argument was also empirically flawed, as it relied on omitting Black families' dissatisfaction with school segregation—and in some cases exclusion from state-operated schools altogether—as relevant to its validity.

a. *Roberts v. City of Boston: The Case the Fourteenth Amendment Should Have Superseded*

The primary school-segregation case relied upon by the *Plessy* Court was *Roberts v. City of Boston*,<sup>152</sup> a case that not only preceded the passage of the Fourteenth Amendment, but one which had already been superseded by the Massachusetts Legislature before the Civil War. By the time *Plessy* was decided, *Roberts* was no longer good law under both the Massachusetts and

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150. This is not to say that all Black families were integrationist, or that they wanted their children to attend schools with white children amidst hostile, unwelcoming conditions. There is considerable evidence to the contrary. It is to say, however, that most white families were not seeking to enroll in Black educational institutions. And, when they were, they were not greeted with opposition sufficient to rise to state and federal Supreme Court challenge.

151. I recognize that the use of the term “constitutionally suspect” is anachronistic. But it is helpful to think of a proto-suspicion of constitutional incompatibility of state-mandated segregation in public accommodations as necessitating the *Plessy* Court's appeal to existing segregation in public education.

152. *See Plessy*, 163 U.S. at 544–45 (discussing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)).

U.S. constitutions and had not been for decades. And yet, for the *Plessy* Court, it was persuasive on the question of segregation's compatibility with the Fourteenth Amendment, even as that case imposed known educational inequalities on Black Bostonian schoolchildren.

In *Roberts*, as would be the case in most pre-*Plessy* school segregation cases, the aggrieved five-year-old Black plaintiff sought access to the nearest, tax-funded, state-operated school, and was denied entry solely on account of her race.<sup>153</sup> Importantly, the Massachusetts legislature had passed a law in 1845 giving all educable school-age children within the Commonwealth access to public education and standing to sue local school committees for denial of the same.<sup>154</sup> Sarah Roberts met all age and capacity requirements to enroll in school, and except for her race,<sup>155</sup> she would have been able to enroll in any of the five more proximate schools between her father's home and the Abiel Smith School she was assigned to.<sup>156</sup>

At the time, the City of Boston operated 160 primary schools for schoolchildren between the ages of four and seven.<sup>157</sup> Black children could enroll in *only two* of those schools; the remaining 158 reserved exclusively for white students.<sup>158</sup> The Smith School, one of the two reserved for Black primary schoolchildren, had already fallen into substantial disrepair. Unlike the schools maintained for white students, the physical plant of the Smith School was subpar—even when in good repair.<sup>159</sup> In its then condition, Black students were unable to learn, discomforted by inadequate facilities and condemnable conditions.<sup>160</sup> Worse, Black families were taxed for the

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153. *Roberts*, 59 Mass. (5 Cush.) at 200.

154. Act of Mar. 25, 1845, ch. 214, 1845 Mass. Acts 545 (providing a remedy to “[a]ny child unlawfully excluded from public school instruction”).

155. *Roberts*, 59 Mass. (5 Cush.) at 200.

156. See Leonard W. Levy & Harlan B. Phillips, Note, *The Roberts Case: Source of the “Separate but Equal” Doctrine*, 56 AM. HIST. REV. 510, 512 (1951).

157. *Roberts*, 59 Mass. (5 Cush.) at 204–05.

158. *Id.* at 205.

159. Levy & Phillips, *supra* note 156, at 511 n.8.

160. *See id.*

maintenance of Black schools,<sup>161</sup> resulting in higher levies for worse schools.<sup>162</sup>

While the Black Boston community had once heralded separate schools to shield their children from social racism and discrimination within the common schools, the experiment proved that segregation was a tool for educational takings. In response to the Black community's request to abolish separate schools and allow their children to return to the common schools, the Boston School Committee resisted, contending that Black children's "peculiar physical, mental, and moral structure, requires an educational treatment, different, in some respects, from that of white children."<sup>163</sup> Apparently, the School Committee's proto-eugenic conceptualization of Black children's educational fitness justified the resulting educational inequality it provided them.

Massachusetts Chief Justice Lemuel Shaw,<sup>164</sup> "[c]onceding . . . in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social," questioned only whether Boston's practice of segregating its schools "is a violation of any of these rights."<sup>165</sup> He even acknowledged the true issue of segregation perpetuating caste-like distinctions of race, but he just as quickly dismissed any authority to intervene, choosing to trust the same school committees that nakedly adopted private discriminatory tastes with the reason and discernment to evaluate whether embracing these tastes was in the best interest of Black and white students.<sup>166</sup>

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161. Initially, Boston had refused to fund Black schools, Commonwealth law notwithstanding. George A. Levesque, *White Bureaucracy, Black Community: The Contest Over Local Control of Education in Antebellum Boston*, 11 J. EDUC. THOUGHT 140, 142 (1977). The first Black school in the city was founded by Primus ("Prince") Hall in 1798. George Dargo, *The Sarah Roberts Case in Historical Perspective*, 3 MASS. LEGAL HIST. 37, 37–38 (1997). Initially, the school was supported exclusively by private philanthropy until 1812, when the city first assisted the school—not with the same funding allocated to white schools, but with an annual \$200 (\$4,192.51 in 2022 dollars) lump-sum grant. See Levy & Phillips, *supra* note 156, at 510–11. Only after the death of one such philanthropist, Abiel Smith, who endowed the school with \$4,000 (\$72,416.10 in 2022 dollars), did the Boston School Committee assume control over it. See Levy & Phillips, *supra* note 156, at 511.

162. Compare Levy & Phillips, *supra* note 156, at 510–11, with San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 (1973) (displaying similar latter-day allegations of segregated higher tax burdens for poorer quality schools).

163. WILLIAM CROWELL ET AL., REPORT TO THE PRIMARY SCHOOL COMMITTEE ON THE ABOLITION OF THE SCHOOLS FOR COLORED CHILDREN WITH THE CITY SOLICITOR'S OPINION 29 (Boston, J. H. Eastburn 1846); see also Levesque, *supra* note 161, at 141–42 (explaining that "school officials fiercely resisted challenges to their authority" and were averse to relinquishing social control).

164. To my knowledge and relief, Chief Justice Shaw is not among the ancestors to whom I dedicate this Article.

165. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849).

166. See *id.* at 209–10.

*Roberts* changed the relationship between the Commonwealth legislature and local school committees and the courts' posture in reviewing students' rights against school administrators' exercises of authority. In a departure from Commonwealth law, "local control" was born. The summative effect of this new judicial deference to local control had the effect of giving school districts wider discretion to endorse social discrimination through administrative practice. The *Roberts* plaintiffs had argued for equality; that precedent had established uniform expectations in public education and subordinated school committee administration to the spirit and letter of state laws on education and equality.<sup>167</sup> The school committees' actions in the three *Roberts* precursor cases were administrative exercises of local control, arguably in "reasonable" interpretation of ambiguous statutory authority. Despite having previously rejected the idea of local control as violating the spirit of school laws, the Supreme Judicial Court fortified those powers in *Roberts* by constructing the lack of direct constitutional instruction on how to exercise local authority in these circumstances as a proscription on the court limiting the school committees' exercises of power.<sup>168</sup>

"The power of general [education] superintendence," which until *Roberts* had not been articulated in U.S. law, was announced to include local control over "how schools shall be organized; how many schools shall be kept; what shall be the qualifications for admission to the schools; the age at which children may enter; [and] the age to which they may continue."<sup>169</sup> This power "vests a plenary authority in the [school] committee to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."<sup>170</sup>

Much is made in *Roberts* of the "reasonability" of the school committee's clearly intentional decision to segregate Black and white students by providing Black students with "special schools."<sup>171</sup> However, the local control authority affirmed by the Supreme Judicial Court also allows school committees to provide unequal educational opportunity as well as disclaim the educationally segregative actions of private actors, even when they incorporate the impact of such actions in their official decisions out of administrative "expedien[cy]."<sup>172</sup> Individuals have no rights to challenge, or

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167. *See id.* at 206.

168. *See id.* at 206–07.

169. *Id.* at 207–08.

170. *Id.* at 208.

171. *See id.*

172. *Id.* at 208–09 ("It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. *This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings*

even question, such administrative exercises of local control or indict the school committee's endorsement of private discriminatory tastes. The courts will not intervene except in rare instances. As a standard of judicial review, *Roberts* announced that "when this power is reasonably exercised, without being abused or perverted by colorable *pretences*, the decision of the committee must be deemed conclusive."<sup>173</sup>

*Plessy* should have never considered *Roberts* at all. It is as inapposite a case to the Fourteenth Amendment as any one case could be—substantively, procedurally, precedentially. And yet its elevation of local control as the mechanism by which to empower private prejudice appealed uniquely to the majority. Within the architecture of the 1896 case, *Roberts* provides proof of concept that a string citation of post-Fourteenth Amendment cases appear to ratify,<sup>174</sup> suggesting without any exposition that the intervening constitutional change is immaterial to the legality of school segregation.

b. *Cory and Garnes: School Segregation Through Classification and Exclusion*

A superficial review of some of the cited cases would affirm the *Plessy* Court's assumption. A more engaged review would reveal the extent social tastes for discrimination pervert the various courts' ability to evaluate the incompatibility of state adoption of those tastes with the Fourteenth Amendment.

In *Cory v. Carter*, the Indiana Supreme Court explicitly rejected the Fourteenth Amendment altogether.<sup>175</sup> In response to a writ seeking to compel the admission of a Black child to a township school reserved for white children, the state high court declined. In its opinion, attending Indiana public schools was a privilege the state constitution granted to *state citizens* as that class existed *before* the enactment of the Fourteenth Amendment.<sup>176</sup> Understanding "that the meaning of a constitution is fixed when it is adopted,"<sup>177</sup> because Black people had been ineligible for state citizenship at the time Indiana assigned the public-school privilege, they could not be made eligible by virtue of the Amendment's having declared Black Indiana

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*of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence . . . ."* (emphasis added)).

173. *Id.* at 209 (emphasis added).

174. See *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (internal citations omitted).

175. *Cory v. Carter*, 48 Ind. 327, 352, 356 (1874).

176. See *id.* at 354–55.

177. *Id.* at 343.

residents state citizens after that fact.<sup>178</sup> The *Cory* court went one step further than most by embracing private discrimination as a rule of constitutional construction:

There is but one construction which will preserve the unity, harmony, and consistency of our state constitution, and that is, to hold that it was made and adopted by and for the exclusive use and enjoyment of the white race. Any other construction would convict the members of the constitutional convention and the voters of the State of the grossest inconsistency, absurdity, and injustice. It would be monstrous to hold that the framers of the constitution in adopting, and the voters of the State in ratifying it, intended that the common schools of the State should be open to the children of the African race, when, by the same instrument, that portion of such race as then resided in the State were denied all political rights, privileges, and immunities, and the further immigration of that race into the State was prohibited by the thirteenth article of the constitution, which received the almost unanimous approval of the voters of the State.<sup>179</sup>

Relying on the U.S. Supreme Court's decision in *Slaughter-House Cases*, which protects from the so-called "hostile and discriminating legislation of other States" the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States,<sup>180</sup> the *Cory* court reaffirmed public education as a *state privilege* beyond the purview of the eponymous clause.<sup>181</sup> The Indiana court found procedural due process "protection[s] for] private rights" inapposite on privileges,<sup>182</sup> and summarily dismissed the Equal Protection Clause as "hav[ing] been added in the abundance of caution," but not with the purpose of "enlarg[ing] the powers of the Federal Government [or] diminish[ing] those of the states."<sup>183</sup>

Worse than the classification cases, the rank exclusion imposed by *Cory* is unquestionable discrimination that the *Plessy* Court in its citation to *Cory*, out of context, embraces without distinction, notwithstanding its clearly erroneous disregard for the Fourteenth Amendment. Nevertheless, consistent with *Cory*, the overwhelming balance of state supreme courts across the country, from California<sup>184</sup> to Ohio,<sup>185</sup> rejected the Fourteenth Amendment

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178. *See id.* at 344.

179. *Id.* at 342–43.

180. *Slaughter-House Cases*, 83 U.S. 36, 100–01 (1872).

181. *Cory*, 48 Ind. at 350–53.

182. *Id.* at 352 (quoting *Westervelt v. Gregg*, 12 N.Y. 202, 209 (1854)).

183. *Id.* at 353 (quoting *State v. Gibson*, 36 Ind. 389, 393 (1871)).

184. *Ward v. Flood*, 48 Cal. 36, 49–50 (1874).

185. *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 210 (1871).



intervention over education rights, casting Black petitioners' requests as aspirations to a social citizenship beyond the scope of the Constitution to grant. Having distorted Mary Frances Ward's petition in this manner,<sup>186</sup> in *Ward v. Flood*, the California Supreme Court held:

The right of admission to our public schools is not one of those privileges and immunities [of the United States]. They were unknown, as they now exist, at the time of the adoption of the Federal Constitution; that instrument is silent upon the subject of education, and our public schools are wholly the creation of our own State Constitution and State laws.<sup>187</sup>

On the matter, the California Supreme Court rejected the Fourteenth Amendment as superseding, or even controlling authority on educational segregation. Rather, *Roberts* was persuasive. The *Ward* court's opinion was "that the language of the [then] Massachusetts Constitution prohibiting 'particular and exclusive privileges,' was fully as significant, to say the least . . . as is that of the Fourteenth Amendment . . . , securing 'the equal protection of the laws.'"<sup>188</sup> Thereafter, the California high court quoted Chief Justice Shaw's *Roberts* opinion for the balance of three pages,<sup>189</sup> only to announce its "concur[rence] in these views," and to admonish school districts from excluding Black children from white schools, as Indiana had done in *Cory*, without providing them a separate school to attend.<sup>190</sup>

*c. School Segregation Through Classification and Exclusion*

The compatibility of racially segregated schools with the Fourteenth Amendment was finally taken up as *the* issue in *Garnes v. McCann*, but to similar outcome.<sup>191</sup> Before the Civil War, the Ohio Supreme Court had already decided that racially segregated schools were compatible with state law in *Van Camp v. Logan*.<sup>192</sup> In *Van Camp*, one of only two reported antebellum (and therefore pre-Fourteenth Amendment) school segregation cases,<sup>193</sup> the state high court was tasked with determining the meaning of the

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186. *Ward*, 48 Cal. at 52.

187. *Id.* at 40.

188. *Id.* at 53.

189. *See id.* at 53–57.

190. *See id.* at 56–57.

191. *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 204 (1871).

192. 9 Ohio St. 406 (1859).

193. The *Plessy* Court discusses the other, more famous, antebellum school segregation case, *Roberts v. City of Boston*. *Plessy v. Ferguson*, 163 U.S. 537, 544–45 (1896) (quoting *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849)).

words “white” and “colored” in the state law providing for separate common schools by those classifications.<sup>194</sup>

The state high court contrasted the previous law of 1848 with that of 1853, which repealed it. The former allowed the creation of separate school districts and support funds for “colored” schools to be implemented if white families balked at integrated schools.<sup>195</sup> The latter, in effect during the *Van Camp* events, imposed a common duty of support for Black and white schools on the same local school boards.<sup>196</sup> Under the earlier law, “colored” students could attend schools set aside for “white” students, but only if white people did not object to their enrollment.<sup>197</sup> Black schools were supported solely by taxes collected from the property of “colored” persons.<sup>198</sup> The white school fund could share with the Black school fund, but only upon the explicit assent of the white school fund and its funders.<sup>199</sup> The effect of those provisions was hardly surprising. White schools were established and flourished; Black schools did not exist.

Once the later antebellum law abolished segregated funding, the Ohio Supreme Court found that the only remaining issue was one of classification.<sup>200</sup> And, presaging *DeCuir* and *Plessy*, multiracial children had no right to classification as white.<sup>201</sup> Their assignment to Black schools was not deemed discriminatory even though they had to travel longer distances—beyond the catchment area of the white school—to attend.<sup>202</sup> Structural equality apparently cured the discriminatory effects of segregation.

Following the passage of the Reconstruction Amendments, the *Garnes* petitioners argued that, however compatible the practice was with state law, maintaining continued racial segregation of schools offended the Fourteenth Amendment. They argued that forcing Black students to enroll in schools beyond their township denied them the “advantages and conveniences” of attending schools operated by their township.<sup>203</sup> Their exclusion from the township’s schools not only offended the Privileges and Immunities Clause,

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194. *Van Camp*, 9 Ohio St. at 409–10.

195. *Id.* at 409.

196. *Id.* at 409–10.

197. *Id.* at 409.

198. *Id.*

199. *Id.*

200. *Id.* at 410, 414.

201. *Id.* at 411–14; *see also* *Plessy v. Ferguson*, 163 U.S. 537, at 552 (1896) (upholding a state law that classified one-eighth Black as belonging to the “colored race”); BAY, *supra* note 117, at 41–43 (depicting instances where multiracial people were denied the right to classification as white).

202. *See Van Camp*, 9 Ohio St. at 408, 410.

203. *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 200 (1871).

the *Garnes* petitioners argued, but their operation of local schools for white students and not Black violated the Equal Protection Clause as well.<sup>204</sup>

In their defense, school officials simply argued that the Fourteenth Amendment did not apply to matters of taste. They explicitly argued that local boards of education can lawfully exercise their authority “with due regard to the peculiar circumstances, wants, interests, and even *prejudices*, if you please, of each particular locality or neighborhood.”<sup>205</sup> “[C]lassification *on account of color*,” officials went on to argue, was benign, perhaps more so than unchallenged classifications on the bases of age, sex, and ability.<sup>206</sup> Such a benign distinction allegedly favored no group of children over another. Further, the board argued, the distinction was not even its own, but that of the community. Separation of the races was merely “a matter of taste.”<sup>207</sup> And, invoking the Latin maxim, “*de gustibus non [est] disputandum*,”<sup>208</sup> private matters of taste are beyond legal intervention; suggesting, in echoes of *Roberts* and *Ward*, that in such matters of taste there can be no cause of action, not even under the Fourteenth Amendment.

The Ohio Supreme Court went with the school officials, summarily restating their classification position from *Van Camp* and tacitly affirming the private tastes argument as nullifying the import of both Fourteenth Amendment arguments.<sup>209</sup> But, as was then the case—and I argue remains so today<sup>210</sup>—school boards were not merely observing the operation of private tastes in public school assignment, staffing, funding, or support. In *Garnes*, these allegedly communal tastes were converted into law by governmental action and enforced by related governmental actions. State action presented an apparent problem to the school board’s ability to disclaim responsibility. And so, counsel and the court had to make the state actor less of an agent than it actually was. The state’s counsel had to make school officials a pass-through of sorts, non-agents in the construction of the socioeducational order at issue in the case.

The Missouri case, *Lehew v. Brummell*, decided only five years before *Plessy* provides, perhaps, the best example of state actions elevating private discriminatory tastes.<sup>211</sup> The *Lehew* plaintiffs were white parents who filed suit to keep the *Brummell* defendant children, who were Black, from enrolling

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204. *Id.* at 199–200.

205. *Id.* at 201.

206. *Id.*

207. *Id.* at 202.

208. *Id.* The original invocation incorrectly recited the maxim as “*de gustibus non disputandum*.”

209. *Id.* at 208–11.

210. *See supra* Section III.B.1.

211. *Lehew v. Brummell*, 15 S.W. 765 (Mo. 1891).

into the whites-only school.<sup>212</sup> Unlike in *Roberts* and *Garnes*, and much more akin to *Cory* and *Van Camp*, the local township responsible for establishing schools had not upheld its state constitutional obligation to maintain any school for Black children.<sup>213</sup> For this reason, and this reason only, the Brummell children had been able to attend the public schools.

That is, until the *Lehew* plaintiffs secured a preliminary injunction. The Missouri court characterizes the Black children's complaint, that the nearest school aside from their home township's is prohibitively distant, as invoking "chimerical theories."<sup>214</sup> But it is the court's adoption of proto-eugenic theories defining ability level based on race and sex and determining that "the color carries with it natural race peculiarities, which furnish the reason for the classification,"<sup>215</sup> that supports its "conce[ssion] that separate schools for colored children is a regulation to their great advantage."<sup>216</sup>

The Brummells' claims were all but ignored. It was left unevaluated how the Fourteenth Amendment is satisfied by the local township neither providing Black students with a school nor allowing them access to existing schools. Furthermore, it was unstated how the *Lehew* plaintiffs might have been injured by the Brummell children's enrollment. The *Lehews*' desire to keep Black students out was sufficient justification for the state's exclusion actions and the courts' injunctive "relief."

#### *d. Failure to Acknowledge Challenges to Educational Segregation*

As it turns out, the gravity of these errors, factual and doctrinal, are particularly palpable *when the state constitution itself did not allow educational segregation*, as was the case in Louisiana. Almost twenty years before *Plessy*, in *Bertonneau v. City Schools*, which the *Plessy* Court cited, Black residents *had* explicitly challenged New Orleans school segregation—and, according to the federal circuit court, only school segregation—under the Fourteenth Amendment Equal Protection Clause.<sup>217</sup> Moreover, at the time, the Reconstruction-era Louisiana state constitution *did not allow educational segregation*. Article 135 of that Constitution provided:

All the children of this State between the ages of six (6) and twenty-one (21) shall be admitted to the public schools or other institutions

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212. *Id.* at 765.

213. *Id.*

214. *Id.* at 766.

215. *Id.*

216. *Id.*

217. *Bertonneau v. Bd. of Dirs. of City Schs.*, 3 F. Cas. 294 (C.C.D. La. 1878) (No. 1361); *see also Plessy v. Ferguson*, 163 U.S. 537, 545 (1896).

of learning sustained or established by the State in common without distinction of race, color, or previous condition. *There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.*<sup>218</sup>

Despite the acknowledged equal protection challenge to city educators' refusal to admit two Black students to their nearest school—because they had reserved it for white students in contravention of the state constitution—the federal circuit court demurred by maxim: “[e]quality of rights does not necessarily imply identity of rights.”<sup>219</sup> The *Bertonneau* court cited *State v. McCann* and *State v. Duffy*, where state supreme courts in Ohio and Nevada, respectively, had upheld the practice against a Fourteenth Amendment challenge.<sup>220</sup> Against this, the fact that public education is not specifically enumerated by the U.S. Constitution was held to bar Fourteenth Amendment relief. For this reason, segregated schools in New Orleans were upheld, the then-state constitutional provision notwithstanding.<sup>221</sup> The *Bertonneau* court invoked local control to justify its judicial abdication, stating: “The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.”<sup>222</sup>

One year after *Bertonneau*, the post-Reconstruction state legislature adopted the constitution of 1879, which, among other things, codified the already judicially endorsed racial segregation of its schools.<sup>223</sup>

Though their reliance on *Bertonneau* was in error, the pervasiveness and intractability of educational segregation across the country did provide the strongest support for the seven-Justice *Plessy* majority, which was determined to evade the Equal Protection Clause's clear dictates in order to ratify social discrimination into law. Though the policy domain in *Plessy* was

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218. LA. CONST. of 1868, art. 135 (emphasis added).

219. *Bertonneau*, 3 F. Cas. at 296 (citing *Hall v. Decuir*, 95 U.S. 485, 503 (1877) (Clifford, J., concurring)); see also *supra* text accompanying notes 131–136.

220. *Bertonneau*, 3 F. Cas. at 296 (citing *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 204 (1871); *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 343–44, 348) (1886).

221. *Bertonneau*, 3 F. Cas. at 296.

222. *Id.*

223. Libby Neidenbach, *Homer Plessy and the Black Activists who Fought Segregation All the Way to the Supreme Court*, THE HISTORIC NEW ORLEANS COLLECTION (Mar. 4, 2021), <https://www.hnoc.org/publications/first-draft/symposium-2021/homer-plessy-and-black-activists-who-fought-segregation-all-way-supreme> [https://perma.cc/DA5B-M9SY]. Louisiana's post-Reconstruction regression catalyzed Homer Plessy's political activism. See *id.* In 1887, five years before the *Comité des Citoyens* recruited him to become the test plaintiff in his eponymous case, Plessy served as vice president of the Justice, Protective, Educational, and Social Club, whose charge was securing the public education of Black students who had been educationally disenfranchised following the 1879 state constitution. See *id.*

transportation, thought by petitioners to be more analogous to labor-economic regulation than schooling, the Court situated the bulk of its rationale for how segregated transportation could not *possibly* offend equal protection *because* of the ubiquity of “unchallenged” school segregation.<sup>224</sup>

## 2. *School Segregation as Precedent to the Segregation of Public Life*

None of the nuances of classification or exclusion, of segregation or inequality, of access through taxation, or even whether the Fourteenth Amendment applies, emerge in *Plessy*. But, by blanket appeal to school segregation cases, and relying upon them to support its central claim that school segregation is not incompatible with equal protection, the *Plessy* majority embraced all the ways in which the various states exercised segregative authority—taxation, school closure, school assignment, “ability” grouping, and endorsement of social and cultural discriminatory tastes. Through the example of legally *permissible* educational segregation, the *Plessy* Court introduced constitutional permission for legally *mandated* educational segregation.

Justice Brown’s blind eye toward schools’ failures to provide Black students with any type of educational opportunity that could arguably be considered “equal” was key to enabling the Court’s preferred classification logic over schoolchildren’s apparent experiences of discrimination. Mr. Plessy’s argument, which mirrored arguments made by Black schoolchildren and their families, had to be transmogrified into an “underlying fallacy,” an “assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority . . . solely because *the colored race chooses* to put that construction upon it.”<sup>225</sup> Otherwise, separation might plausibly be unequal and its practices, therefore, subject to constitutional scrutiny.

The Court’s purposefully sanitized presentation of segregated schooling made “separate but equal” plausible in other contexts, including public transportation. And, without the righteous malcontents of Black people to consider, the *Plessy* Court could describe preservation of the social order as a legitimate interest and state acquiescence, embrace even, of discriminatory social and cultural norms through segregative laws promulgated for the promotion of the comfort of white people as a “reasonable” exercise in pursuit of that interest. Justice Brown writes:

*Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public*

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224. See *Plessy v. Ferguson*, 163 U.S. 537, 544–45, 550–51 (1896).

225. *Plessy*, 163 U.S. at 551 (emphasis added).

conveyances is unreasonable, or more obnoxious to the [F]ourteenth [A]mendment than the acts of [C]ongress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.<sup>226</sup>

The idea that segregated schools provided equal educational opportunity (irrespective of the Justices' actual belief that they did so) was critical to *Plessy*. Without it, racial classification has meaning, and the state's actions—or, in other cases, *inactions*—codifying it through law could not be reconciled with the Fourteenth Amendment. The inequality logic would have prevailed; “equality” could never have been accomplished through segregation. The “separate but equal” classification scheme might never have enjoyed plausible validity or extended its reach as pervasively as it did throughout public life and public education in particular.

### C. *The Incompleteness of Brown on Plessy, Reprise*

The *Brown I* opinion also engages none of this directly, neither the cases *Plessy* cites nor any of the points of law they settle. Instead, it addresses the six post-*Plessy* U.S. Supreme Court cases on educational discrimination, and only passingly.<sup>227</sup> While *Cumming v. County Board of Education of Richmond County* involves the racially disparate impact of school closures and funding decisions,<sup>228</sup> and *Gong Lum v. Rice* directly supports the state's

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226. *Id.* at 550–51 (emphasis added).

227. *See Brown I*, 347 U.S. 483, 491 (1954).

228. In *Cumming v. County Board of Education*, Justice Harlan (the “great dissenter” from *Plessy*) affirmed the eponymous county school board's decision to disestablish its only publicly funded Black high school. 175 U.S. 528, 532, 545 (1899). While the Georgia Constitution of the time required publicly funded, racially segregated education for elementary students, it provided no such guaranteed education for Black high school students. *Id.* at 543–44. Justice Harlan found that the county's enforcement of state segregation provisions did not offend any of the Fourteenth Amendment clauses. *Id.* at 543. This conclusion stemmed from his framing the situation as the result of practical and nondiscriminatory decisions taken by the county school board. *See id.* at 544. The county school board had two possible solutions to solve its resource allocation problem. It could either offer a public high school for 60 Black high-school students or reallocate the money to support 300 Black elementary-school students who had no public school. *See id.* Rather than explore why Richmond County dedicated so few resources to Black elementary-school students, or why it imposed a competition among Black students for resources it did not impose among white students, the “great dissenter” fully accepted stratification of resources by race as an inalterable condition precedent. *See id.* at 542. Even within the “separate but equal” framework, Richmond County's actions should have been enjoined. Instead, “reasonability,” however foundationally corrupted, was affirmed to justify actions the Congress and States had jointly agreed were impermissible.

authority to classify students for purposes of school assignment,<sup>229</sup> neither issue nor its relevance to educational inequalities features in the *Brown* opinion.<sup>230</sup> Nor does the intractable role that private prejudice and state embrace, adoption, or exploitation of the same receive necessary treatment.

#### IV. PRELIMINARY THOUGHTS ON A MORE COMPREHENSIVE STATE ACTION DOCTRINE TO ELIMINATE THE *PLESSY* REMAINDER

The primary contribution of this Article is its identification of the *Plessy* remainder as a site for doctrinal intervention. A precise prescription for how to excise it from our jurisprudence and sociolegal consciousness needs to develop. At the same time, some preliminary thoughts might guide our approach. And they, too, begin with *Brown*.

*Brown*, for all its faults, does help set up a surgical removal of the *Plessy* remainder. Ironically, it does so by being terrifically blunt. By clarifying that segregation cannot possibly yield equal educational opportunity, *Brown* plausibly reaches back through *Plessy* to invalidate *all the ways in which the states have used segregation to assign unequal educational opportunity*—through state compulsion, state permission, state acquiescence, and state exploitation. *Milliken* and its progeny did not change any of this. Those cases were laser-focused on the appropriateness of particular remedies to accomplish desegregation. None challenged the fundamental premise that state-sponsored segregation is incompatible with equal educational opportunity.

*Brown* also made no changes to the underlying duty. It left the broader duty that *Plessy* announced—of equalizing public services, in this case educational opportunity—inviolate. It only arrested the argument of segregation as a plausible means. This duty is clearly breached when the state compelled or authorized school desegregation, as one observes from the

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229. See generally *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927) (involving a Chinese-American student's appeal to be classified as "white" for school assignment purposes; despite being considered "socially white," the State of Mississippi classified her as "colored" and would not allow her to enroll in the more geographically proximate whites-only school).

230. *Brown I*, 347 U.S. at 491 (enjoining racial segregation of schools but leaving undisturbed the state's authority to classify students by race). The remaining four post-*Plessy* education discrimination cases involved inequalities between opportunities offered to white and Black students in graduate law studies. See generally *State ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that Missouri's failure to provide a state-sponsored law school for Blacks, as it did for whites, is per se unequal protection); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (holding that the Fourteenth Amendment required Ohio make legal education equally available to Black and white students); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that unequal legal education for Black law school students violates the Fourteenth Amendment); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (holding that within-school segregation of Black law students violates the Fourteenth Amendment).



*Brown–Green* set of cases. What was less clear from the *Brown* decision itself was how contingent the state’s duty to provide equal educational opportunity was on the state being the primary agent or decision-maker in effecting school segregation. In other words, would the state’s duty be implicated—or could it avoid a constitutional inquiry altogether—if private, non-state actors were the agents of school segregation and its concurrent discriminatory provision of unequal educational resources?

A. *Griffin v. Prince Edward County as the Ultimate Case of Public–Private Collusion to Violate Equal Protection in Education*

The Court addressed such questions in *Griffin v. Prince Edward County*.<sup>231</sup> *Griffin* is the continuation of the *Davis* case.<sup>232</sup> Unique among the *Brown* cases, *Davis* was brought at the insistence of Black high-school students whose education the local school board had constructively abandoned.<sup>233</sup> After the Court had declined in *Sweatt* to review the consistency of *Plessy* with the Fourteenth Amendment, the NAACP abandoned a strategy of school equalization for one of school desegregation—against the plaintiffs’ own wishes.<sup>234</sup> Although the *Davis* plaintiffs preferred school equalization to desegregation—the NAACP would not have taken their case had they insisted on school equalization—their true interest was holding the Commonwealth to its obligation to provide Black children with quality educational opportunity.<sup>235</sup> As hinted above, the three-judge District Court’s ruling in *Davis* that the school board had a duty to provide equal school

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231. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964).

232. The Supreme Court clearly understood this to be the case:

The amended complaint . . . [is] not a new cause of action but merely part of the same old cause of action arising out of the continued desire of [Black] students in Prince Edward County to have the same opportunity for state-supported education afforded to white people, a desire thwarted before 1959 by segregation in the public schools and after 1959 by a combination of closed public schools and state and county grants to white children at the [Prince Edward School] Foundation’s private schools.”  
*Id.* at 226–27.

233. Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and Brown*, 90 VA. L. REV. 1667, 1669–70 (2004).

234. *See id.*; *see also* KLUGER, *supra* note 67, at 282.

235. Turner, *supra* note 233, at 1669–72 (quoting high-school strike participants who clearly establish the goal of their participation in desegregation lawsuits as getting the Commonwealth to provide them “quality” or the “best education,” and not “about sitting beside a given person.”); *see also* Bell, *supra* note 3, at 476–77, n.21 (discussing parents’ critiques of the NAACP’s insistence on desegregation over Black school communities’ preferences for equalization).

facilities for Black students “with diligence and dispatch” was agnostic to the constitutionality of school segregation.<sup>236</sup>

The Prince Edward County school board’s reaction to *Brown II*, regrettably, underscored for the Court the need to articulate the duty to provide educational opportunity to Black students separately from obligations to desegregate schools. The same day the Court remanded *Davis* to the District Court with the instruction to manage school desegregation “with all deliberate speed,”<sup>237</sup> the board began to divest from its public schools.<sup>238</sup> Almost immediately, the school board made provisions to pay white school teachers in the event of school closure.<sup>239</sup> Nearly four years of delay by the board ended with the Fourth Circuit’s decision in May 1959 requiring desegregation of county high schools by September and of county elementary schools as soon as practical.<sup>240</sup> The school board responded by closing its public schools and adopting a budget with no provisions for public education.<sup>241</sup> For their part, the Commonwealth repealed compulsory school-attendance laws and enacted a program that allocated school funds in the form of vouchers for students to attend schools elsewhere, which the school board augmented with its own tuition-grant program.<sup>242</sup> County schools remained closed from 1959 until 1964.<sup>243</sup>

Key to the success of this plan were the actions of private community leaders. Ostensibly acting separately from the school board, white community leaders hurriedly created independent schools<sup>244</sup> that, as non-state-operated schools, they could operate in a segregated fashion free from constitutional

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236. *Davis v. Cnty. Sch. Bd.*, 103 F. Supp. 337, 340–41 (E.D. Va. 1952).

237. *Brown II*, 349 U.S. 294, 301 (1955).

238. See *Turner*, *supra* note 233, at 1680–81.

239. See *id.* at 1681.

240. *Allen v. Cnty. Sch. Bd.*, 266 F.2d 507, 511 (4th Cir. 1959).

241. *Turner*, *supra* note 233, at 1683. One could make an argument that the *Griffin* plaintiffs would have had a harder, if not impossible, constitutional claim to make had the state simply closed its public schools and done nothing else. Less than a decade after *Griffin*—and following the change from the Warren Court to the Burger Court—the Court held in *Palmer v. Thompson* that a municipality’s closure of all public pools did not necessarily reflect a discriminatory purpose or intent, even if: it had previously operated the pools in a racially segregated manner; the effect of the pools’ closure would be denying Black residents access to swimming pools; and it surrendered the lease of one of the pools to a private organization that proceeded to operate it in a racially discriminatory manner. 403 U.S. 217 (1971). Absent proof of discriminatory intent, the city’s otherwise pretextual arguments for its pools closure—that desegregated pools could not operate in an economic fashion or without disturbing the peace—were sufficient to avoid an equal protection violation. *Id.* at 219.

242. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 221–24 (1964).

243. *Turner*, *supra* note 233, at 1670.

244. *Id.* at 1683.

interference.<sup>245</sup> These schools allowed the county to dismantle its public schools without harming either the educational opportunity or progress of its white citizens.

It also created a Hobson's choice for the Black community: either create separate private schools and accept tuition vouchers to fund them or receive no state-funded education at all. The Black community refused the non-choice, and, for five years, Black schoolchildren in Prince Edward County had few available school options and no state- or county-funded ones.<sup>246</sup> The incalculable lifelong educational, socioeconomic, psychological, and cultural toll these events had on these children has led to their being known as "the lost generation."<sup>247</sup>

When presented with these facts, the Court in *Griffin* had to revisit *Brown* anew. Moreover, it had to understand the role school segregation played in sorting opportunity to some and denying it to others, and how desegregation itself was only one of many remedial means that plausibly could accomplish the goal of equal educational opportunity. In what future Fourth Circuit Judge J. Harvie Wilkinson described as "the Court's most notable decision of the mid-sixties,"<sup>248</sup> the Court clearly articulated the cause of action as "the continued desire of [Black] students . . . to have the same opportunity for state-supported education afforded to white people."<sup>249</sup>

By *Griffin*, the southern states and school districts had engaged in a number of practices designed to off-load educational inequality to individuals and private, non-state actors to avoid honoring their duty to provide Black students their Constitution-given right to equal educational opportunity. The balance of this subpart discusses three such practices: 1) reliance on students' individual school choices to yield student-body demographics; 2) reliance on teachers' individual placement preferences to yield teacher-force demographics; and 3) state support of independent schools through both vouchers and direct-funding support. In order to rule on their unconstitutionality, in each instance the federal courts had to understand with greater nuance the manner in which governmental exploitation of private actions itself constitutes state action.

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245. See discussion *supra* note 241. *But see* *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (upholding the constitutionality of 42 U.S.C. § 1981 under the Thirteenth Amendment); *id.* at 172–73 (allowing § 1981 action against independent schools that racially discriminate); *id.* at 187–89 (Powell, J., concurring) (cautioning restraint in applying § 1981 to all private contracts, preferring to limit causes of action to private *commercial* relationships).

246. See generally *Griffin*, 377 U.S. 218.

247. Turner, *supra* note 233, at 1683–89 (describing the inestimable cost of school closures on affected schoolchildren).

248. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1945–1978, at 97 (1979).

249. *Griffin*, 377 U.S. at 226; see also *Brown I*, 347 U.S. 483, 493 (1954).

B. *Beyond Griffin: Judicial Interventions that Invalidated State Endorsement of Individual Student and Educator Actions that Collectively Threatened Disparate Impact*

In *Goss v. Knoxville*, the Court considered the constitutionality of a school district allowing individual students and parents to request transfers from desegregating schools in which they would be in the statistical racial minority to schools in which they would be in the statistical racial majority.<sup>250</sup> Ostensibly, student-assignment decisions were squarely within the school district's control, and among the many reasonable approaches to managing student assignment was empowering individual choice.<sup>251</sup> The district appeared to reason that it could not be held responsible for resulting school demographics since individual students and parents were the authors of school segregation rather than the district itself. Giving plausible support to the district's program is the fact that allowing choice is conceptually different from constraining choice,<sup>252</sup> as was the case in *Bolling*.<sup>253</sup> But the Court rightly saw through the scheme. The relevant issue was not school choice, but rather the school district's exploitation of individuals' associational discomfort with racial integration, and on that basis the Court invalidated the plan as unconstitutional.<sup>254</sup>

Similarly, individual teacher and administrator preference was not the relevant issue with respect to faculty assignments. Many Black educators were fighting to keep their jobs in any restructured school system. As the Hendersonville City (N.C.) school district desegregated its student population in 1965, it experienced a massive decline in Black students due to many of those students having enrolled in its Blacks-only school when their home districts did not maintain one.<sup>255</sup> The decline in Black student enrollment precipitated a decline in demand for Black teachers and administrators, at least to the extent Black educators were viewed as satisfying needs uniquely for Black students.

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250. *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963). An important note: this *Goss* is not the same as the more famous *Goss v. Lopez*, 419 U.S. 565 (1975), which discussed public education as a due process-protected property interest.

251. *Cf. Goss*, 373 U.S. at 688–89 (“This is not to say that appropriate transfer provisions, upon the parents’ request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall [sic].”).

252. *See id.* at 689 (suggesting the Court would have been more comfortable with the provisions if the district had allowed unrestricted transfers without explicit consideration of the racial demography of the schools).

253. *Supra* notes 78–84, 96–98, and accompanying text (discussing racial segregation as a constraint on Black students’ school choice).

254. *Goss*, 373 U.S. at 688 (exposing the “purely racial character and purpose of the transfer provisions”).

255. *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189, 190 (4th Cir. 1966).

The Black teacher and administrative corps was decimated. Only eight of the twenty-four Black teachers who taught in the Black school were offered re-employment by the desegregating city school district.<sup>256</sup> Every white teacher who wanted re-employment was retained, along “with fourteen new white teachers.”<sup>257</sup> The school district offered multiple *post hoc* pretextual reasons to justify the sharp disparities in teacher-force retention. One reason was poor principal recommendations, even though the Black principal recommended his faculty in written detail, while the white principal made oral recommendations, and many Black teachers with good recommendations were not hired.<sup>258</sup> Another reason was low performance on national teacher exams, even though many teachers, Black and white, never took the test; and seniority, which for Black teachers counted both for and against retention.<sup>259</sup> The Fourth Circuit applied the *Brown* cases to reverse a District Court’s upholding of the Black teachers’ termination.<sup>260</sup> But this line of cases did not link employment issues with Black-teacher assignment to students’ educational opportunity.<sup>261</sup>

Commentators have identified faculty reluctance towards reassignment as a hidden, possibly more caustic factor in school desegregation delays.<sup>262</sup> But, unlike student choice, the state and school district’s role in empowering faculty choice in school site has received little direct evaluation, then and now. One year after *Griffin*, in both *Bradley v. School Board of Richmond* and *Rogers v. Paul*, the Supreme Court emphasized the requirement that *Brown II*-compliant desegregation plans include racial reallocations of faculty.<sup>263</sup> The following year, the Fourth Circuit would more forcefully require desegregating districts to structure faculty desegregation. But, in *Wheeler v. Durham*, the Circuit did not require involuntary reassignment of existing teachers. Rather, it allowed the school district to “encourage” teachers to volunteer and for aspiring teachers to elect placements in vacant schools.<sup>264</sup>

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256. *Id.*

257. *Id.*

258. *Id.* at 191.

259. *Id.*

260. *Id.* at 192–93. The later case, *N.C. Tchrs. Ass’n v. Asheboro City Bd. of Educ.*, 393 F.2d 736, 744 (4th Cir. 1968), clarified the rule of law: “[W]hen the constitutional requirement of racial equality compels realignment of the allotment of teachers, that realignment may not serve as a vehicle for other forms of discrimination . . . .”

261. *See Chambers*, 364 F.2d at 192–93.

262. *See, e.g., Wilkinson III, supra* note 248, at 96–97.

263. *See Bradley v. Sch. Bd.*, 382 U.S. 103, 105 (1965) (per curiam) (rejecting the serial practice of discriminating student bodies and then teachers and administrators as inconsistent with *Brown II*); *Rogers v. Paul*, 382 U.S. 198, 200 (1965) (per curiam) (allowing plaintiffs standing to sue, in part, on a theory “that racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils”).

264. *Wheeler v. Durham City Bd. of Educ.*, 363 F.2d 738, 741 (4th Cir. 1966).

And in *Bowman v. County School Board of Charles City County*, a precursor case to *Green*, the Circuit majority specifically demurred on students' complaint that, without direction on teacher reassignment, school desegregation was incomplete.<sup>265</sup>

At first glance, the courts' collective reluctance to address faculty reassignment could appear to cut against the thesis of this Article. Setting aside racially motivated reasons for faculty reluctance,<sup>266</sup> the courts might have avoided structuring reassignments out of sympathy for professional liberty.<sup>267</sup> Or, they might have been reluctant to cast a racial group of educators as categorically inferior.<sup>268</sup> The dangers of not approaching the latter peril with care is evident by the baseline assumptions undergirding Judge John Minor Wisdom's insistence in *U.S. v. Jefferson County* that school faculties desegregate.

Judge Wisdom, a lion of desegregation efforts on U.S. Court of Appeals for the Fifth Circuit, falls desperately into this trap even as he correctly articulates the goal of the desegregation project: "[T]he governmental purpose is to offer [Black students] equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing *the better teachers* equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race."<sup>269</sup> Conditional on accepting *Brown I*'s premise that racially segregated schools "are inherently unequal,"<sup>270</sup> four of Judge Wisdom's five exemplars for

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265. *Bowman v. Cnty. Sch. Bd. of Charles City Cnty.*, 382 F.2d 326, 329 (4th Cir. 1967) (en banc).

266. WILKINSON III, *supra* note 248, at 96–97, sufficiently summarizes white teachers' reluctance to teach alongside Black teachers or to teach Black students, such that one need not refer directly to the language many white teachers used to express those concerns.

267. *Cf. Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (affirming a Sunday school teacher's right to teach the German language); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535–36 (1925) (holding that an independent school had a due process-protected interest in hiring teachers and providing independent educational opportunity); *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927) (invalidating a U.S. territorial law requiring foreign-language teachers' and schools' agreement to strict governmental control).

268. *See generally* Vanessa Siddle Walker, *School "Outer-gration" and "Tokenism": Segregated Black Educators Critique the Promise of Education Reform in the Civil Rights Act of 1964*, 84 J. NEGRO EDUC. 111 (2015) [hereinafter Siddle Walker, *School "Outer-gration"*] (documenting the perspectives of Black educators in Georgia, who decried legislative and judicial desegregation efforts predicated on Black teachers and administrators as inferior to their white counterparts); Vanessa Siddle Walker, *Second-Class Integration: A Historical Perspective for a Contemporary Agenda*, 79 HARV. EDUC. REV. 269 (2009) (juxtaposing desegregation-era Black educators' advocacy efforts for integrating Black schoolchildren's access to quality education to similar efforts by post-*Parents Involved* Black educators).

269. *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 877 (5th Cir. 1966) (emphasis added).

270. *Brown I*, 347 U.S. 483, 495 (1954).

advancing equal educational opportunity clearly involve resolving inequality: undoing racialized student assignments, equalizing physical plants, choosing appropriate school sites that will not encourage segregation, and avoiding resegregation itself. These all relate back both to racial segregation and the inequality racial segregation created in each of those phenomena.<sup>271</sup> The fifth, “distributing the better teachers equitably,” does not explicitly address segregation and racial inequality, absent some prior understanding of who the better teachers are and where and whom they were then teaching.<sup>272</sup>

In *Jefferson County*, a case presenting a novel application of Title VI,<sup>273</sup> Judge Wisdom had to bridge the gap between the racial discrimination prohibited by the statute and racialized teacher assignment.<sup>274</sup> Stated inversely, if teacher assignment in and of itself did not cause students to experience racial discrimination in their education, then Title VI would have been an inappropriate vehicle for relief.<sup>275</sup>

Teacher preferences, thus, created an inconvenient problem. In *Jefferson County*, as in *Wheeler*, but unlike in *Chambers* and *North Carolina Teachers Association*, the case was not initiated by teachers complaining of employment discrimination based on their assignments, let alone that their placements deprived their students of educational opportunity.<sup>276</sup> Title VI can only be used to further teacher integration in circumstances created by discrimination. Title VI is not invoked, however, if such segregation is merely a function of teachers’ choice.<sup>277</sup> Neither Black nor white teachers were excited about integration, and so, a teacher-initiated (or centered) discrimination claim was unavailable to Judge Wisdom.

Neither was a wider teacher-force claim at first pass. Consistent with his earlier assumption, Judge Wisdom discussed a number of cases that required teacher desegregation as a *Brown II* factor, but none made the necessary connection between current teacher assignment patterns and student

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271. See *Jefferson Cnty. Bd. of Educ.*, 372 F.2d at 877.

272. *Id.*

273. 42 U.S.C. § 2000d; see also *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 433 n.2 (1968) (describing the statutory prohibition of racial discrimination by federally funded programs as complementary to constitutional desegregation mandates).

274. See *Jefferson Cnty. Bd. of Educ.*, 372 F.2d at 882–83 (explaining that student desegregation is dependent upon faculty desegregation, and therefore faculty discrimination also violates Title VI).

275. *Id.*

276. See *id.* at 845 (initiated on behalf of Black students); *Wheeler v. Durham City Bd. of Educ.*, 363 F.2d 738, 739 (4th Cir. 1966) (initiated by Black parents and students); *Chambers v. Hendersonville City Bd. of Educ.*, 364 F.2d 189, 190 (4th Cir. 1966) (initiated by Black teachers); *N.C. Tchrs. Ass’n v. Asheboro City Bd. of Educ.*, 393 F.2d 736, 739 (4th Cir. 1968) (initiated on behalf of Black teachers).

277. See *Jefferson Cnty. Bd. of Educ.*, 372 F.2d at 883.

educational opportunity that Title VI required.<sup>278</sup> He eventually arrived at *Singleton v. Jackson*, where, buried in a footnote in that case's discussion, Judge Wisdom finally makes the necessary decoupling between "distribution of the better teachers" and non-racialized assignment of teachers.<sup>279</sup>

Quoting the U.S. Commission on Civil Rights, Judge Wisdom does not identify "better" teachers with teachers of any race, but rather suggests that "all teachers of each race" could improve, and especially "those who most need assistance in being better qualified as teachers."<sup>280</sup> This is important on two counts. First, it avoids the inaccurate projection of inferiority onto Black or white teachers. Second, it correctly identifies the issue with teacher assignment not as one involving teacher race but one involving the avoidance of opportunity hoarding for the benefit of particular students, in this case white students.

Another underexplored phenomenon of faculty desegregation was the selection of highly qualified, often veteran Black teachers and administrators to serve as the first to teach in nominally desegregated, formerly all-white spaces. Renowned historian of education, Vanessa Siddle Walker refers to this phenomenon as "outer-gration," a form of redistribution of important educational expertise from all-Black schools to white schools at the precise moment when Black students were exposed to massive disruptions and instability in their educational trajectories.<sup>281</sup> Complementing these practices were "token" placements of well-trained, entry-level Black teachers in majority-white schools, often through use of standardized testing.<sup>282</sup> Thus, districts manipulated teacher-placement decisions through: forcing high-scoring teacher candidates to select majority-white schools; encouraging those candidates to make placement choices toward these schools; or disallowing choices by poorer-performing teacher candidates of all races. Additionally, districts often reduced the quality of teachers available to Black students more overtly, using the very mechanisms the courts promoted for accomplishing school desegregation.<sup>283</sup>

Again, non-racialized teacher assignment was only a means to the end of improving equal educational opportunity for Black students. Racially integrating the teacher corps itself was never the end. Consistent with this

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278. *Id.* at 884–93.

279. *Id.* at 893–94, 894 n.119.

280. *Id.* at 894 n.119 (quoting U.S. DEP'T HEALTH, EDUC. & WELFARE OFF. EDUC., SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965–66, at 64 (1966)).

281. See Siddle Walker, *School "Outer-gration," supra* note 268, 115, 117–18.

282. See *id.* at 116–17.

283. *Cf. id.* (documenting the perspectives of Black educators in Georgia, who decried legislative and judicial desegregation efforts predicated on Black teachers and administrators as inferior to their white counterparts).



observation, the Civil Rights Commission did not recommend racial parity or balance within school faculties, instead recommending that “the best teachers of either race, worthy of their profession, should be put in the schools needing the most help to improve.”<sup>284</sup> These are the “better teachers” whose redistribution to areas of need serves the goal of equalizing educational opportunity. Consequently, a preferences-based model of teacher assignment that operates on, but remains agnostic to, its racialized inequality those preferences yield violates Title VI, and separately the spirit of *Brown*.

C. *Griffin Redux: The Private-School Closure Remedy Not Imposed*

The third way in which states sought to off-load their culpability for school segregation was through supporting independent, private schools. In *Hall v. St. Helena Parish School Board*, the courts invalidated a Louisiana statute that allowed school boards to reclassify public schools as private schools in order to avoid desegregation mandates and required the boards to support these schools’ physical plants and auxiliary services.<sup>285</sup> Virginia and its school districts in *Griffin* avoided such detectable state action by allowing school boards to withdraw from the public-education enterprise and, together with those boards, provide support for white individuals to engage education in segregated schools of their choosing.<sup>286</sup> The sophisticated, Byzantine way in which the school made the resulting denial of equal educational opportunity to Black students remote from direct state decisions did not complicate the Court’s understanding of the problem; it clarified it.<sup>287</sup>

In the Supreme Court’s strongest condemnation of local school authority, it castigated state and local governments for employing non-racial, presumably authorized means to accomplish the unconstitutional objectives of opposition to desegregation<sup>288</sup> and “perpetuation of racial segregation” through governmental endorsement of private discrimination<sup>289</sup> because both “work[ ] to deny [Black] students equal protection of the laws.”<sup>290</sup> This

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284. *Jefferson Cnty. Bd. of Educ.*, 372 F.2d at 894 n.119 (quoting U.S. DEP’T HEALTH, EDUC. & WELFARE OFF. EDUC., SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965–66, at 64 (1966)).

285. *Hall v. St. Helena Par. Sch. Bd.*, 197 F.Supp. 649, 661–62 (1961).

286. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 229–30 (1964).

287. *See id.* at 228, 230–31.

288. *Id.* at 231 (“Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”).

289. *Id.* at 232 (supporting its finding that the Virginia plan, like the Louisiana plan in *Hall*, was “created to accomplish the same thing: the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds.”).

290. *Id.*

chastisement was accompanied by the Court's most searching remedy to date in school management. The Court extended the District Court's injunction against the county's paying tuition grants and extending tax credits.<sup>291</sup> It also authorized the District Court to mandate local governments to raise taxes and spend the necessary funds to reopen and operate county schools in a non-discriminatory manner.<sup>292</sup> Further, it signaled that the District Court would have near *carte blanche* in fashioning a remedy that "will guarantee that [Black students in Prince Edward County] will get the kind of education that is given in the State's public schools," even if the joinder of additional parties were needed to accomplish that end.<sup>293</sup>

The only remaining remedy the *Griffin* Court did not extend was the forced closure of private "segregation academies." The infallibility of *Pierce* on independent schools' due process-protected property interest to exist<sup>294</sup> made such a direct remedy nearly impossible. But, given these academies' establishment and maintenance through unconstitutional state collusion to segregate, one could envision a more equitable remedy, perhaps sounding in replevin of unlawfully transferred school expenditures to students from the "lost generation." Such timely restitution would have made the academies' continued operation impossible. If not that, an earlier denial of federal non-profit tax status to racially discriminatory schools might have accelerated the demise of many such schools, or made the establishment of new academies less likely. As it were, the denials of section 501(c)(3) status<sup>295</sup> and section 170(a) charitable-gifts exemptions<sup>296</sup> to racially discriminatory independent schools whose operations involved state action in 1967, and to those which did not in 1970,<sup>297</sup> were too late and inconsistently enforced. By the time the Court decided *Runyon v. McCrary* to allow Black families to sue whites-only private schools under section 1981,<sup>298</sup> and *Bob Jones University v. United States* to uphold the Internal Revenue Services' status and exemptions determinations as constitutional, segregationist independent schools had survived.<sup>299</sup>

Because the segregation academies survived, white teachers, parents, and students who prefer to avoid racially desegregated schools, or even to control the extent to which they have to engage people of different races, can do so.

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291. *Id.* at 233.

292. *Id.* at 233–34.

293. *Id.* at 234.

294. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535–36 (1925).

295. 26 U.S.C. § 501(c)(3).

296. 26 U.S.C. § 170(a).

297. *See Green v. Kennedy*, 309 F.Supp. 1127, 1130–31 (D.D.C. 1970), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

298. *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

299. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

Though these schools are now firmly outside the scope of state remedial action, the states should not be allowed to exploit their existence in promulgating latter-day policies that compromise their duty to provide Black students with equal educational opportunity, especially in concert with private institutions that the state, local governments, and school boards have encouraged.

*Griffin* was watershed for the Court's understanding of the intransigence of Southern governmental resistance to school desegregation and the means by which they will seek that end. The holding for which *Green* is most commonly cited, "[t]he time for mere 'deliberate speed' has run out," is actually a quote from *Griffin*.<sup>300</sup> But where *Green* rejects "all deliberate speed"<sup>301</sup> within the confines of *Brown II*-compliant desegregation plans,<sup>302</sup> the parent quotation in *Griffin* eschews further deliberation in the face of a public-private action apparatus dedicated to nullifying any attempt at providing Black students with equal educational opportunity. Because the voucher-supported independent schools were not subject to the desegregation remedy, the Constitution could not easily be applied to block their interference. But the school districts that funded and managed the vouchers were classic state actors whose conduct fell well within the scope of the equal protection mandate: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County schoolchildren their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia."<sup>303</sup> *Griffin* should also be illuminating of the Court's understanding of the mechanics of *sociolegal* resistance to school desegregation and the affirmative duty the Equal Protection Clause imposes on states to accomplish not only school desegregation, but also equal educational opportunity. Through *Green*, we have pursued and now have almost fully exhausted the *Brown* mandate for school desegregation. But the more important duty remains. Irrespective of segregation, whether governments or individuals cause it, whether it is a direct or derivative function of discrete individual choices or a matrix of choices working in concert, or whether governments are required or are permitted to pursue desegregation, the constitutional goal is equal protection under the law through equality of educational opportunity.

Relating back to the *Griffin* plaintiffs, to the NAACP's pre-*Brown* strategy, and even to the Black families in Richmond County, Georgia,<sup>304</sup>

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300. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968) (quoting *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 234 (1964)).

301. *Brown II*, 349 U.S. 294, 301 (1955).

302. *Green*, 391 U.S. at 438 (quoting *Goss v. Bd. of Educ.*, 373 U.S. 683, 689 (1963)).

303. *Griffin*, 377 U.S. at 234.

304. *Cumming v. Cnty. Bd. of Educ.*, 175 U.S. 528, 530 (1899). For additional discussion, see *supra* notes 68, 231, and accompanying text.

segregation itself was never truly the problem in public education. Segregation was simply the offensive vehicle by which governments denied Black children educational opportunities, offered them inadequate schooling, or endorsed private actors in their discriminatory engagements with them. It is also the persistent social, cultural, political, and economic reality that governments, though they are now prohibited from engaging in any of these actions directly, take advantage of in differently allocating educational benefits to schools and schoolchildren.

*D. Freeing Griffin from its Limited Application in the Brown–Green School Desegregation Canon*

But a direct appeal to *Griffin* or any of the other cases identified in this part will be difficult as they were contingent largely upon the *Brown–Green* remedial scheme for more explicit state-sponsored educational discrimination. There is work in the margins to be done to decouple judicial attention to racial disparity from *de jure* segregation. It is as urgent now as it was in the 1960s to hold school districts and states accountable for where they place schools, how they zone, how they include and exclude students, where they locate particular opportunities and condition access differently based on locality,<sup>305</sup> and more recently, whether districts secede or consolidate.<sup>306</sup> More focus on collusive or less charged, but no less impactful cooperative behaviors between housing markets, lenders, builders, and schools seems in order if racialized housing patterns continue to be a meaningful driver of school segregation and resulting educational inequities.<sup>307</sup> We also need to attend more closely to teacher and administrator assignment: which educators

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305. *See supra* note 11.

306. *See generally* Wilson, *The New School Segregation*, *supra* note 11 (exploring localism arguments as “race-neutral” justifications for racialized school-district secession); Erica Frankenberg et al., *Segregation by District Boundary Line: The Fragmentation of Memphis Area Schools*, 46 *EDUC. RESEARCHER* 449 (2017) (examining demographic and resources impacts of the largest U.S. school-district merger and the subsequent school-district secessions from the merged district of wealthy, white geographic catchment areas); Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 *L. & SOC. INQUIRY* 869 (2009) (discussing the causal link between modern school boundary decisions and increased school segregation, such as in the case study of Jefferson County, Alabama).

307. *Cf.* MAIA BLOOMFIELD CUCCHIARA, *MARKETING SCHOOLS, MARKETING CITIES: WHO WINS AND WHO LOSES WHEN SCHOOLS BECOME URBAN AMENITIES* 2–3 (2013) (describing urban public-school policies targeted at retaining white, upper-middle-class families at the expense of poorer families of color).

choose to work at which schools,<sup>308</sup> how districts and states incentivize the transfer of more experienced, “better teachers” away from poorer, Blacker and browner schools to wealthier, whiter schools, as well as student-teacher assignments within schools.<sup>309</sup> These dynamics were well at play during school desegregation. And because we had a mechanism for addressing student and adult demographics the courts could more closely monitor patterns of how opportunities were meted out differently. But arresting these and other forms of discriminatory segregation that the state brings in, actively or passively,<sup>310</sup> to its administrative operation is both an attainable goal and the current duty the states embraced by deciding to provide public education opportunities.

*Keyes v. Denver*<sup>311</sup> provides a rough blueprint for how to construct an equal-educational-opportunity doctrine that is not strictly limited to state-mandated or state-law-permitted school segregation, but is mindful of state acquiescence to private actions. If *Brown* invalidated state-authorized educational segregation as a plausible approach for states to meet their duty, and *Griffin* demonstrated the need for the federal courts to remedy state educational deprivation actions beyond what *Brown* itself contemplated, then *Keyes* elaborates the current scope of this duty, and it does so by indirect reference to *Plessy*.

Unlike the balance of public-school inequality cases, *Keyes* involved a school district that had “never . . . operated under a [constitutional or statutory

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308. Professor Siddle Walker’s work examining the impact of school desegregation and teacher and principal assignments on the Black educator corps and Black students should also be brought to bear on how remedial, restructuring processes incorporate Black educator preferences in assignments. See *supra* notes 91–92, 271.

309. See generally Demetra Kalogrides et al., *Systematic Sorting: Teacher Characteristics and Class Assignments*, 86 SOCIO. EDUC. 103 (2012) (finding that less experienced teachers, women, and people of color are more likely to be assigned to classes with lower achieving students than their more experienced, male, and white counterparts, with effects on student achievement, teacher value-added, and teacher turnover); Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECONS. EDUC. REV. 377, 391 (2005) (“[N]ovice teachers are disproportionately assigned to the schools and to the classrooms within schools that disproportionately serve black students.”); Chin et al., *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566 (2020) (examining the impact of teachers’ implicit biases on white and Black student test-score inequalities and suspension disparities). But see Jason A. Grissom et al., *Strategic Involuntary Teacher Transfers and Teacher Performance: Examining Equity and Efficiency*, 33 J. POL’Y ANALYSIS & MGMT. 112 (2014) (low-performing teachers who were involuntarily transferred to higher performing schools were outperformed by teachers who replaced them in their previous assignments and continued to underperform in their new assignments).

310. See, e.g., Francis A. Pearman II, *Collective Racial Bias and the Black-White Test Score Gap*, 14 RACE & SOC. PROBS. 283 (2022) (extending Chin et al., *supra* note 309, to county-level bias effects on test-score inequalities).

311. *Keyes v. Sch. Bd. No. 1*, 413 U.S. 189 (1973).

provision] that mandated or permitted racial discrimination in [public education].”<sup>312</sup> Thus, not only was *Brown I* inapplicable, but the *Brown II* remedies were also unavailable, and the entire classification-based segregation logic was inapposite.<sup>313</sup> This is not to say that *segregation itself* was not a factor; it was a determining factor in that case. But the *source* of segregation was neither governmental classification nor direct student assignment. Rather, it was district exploitation of known segregative factors, the individual and cumulative effects of which assigned Black and Latinx students to specific schools that, in turn, offered them unequal educational opportunity when compared to their white peers.

The Denver school board took advantage of racialized housing patterns<sup>314</sup> in locating schools and drawing attendance zones. Despite the overcrowding of majority-Black and Latinx schools, the school board did not reassign students zoned to these schools to geographically proximate schools that were under capacity.<sup>315</sup> In one instance, it built a new school at smaller scale than was then its standard, aware that it would exceed capacity at opening.<sup>316</sup> Toward containing these groups of students, they used portable classroom units.<sup>317</sup> And toward disclaiming state sponsorship of the resulting segregation, they promoted “optional zones,” by which students could transfer out of schools where they were in the racial majority to schools where they were in the racial minority.<sup>318</sup> As was the case in *Green*, the success of such transfer programs was conceptually minimal, and there was little uptake; students, on balance, remained at their assigned schools.

In order to situate the district’s reliance on housing segregation as educational segregation within the orbit of the *Brown* doctrine, Justice William Brennan elevated the *Swann* Court’s passing reference to *de facto* segregation.<sup>319</sup> But, contrary to latter-day misreadings of *Keyes*, he did not

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312. *Id.* at 191.

313. *Id.* at 200–01 (distinguishing *Keyes* from *Brown I*, *Brown II*, *Green*, and *Swann*, as those cases were dedicated to “eliminat[ing] from the public schools . . . ‘all vestiges of state-imposed segregation.’” (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971))). Denver’s lack of history with state-sponsored school segregation was a distinction that then-Justice William Rehnquist would have held dispositive against any equal protection claim at all. *See id.* at 254–55 (Rehnquist, J., dissenting).

314. *Cf. Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436–37 (1976) (disclaiming state responsibility for racially identifiable housing patterns and relieving a school district from court-supervised school desegregation, in part, on that basis).

315. *Keyes v. Sch. Dist. No. 1*, 313 F.Supp. 61, 71 (1970).

316. *Id.* at 64–65.

317. *Id.* at 65.

318. *Keyes*, 413 U.S. at 192.

319. *See id.* at 208.

create a false binary between *de jure* and *de facto* discrimination.<sup>320</sup> Nor did he distinguish happenstance discrimination as a discrimination that the government is presumptively not responsible for. In instances of *de facto* segregation, Justice Brennan maintained that *Plessy v. Ferguson*—and its prohibition on exploiting segregation to maintain *unequal* schools—is the controlling law.<sup>321</sup> According to *Plessy*, and conditional on *Brown* having made *de jure* segregated schools unlawful, a government cannot exploit happenstance racial segregation without then becoming responsible for resulting racial discrimination and unequal provision of educational opportunity.<sup>322</sup> In other words, *Keyes* discusses *how* a government can be held accountable for exercises of “local control” that cement *de facto* segregation.

Two justices went further. Justice Powell decried the *de jure* versus *de facto* dichotomy as false, both as a matter of law and as it affects students whose educational opportunities were compromised by school segregation.<sup>323</sup> “Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle.”<sup>324</sup> In a separate concurrence, Justice Douglas insightfully observed, “it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies.”<sup>325</sup> To update Justices Douglas and Powell’s observations with the doctrinal developments of the intervening fifty years, one could—and should—hold that: there is no constitutional difference between *de jure* and *de facto* segregation *when either is exploited* by state actions or policies.

Instead, a duty to provide equal educational opportunity emerges. Professor Joshua Weishart has done much of the conceptual work at the

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320. *See id.* at 241 (Powell, J., concurring in part and dissenting in part) (foreshadowing future interpretations of the *Keyes* holding that call for differing treatment of *de jure* and *de facto* segregation).

321. *Id.* at 193 (majority opinion) (“Thus, the [district] court held that, under the doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), [the] School Board constitutionally ‘must at a minimum . . . offer an equal educational opportunity.’” (quoting *Keyes*, 313 F.Supp. at 83)).

322. *See id.* 213–14 (“[T]he Board’s burden is to show that its policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board’s so-called “neighborhood school” concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools.”)

323. *See id.* at 224 (Powell, J., concurring in part and dissenting in part).

324. *Id.* at 227.

325. *Id.* at 216 (Douglas, J., concurring).

Fourteenth Amendment intersection of equality and opportunity.<sup>326</sup> Rather than applying the clauses separately to understand education rights as a due process-protected liberty interest as distinct from a right to equal educational opportunity,<sup>327</sup> his papers harken back to the pre-modern era of Fourteenth Amendment jurisprudence and ask whether the various clauses act in concert to offer state residents<sup>328</sup> federal constitutional protection of certain state-conferred benefits. Three of his articles, in particular, converse well with the proofs-as-argument approach employed here.

In *Reconstituting the Right to Education*, Professor Weishart decomposes both education and the constitutional rights thereto into their “molecular forms.”<sup>329</sup> He identifies the right to education as an “immunity-claim-right with a protection function.”<sup>330</sup> Translated, he would recognize the states’ decisions to guarantee public education, by constitution or statute, as their having embraced a duty to provide educational opportunity to their residents. The substantive public-policy goal of providing this opportunity is to protect school-aged children from the lifelong harms of educational deprivation and disparity, and the Fourteenth Amendment Due Process and Equal Protection Clauses mediate protection over this interest.<sup>331</sup> Individual residents thus have a claim-right under the Constitution for education-as-protection that correlates with the state’s duty. The nature of this specific correlative duty-claim-right is an immunity, a right against the state or any other entity from arbitrarily or capriciously diminishing or removing their claim-right.

Though I do not engage Hohfeldian analysis in this Article beyond the brief summary above, the retreat this Article offers from the *Brown–Green–Freeman–Parents Involved* desegregation management colloquy to more foundational questions of how the Fourteenth Amendment protects education rights is restorative, if not necessary. The example presented through

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326. See, e.g., Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL’Y 346 (2018); Joshua E. Weishart, Essay, *The Compromised Right to Education?*, 71 STANFORD L. REV. ONLINE 123 (2018).

327. See Shaw, *supra* note **Error! Bookmark not defined.**

328. Cf. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (extending rights to access public education to all in-state residents without regards to their citizenship or immigration status).

329. See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 923 (2015).

330. *Id.* at 959.

331. Professor Weishart suggests that the Fourteenth Amendment protection function entails liberty as a due process-protected interest with equal protection. See *id.* at 975. While I have no quarrel with that premise, I argue in *The Public Right to Education* that the education interest is more accurately understood as a *property* interest. Shaw, *supra* note 6, at 1214. Discourse in “deprivation,” “divestment,” “usage,” and “access,” which typically animates rights-to-education debates, is more conversant with property than liberty, which tends to be more concerned with “freedoms” to use and access. See Shaw, *supra* note 6, at 1185, 1191, 1202, 1217–18.



*Reconstituting the Right to Education* is instructive both in validating the task this Article attempts and in establishing the viability of a doctrinal proof in service of accomplishing it.

*Rethinking Constitutionality in Education Rights Cases*<sup>332</sup> asks a more conceptual question: have advocates and the courts undone the work of the Fourteenth Amendment by reducing the constitutional goal from holding the states accountable to their obligations to provide education<sup>333</sup> to administrative compliance with educational equity, adequacy, or quality benchmarks?<sup>334</sup> My recommended approach would extend Professor Weishart's thoughtfulness to construing equality of educational opportunity to include both compliance with desegregation orders and post-compliance administrative avoidance of the segregative, unequalizing conditions that made those orders necessary in the first place.

One of the cardinal rules of remedies is that the nature of the remedy is limited by the nature and scope of the harm. This rule has been repeatedly manipulated in the realm of school desegregation.<sup>335</sup> From *Milliken* onward, the Court shrank the scope of the federal judiciary's involvement in managing desegregating schools by systematically disclaiming the states' responsibility for a number of racially segregative phenomena that affected the racial composition of schools. Despite the states being the ultimate guarantor of public education,<sup>336</sup> public school districts being subordinate "creatures of the state,"<sup>337</sup> and it having been well established that the states both enable and take advantage of school district lines to allow educational disparity,<sup>338</sup> the *Milliken* court (mis)identified the *local school district* as the locus of inquiry in the *Brown-Green* colloquy of cases. Without proof of an intradistrict

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332. See Joshua E. Weishart, *Rethinking Constitutionality in Education Rights Cases*, 72 ARK. L. REV. 491, 491 (2019).

333. See, e.g., Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 221–22 (2017) (proposing that federal courts understand state constitutional guarantees of education as establishing individual claims for "equal liberty," reconciling in the process the conceptual gap between equality and liberty logics that states have inadvertently relied upon to avoid meaningful provision of public educational opportunity to all students).

334. See also Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 480 (2014) (deconstructing the false dichotomy between relativist (equality) and absolutist (adequacy) school-finance compliance regimes—and, indeed, administrative regimes in general—to meet the goals of the Fourteenth Amendment).

335. *Milliken I*, 418 U.S. 717, 746 (1974) ("[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."); see also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419–20 (1977).

336. See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 233 (1964).

337. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 227 (Powell, J., concurring in part and dissenting in part).

338. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 15–16 (1973).

segregation plan, the *Milliken* logic goes, there can be no intradistrict desegregation remedy.<sup>339</sup>

This logic extended to disaffirming desegregation remedies for segregation caused by housing patterns,<sup>340</sup> including segregation that persisted because of “white flight” from residential proximity to Black families and families of color.<sup>341</sup> In *Freeman*, the Court insisted that the vestiges of segregation “must be so real that they have a causal link to the *de jure* violation being remedied.”<sup>342</sup> In *Parents Involved*, Chief Justice Roberts “emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that ‘the Constitution is not violated by racial imbalance in the schools, without more.’”<sup>343</sup> In the school desegregation context, the federal courts are encouraged to “take into account the interests of state and local authorities in managing their own affairs,”<sup>344</sup> especially given state primacy in the educational domain,<sup>345</sup> points which Justice Anthony Kennedy elaborated in his *Parents Involved* concurrence.<sup>346</sup>

And, as Justice Clarence Thomas has remarked in multiple opinions, a “racial imbalance does not itself establish a violation of the Constitution.”<sup>347</sup> There is some truth to this. His concurrence in *U.S. v. Fordice* rightly points out problems with assuming that desegregation is the constitutional end goal. Using the example of Historically Black Colleges and Universities to refute the idea that Black students can only learn well in racially integrated environments, Justice Thomas points out that Black schools can function as the center and symbol of Black communities, and provide examples of independent Black leadership, success, and achievement.<sup>348</sup>

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339. Compare *Milliken I*, 418 U.S. at 746–47, with *id.* at 761–62 (Douglas, J., dissenting), and *id.* at 804–05 (Marshall, J., dissenting) (“School district lines, however innocently drawn, will surely be perceived as fences to separate the races when, under a Detroit-only decree, white parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-white schools.”).

340. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 432–33 (1976).

341. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

342. *Id.* at 496.

343. *Parents Involved*, 551 U.S. 701, 721 (2007) (quoting *Milliken II*, 433 U.S. 267, 280 n.14 (1977)).

344. *Milliken II*, 433 U.S. at 281.

345. See *U.S. v. Lopez*, 514 U.S. 549, 564 (1995).

346. *Parents Involved*, 551 U.S. at 782–98 (Kennedy, J., concurring).

347. *U.S. v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring); see also *Parents Involved*, 551 U.S. at 749–50 (Thomas, J., concurring).

348. See *Fordice*, 505 U.S. at 748 (Thomas, J., concurring).

*E. Harmonizing an Extension of Griffin with Extant State-Action Doctrine to Address the Plessy Remainder*

*This Article* takes no issue with the Court's desegregation doctrine except to the extent it overidentifies state-mandated segregation as the fullness of the segregative harm Black and Latinx schoolchildren experience. Where, as in this Article, one understands the states' failure to meet their duty to provide equal educational opportunity as the harm, the scope of available remedies should expand commensurately, as we observed in *Griffin* and *Keyes*.

By exploiting desegregative factors in their administration and allocation of public education opportunities, the states and their school districts are taking advantage of so-called "private" discrimination with impunity and to the harm of the disadvantaged students. In *The New School Segregation*, Professor Erika Wilson examines suburban, mostly-white communities that adopt rhetoric of local control to justify secession from racially plural or mostly-Black school districts.<sup>349</sup> Because of *Milliken I*, these districts, once successfully seceded, can more efficiently hoard their educational resources from rump districts that are left resource poorer. Moreover, as Professor LaToya Baldwin Clark observes in *Stealing Education*, once these districts are independent, they can employ the power of the state to enforce their rights to exclude their former co-district residents from accessing their now choice schools.<sup>350</sup>

In shades of *Griffin*, similar phenomena emerge within districts that allow private citizens and entities to establish charter schools from scarce district resources. And, in shades of *Keyes*, as Professor Wilson identifies in *Monopolizing Whiteness*, racially homogenous schools serving mostly white students have been allowed to emerge in racially diverse school districts.<sup>351</sup> Professor Osamudia James rightly attacks state- and school district-mediated school-choice regimes that rely on white-parent choices as subordinating.<sup>352</sup>

Professor Wilson proposes a normative challenge to the legitimacy of localism justifications.<sup>353</sup> This Article recognizes a duty on the states to provide equal educational opportunity and would complement Professor Wilson's framework by subjecting redistricting proposals to heightened scrutiny under the Equal Protection Clause. And, though it would not combat the opportunity hoarding at the heart of Professor Baldwin Clark's critique,<sup>354</sup> it would hold the state accountable for equalizing resulting educational

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349. See Wilson, *The New School Segregation*, *supra* note 11, at 143.

350. See Baldwin Clark, *supra* note 11, at 590–91.

351. See Wilson, *Monopolizing Whiteness*, *supra* note 11, at 2384.

352. See James, *supra* note 11, at 1102.

353. See Wilson, *The New School Segregation*, *supra* note 11, at 190.

354. See Baldwin Clark, *supra* note 11, at 573–74.

resource and opportunity disparities. It would also recognize subordination for what it is—and the state’s role in facilitating and exploiting it. The enforcement of a duty to provide equal educational opportunity might also respond to Professor James’s call in *Risky Education* for states to affirmatively mitigate structural obstacles to high-quality education, like threats of school closure, inadequate educational opportunity, and racialized vulnerability, that emerge from state exploitation of so-called private behaviors.<sup>355</sup>

The proposed doctrinal intervention, skeletal and inchoate in its articulation here, would require revisiting the state-action doctrine with an eye toward its extension, most notably with respect to entwinement and the exclusivity of state powers in educating the public. Since the *Civil Rights Cases*, the scope of the Fourteenth Amendment has been understood as limited to “[s]tate action of a particular character.”<sup>356</sup> Purely private actions, that is to say, actions that do not involve the performance by private actors of public functions, are beyond the orbit of the Amendment’s commands.<sup>357</sup> Neither the putatively private nature of the actor nor the common understanding of how public a function is devoid of context.<sup>358</sup>

On the former point, *Marsh v. Alabama* invoked the First Amendment (via the Fourteenth) to invalidate a private company town’s trespass conviction of a religious proselytist.<sup>359</sup> Though the sidewalks the company maintained—and even the town itself—were privately owned, the company had operated them for the beneficial use of the general public.<sup>360</sup> The private company’s essential operation of the town as public brought its law-enforcement actions within the state-action doctrine. Similarly, in *Evans v. Newton*, a privately owned park was subject to the Fourteenth Amendment because its operation had become so entwined with its municipal government that the park became effectively municipal in character.<sup>361</sup> On the latter point,

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355. See Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 667, 671–72 (2021).

356. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

357. *E.g.*, *Terry v. Adams*, 345 U.S. 461, 484 (1953) (Clark, J., concurring) (attaching the attributes of constitutional obligation to a private political organization on which the state has devolved effective authority to select uncontested nominees for political office).

358. *E.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (actions of a private lessee that is “interdependent” with a state lessor is not so “purely private” as to fall outside the scope of the Fourteenth Amendment).

359. *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946).

360. *Id.* at 503. *But see* *Hudgens v. NLRB*, 424 U.S. 507, 519–20 (1976) (finding a private shopping center is not the functional equivalent of a town and is therefore distinguished from the sidewalk in *Marsh*).

361. *Evans v. Newton*, 382 U.S. 296, 302 (1966). Following *Evans v. Newton*, Georgia courts dissolved the park trust because Senator A.O. Bacon’s bequest specified that the park

*Jackson v. Metropolitan Edison Co.* instructed that public functions for state-action purposes are only those that are “traditionally the exclusive prerogative of the State.”<sup>362</sup> And so, a privately owned utility was not found to be a “state actor” even though it performed the erstwhile public service of providing electricity—and under a state-conferred monopoly—because the state had not traditionally been the exclusive provider of electrical utility services.<sup>363</sup>

It can hardly be stated that schooling is the exclusive prerogative of the state. At the same time, the *guarantee* of educational opportunity *is*. Each state has chosen to exercise through compulsory education requirements, and each has chosen to facilitate compliance therewith, by providing public schools.<sup>364</sup> In a previous article, I identified the states having created this unique set of mutual expectations—the mandate to pursue education and its provision of schools as an opportunity to meet them—as having created a due process-protected property interest the states are constitutionally obligated to honor.<sup>365</sup> Their duty to equal protection is no less compelling, and the states should not be allowed to shirk this duty by inducing, exploiting, or encouraging private behaviors that governments themselves are constitutionally prohibited from performing.

## V. CONCLUSION

Identifying *The Plessy Remainder* as a site for doctrinal intervention also does important conceptual work in constitutional law. Though federal constitutional law ostensibly no longer accepts either racial segregation as a governmental interest<sup>366</sup> or a distinction between privileges and rights for

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must be for the benefit of “white women, white girls, white boys, and white children” only. *Evans v. Abney*, 396 U.S. 435, 441 (1970). After the trust dissolved, Senator Bacon’s heirs permanently closed the park. The U.S. Supreme Court held that this sequence of events did not violate the Fourteenth Amendment. *Id.* at 447; *see also* MARY ANNE BERG RICHARDSON, *THE CITY OF MACON, GEORGIA’S SACRIFICE TO JIM CROW: A.O. BACON’S GIFT OF BACONSFIELD PARK, 1911–1972* (1988) (presenting a comprehensive history of the creation and demise of the park at issue in *Evans v. Newton* and *Evans v. Abney*).

362. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974).

363. *Id.* at 358–59.

364. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (“Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not ‘shed their constitutional rights’ at the schoolhouse door.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

365. *See Shaw*, *supra* note 6, at 1214–26, for the proposal that a “public right” to education exists because education is a property interest protected by substantive due process.

366. *See Brown I*, 347 U.S. 483, 495 (asserting that segregation is no longer justifiable in the domain of public education); *see also Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

purposes of Fourteenth Amendment analysis,<sup>367</sup> the logical and assumptive support for evaluating education as a privilege offered by the states rather than a right remains.<sup>368</sup> As a consequence, independently of the rise and demise of the school-desegregation doctrine, the federal courts will not intervene when state governments activate wealth inequalities that are strongly correlated with race to distribute educational resources unequally.<sup>369</sup> They will not intervene when states blame social discriminations in housing for intractable school segregation.<sup>370</sup> They will neither guarantee a modicum of educational quality for individual students nor will they allow districts that seek to attend to racial discriminations the means to remediate those by appeal to the very racial classifications by which discriminations were meted.<sup>371</sup> They should.

Reviving an affirmative duty to equal educational opportunity, or at the very least denying the state's calculated ignorance to its embrace of private actions that interfere with that duty, gives schoolchildren a hook by which they might advocate for their own equal protection in education.

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367. See *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding a suspension of driver's licenses reviewable under Fourteenth Amendment due process law irrespective of whether access to licenses are a "privilege" or a "right"); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (noting statutory denial of unemployment benefits unsalvageable "from constitutional infirmity on the ground that . . . benefits are not [a] 'right' but merely a 'privilege'").

368. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."); *id.* at 111 (Marshall, J., dissenting) ("[The Court] has on occasion suggested that state-supported education is a privilege bestowed by a State on its citizens."); see also Liu, *supra* note 6, at 348–49 (noting that, choosing among complementary arguments, one could determine that education would be a "privilege" for privileges-and-immunities purposes). *But see Shaw*, *supra* note 6, at 1214 (determining education as a "right" based in the substantive due process property interest).

369. *E.g.*, *Rodriguez*, 411 U.S. at 2.

370. *E.g.*, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 438 (1976).

371. *Cf. Parents Involved*, 551 U.S. 701, 721, 726 (2007).