WHAT WOULD WARREN DO?A BRIEF HISTORICAL COMMENT ON *BROWN* AND *PARENTS INVOLVED*

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In *Parents Involved in Community Schools v. Seattle School District No. 1*,[1] the Supreme Court, by a 5-4 margin, ruled that school districts striving to keep public schools integrated cannot use race as the basis for assigning students to oversubscribed schools. One of the most remarkable aspects of this case was the passionate discussion it provoked among the Justices about *Brown v. Board of Education*.[2]

If there was any doubt about *Brown*'s significance to *Parents Involved* when the Court granted certiorari, the oral arguments laid that to rest.[3] During the arguments before the Court, all of the complexities surrounding pupil placement plans coalesced around one basic question: whether these voluntary integration programs were distinguishable, as a matter of constitutional law, from the segregation policies that *Brown* invalidated.[4] As Chief Justice John G. Roberts, Jr., framed the issue, "everyone got a seat in *Brown* as well; but because they were assigned to those seats on the basis of race, it violated equal protection."[5] Then he asked the Seattle School District's lawyer: "How is your argument that there's no problem here because everybody gets a seat distinguishable?"[6] When it became clear that the school district's attorney was unable to provide a convincing answer, or at least one that would have persuaded a majority on the

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1. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007). The case that arose in Seattle was joined with another from Louisville, *Meredith v. Jefferson County Board of Education*, No. 05-915. In this Essay, references to specific details of the student placement plans will be drawn primarily from Seattle's program. Many other school districts around the country had similar programs. *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 144-45 (2007); Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y. TIMES, June 29, 2007.

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

3. Transcript of Oral Argument at 48-50, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908).

4. *Id*.

5. *Id*. at 48–49.

6. *Id*. at 49.

Court, the "more liberal" Justices grew "increasingly and visibly dispirited," according to *New York Times* reporter Linda Greenhouse.[7]

Their concerns proved to be well founded. Chief Justice Roberts premised his opinion[8] on the idea that there was no meaningful distinction – at least none having constitutional significance – between Seattle's student assignment program and the de jure segregation of schoolchildren in the Jim Crow South.[9] The Chief Justice noted that *Brown* stopped school officials from telling students "where they could and could not go to school based on the color of their skin."[10] That was, in his view, exactly what Seattle's School District had done,[11] and "[w]hen it comes to using race to assign children to schools," Chief Justice Roberts coolly declared, "history will be heard."[12]

For all the emphasis on *Brown*, neither Chief Justice Roberts nor any other Justice felt compelled to review Chief Justice Earl Warren's reasoning in detail, perhaps due to the familiarity of that landmark decision. For some, Chief Justice Roberts's reliance on *Brown* was obviously wrong.[13] The dissenting Justices portrayed Chief Justice Roberts's interpretation of *Brown* as not just simply wrong-headed, but "cruel"[14]—strong language indicating how much the dissenters thought was at stake.

One way to assess Chief Justice Roberts's opinion and the Court's decision in *Parents Involved* is to return to the basic premises underlying Chief Justice Warren's equal protection analysis in *Brown*. Chief Justice Warren's opinion rested on the idea that public school segregation had a "detrimental effect" on African-American schoolchildren by fueling feelings of inferiority that hampered their educational development.[15] It was this stigmatic injury—and its link with equal educational opportunity—that rendered segregated public schools in violation of the Fourteenth Amendment's Equal Protection Clause[16] under Chief

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7. Linda Greenhouse, *Court Reviews Race as Factor in School Plans*, N.Y. TIMES, Dec. 5, 2006, at A1. Greenhouse reported that the attorneys defending the school district programs "found themselves struggling" to explain "why the plans should be seen as something different from the intentional segregation that the court struck down in *Brown*." *Id.* Michael F. Madden, the attorney arguing for the Seattle School District, responded to Chief Justice Roberts's question by noting that segregation was "harmful" while integration "has benefits." Transcript of Oral Argument, *supra* note 3, at 49.

8. Three Justices joined Chief Justice Roberts's opinion, with Justice Anthony M. Kennedy concurring in part. *See infra* text accompanying notes 33–48.

9. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767–68 (2007).

10. *Id.* at 2768.

11. *Id.*

12. *Id.* at 2767.

13. *See, e.g.*, Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 89 (2007).

14. *Parents Involved*,127 S. Ct. at 2797 (Stevens, J., dissenting); *id.* at 2836 (Breyer, J., dissenting).

15. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

16. U.S. Const. amend. XIV ("No State shall . . . deny to any person within its jurisdiction

Justice Warren's analysis.[17] By focusing on Chief Justice Warren's exact reasoning in its historical context, this Essay responds to the way in which Chief Justice Roberts framed the issue in *Parents Involved* around *Brown*. After all, he did not contend that, whatever meaning *Brown* had in 1954, it had acquired new meanings as conditions changed in the half-century since then. Nor did he suggest that the principle laid down by Chief Justice Warren had been transformed over the years. Chief Justice Roberts might have acknowledged that *Brown* was open to different interpretations; then he could have explained why his interpretation of *Brown* was most appropriate in *Parents Involved*. But he did not take that approach either. Instead, he purported to base his opinion squarely on what *Brown* meant when it was decided.[18]

In that light, this Essay adopts a historical approach to evaluate Chief Justice Roberts's interpretation of *Brown* and his use of that decision. Part I summarizes the Seattle School District's case. Part II surveys the conflicting views of *Brown* that the Justices offered in *Parents Involved*. Part III exposes the fallacy of Chief Justice Roberts's historical interpretation of *Brown*. Part IV, following the logical implications of Chief Justice Robert's argument, tests the Court's decision in *Parents Involved* by applying *Brown*'s underlying rationale concerning stigmatic injury and equal educational opportunity to Seattle's student placement policies.

I. THE SEATTLE SCHOOLS CASE

Seattle's student assignment plan involved the placement of incoming ninth graders in the city's ten public high schools.[19] Facing housing patterns that undercut racial diversity in particular schools, school administrators sought to develop a program that combined racial integration with student choice.[20] The plan allowed incoming ninth-grade students to rank their top choices among the district's high schools.[21] The Seattle School District placed students in their selected schools so long as space was available.[22] For oversubscribed schools, the school district employed four "tiebreakers":[23] (1) whether the prospective student had a sibling at the school;[24] (2) the racial composition of the school compared with that of the entire district's student population;[25] (3) "geographic proximity" between the school and the student's home;[26] and (4) assignment by lottery.[27]

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the equal protection of the laws.").

17. *Brown*, 347 U.S. at 493–95.
18. *See Parents Involved*, 127 S. Ct. at 2767–68.
19. *Id*. at 2738, 2746–47.
20. *Id*. at 2747.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*.
27. *See infra* note 173 at 1226.

When employing the so-called racial tiebreaker, the school district compared the ratio of nonwhites to whites in the school to the district's overall student population.[28] According to the classification scheme employed, the overall ratio was 59% nonwhite to 41% white.[29] Permitting a 15% variance from the district's demographics,[30] school administrators did not use the racial tiebreaker unless an oversubscribed school's ratio was 74% nonwhite and 26% white.[31] The school district permitted students assigned by the racial tiebreaker to transfer after one year without regard to race.[32]

Applying the strict scrutiny standard, the Supreme Court ruled that the Seattle School District's racial classifications were not narrowly tailored to achieve a compelling governmental interest.[33] This ruling led to an inelegant split on the Court. Chief Justice Roberts's opinion was joined in full by three Justices (Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito, Jr.) and in part by Justice Anthony M. Kennedy.[34] Chief Justice Roberts indicated that the only acceptable governmental interest that could justify the use of race in K-12 public schools was to remedy "the effects of past intentional segregation."[35] He rejected "racial balancing"[36] as a compelling interest on the grounds that such an interest, lacking a "logical stopping point,"[37] would inevitably sanction "the imposition of racial proportionality throughout American society."[38] While acknowledging a state interest in having a diversified student body, Chief Justice Roberts confined this interest to higher education.[39] And when that interest in diversity did apply

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28. *Parents Involved,* 127 S.Ct. at 2747.

29. *See id.*

30. The school district had previously used a 10% variance. *Id.* at 2747 n.3.

31. *Id.*

32. *Id.* at 2806 (Breyer, J., dissenting).

33. *Id.* at 2759–61. Noting the small number of students affected by the racial tiebreaker, Chief Justice Roberts pointed to its "minimal effect" as evidence that the use of racial classifications was unnecessary. *Id.* at 2760. He also concluded that the school district had failed to show that it had seriously considered other alternatives. *Id.*

34. *Id.* at 2788 (Kennedy, J., concurring).

35. *Id.* at 2752. According to Chief Justice Roberts, this interest was inapplicable in Seattle's case because the school district had not engaged in de jure segregation and it had not been subject to a court desegregation order. *Id.* at 2747, 2752. *Cf. id.* at 2803–04, 2810–11, 2812 (Breyer, J., dissenting) (noting legal challenges settled by the Seattle School District). Chief Justice Roberts also suggested that this remedial interest did not justify the use of race in school districts, like Louisville's, which had previously segregated by law but then "achieved unitary status" under federal court supervision. *Id.* at 2752.

36. *Id.* at 2757.

37. *Id.* at 2758.

38. *Id.* at 2757. Interestingly, when the issue of racial balancing came up in the 1970s, after Chief Justice Warren had left the Court, he did not reject the goal of achieving "racial balance," though he felt that the racial balance need not be "exact." EARL WARREN, THE MEMOIRS OF EARL WARREN 298 (1977).

39. *Parents Involved*, 127 S. Ct. at 2753–54.

(in college admissions programs, for example), the Chief Justice emphasized that racial identity could only be one of several factors.[40]

In his pivotal concurring opinion, Justice Kennedy agreed that Seattle's racial classification scheme was not narrowly tailored to achieve the school district's stated goals of promoting "the educational benefits" of racial diversity and minimizing the harms of racial isolation.[41] Yet Justice Kennedy refused to go along with everything Chief Justice Roberts said about what constitutes a compelling governmental interest.[42] Significantly, Justice Kennedy acknowledged that "avoiding racial isolation" and achieving "a diverse student population"[43] could be "compelling educational goal[s]."[44] Citing *Brown*'s vision of equal educational opportunity,[45] he offered several race-conscious options that he thought school districts could consider.[46] These included locating new schools, remapping attendance zones, and recruiting students and teachers to promote diversity.[47] The key for Justice Kennedy was to avoid "individual typing by race," though he left such individual classifications open as a "last resort."[48]

Justice Breyer wrote the principal dissenting opinion, joined by Justices Ruth Bader Ginsburg, David H. Souter, and John Paul Stevens.[49] The dissenters disputed Chief Justice Roberts's use of strict scrutiny.[50] Justice Breyer argued that, while governmental racial classifications were subject to careful examination, the traditional heightened strict scrutiny standard was inappropriate in this context, where race-conscious measures sought to "include members of minority races" rather than exclude them.[51] Justice Breyer considered *Swann v. Charlotte-Mecklenburg Board of Education* a major precedent on point, recognizing a school district's "broad discretionary powers"[52] to integrate each school within its jurisdiction to approximate the racial composition of the whole

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40. *Id*. at 2754.

41. *Id*. at 2791 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy was troubled by the "blunt" white/nonwhite classification which did not account for Seattle's diverse student population of Asian-Americans, Native Americans, and Latinos. *Id.*

42. *Id*. at 2788.

43. *Id*. at 2797.

44. *Id*. at 2789. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (treating diversity as a compelling interest).

45. *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

46. *Id*. at 2792.

47. *Id*.

48. *Id*. *See generally* Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (placing Justice Kennedy's concurring opinion in *Parents Involved* in the context of his developing jurisprudence on race).

49. *Parents Involved,* 127 S. Ct. at 2800 (Breyer, J., dissenting).

50. *Id*. at 2819.

51. *Id*. at 2815.

52. *Id*. at 2811 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1267 (1971)).

school district.[53] Even assuming strict scrutiny applied, Justice Breyer rejected Chief Justice Roberts's views on compelling interest and narrow tailoring.[54] Justice Breyer enumerated three justifications for having racially integrated schools: (1) remedial ("to combat the remnants of segregation");[55] (2) educational (to counteract the "adverse educational effects [of] highly segregated schools");[56] and (3) democratic (to prepare children to participate in a "pluralistic society").[57] He suggested that the Seattle School District's use of race, affecting only "a fraction of students' non-merit-based assignments,"[58] was more narrowly tailored than race-conscious programs that the Court had previously declared constitutional.[59] Daring the majority to specify alternative means that could be effective, in light of Seattle's extensive history of other measures including mandatory busing, [60] Justice Breyer used Justice Kennedy's suggestions to point out the real-world difficulties facing school administrators.[61] For example, Justice Breyer suggested that strategic site selection would be ineffective given the pace of school building construction (noting that Seattle had built ten of its high schools by the early 1960s, six of these by the 1920s).[62]

II. THE JUSTICES' VIEWS OF *BROWN*

It might appear as if the Justices could have evaluated the constitutionality of contemporary student assignment plans without more than a passing reference to *Brown*. Yet the debate among the Justices was as much a contest over how *Brown* should be interpreted as it was over whether these student placement policies were narrowly tailored to achieve a compelling governmental interest. The different views of *Brown* advanced by the Justices in *Parents Involved* divided along the lines taken in a longstanding debate over the meaning of equal protection. In the years since Chief Justice Warren issued his opinion, two basic opposing positions have emerged.[63]

One, sometimes called the antidiscrimination or anti-classification principle, reads the Equal Protection Clause to mean that governmental programs should not take race into account except when persons prove that they have been the

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53. *Id*. at 2812.
54. *Id*. at 2820.
55. *Id*.
56. *Id*.
57. *Id*. at 2821.
58. *Id*. at 2825.
59. *Id*. *Cf.* Grutter v. Bollinger, 539 U.S. 306 (2003) (discussing law school admissions program).
60. *Parents Involved*, 127 S. Ct. at 2825–26 (Breyer, J., dissenting).
61. *Id*. at 2828.
62. *Id*.
63. *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (arguing that antisubordination values guide the development and application of the anticlassification principle).

victims of intentional race discrimination.[64] Affirmative action programs based on racial preference are the most prominent target for anti-classification advocates. Proponents of the antidiscrimination principle like to invoke the idea that the Constitution is "color-blind," the catch phrase uttered by Justice John Harlan, dissenting in *Plessy v. Ferguson*.[65] According to those who favor this position, civil rights policy must be predicated on race neutrality.[66] Advocates of the antidiscrimination principle conceive the constitutional issue in terms of individual versus group rights.[67] Their concern is that group membership, particularly based on race, should not override individual merit when the government distributes benefits and burdens.[68]

The alternative view coalesces around the principle of antisubordination.[69] Its proponents interpret *Brown* and the Equal Protection Clause as a mandate to remedy the second-class status of minorities, particularly African-Americans, which resulted from centuries of racial discrimination.[70] They argue that, at this point in time, strictly observing racial neutrality is insufficient and policymakers must sometimes consider race to achieve the equal protection of the laws guaranteed by the Constitution.[71] As Justice Harry Blackmun put it, "[i]n order to get beyond racism, we must first take account of race."[72] Those who subscribe to this view are more doubtful about the idea of a colorblind Constitution than their antidiscrimination counterparts. However commendable in the abstract, they argue, the colorblind Constitution has the effect of perpetuating the disadvantaged position of African-Americans and other racial minorities.[73]

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64. *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469, 526 (1989) (Scalia, J., concurring). Justice Scalia also acknowledged the exceptional case of a "social emergency" as when prison security would require the temporary separation of inmates by race. *Id.* at 521.

65. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

66. *See Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment) (stating "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause").

67. *See, e.g.*, William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, *passim* (1984).

68. *See id.* at 1003.

69. This principle goes by other names as well, including anticaste, which, like the colorblind Constitution, finds support in Justice Harlan's opinion in *Plessy*. *Plessy*, 163 U.S. at 559 ("There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

70. *See, e.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1114 (1991); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1022–23 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 136 (1976).

71. *See, e.g.*, Aleinikoff, *supra* note 70, at 1078–91.

72. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (Blackmun, J., dissenting).

73. Aleinikoff, *supra* note 70, at 1062; Neil Gotunda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2–3 (1991); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 77–78 (2002).

Against that background, Chief Justice Roberts's opinion in *Parents Involved* can be seen as an effort to validate the antidiscrimination principle, once and for all, with the Supreme Court authoritatively tracing its lineage directly to *Brown*. As evidence to support his interpretation, Chief Justice Roberts cited several statements made in the *Brown* litigation.[74] He suggested that the position taken by the NAACP lawyers "could not have been clearer."[75] Chief Justice Roberts quoted from one of their briefs: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[76] In addition, Chief Justice Roberts lifted NAACP attorney Robert L. Carter's language from oral arguments: "We have one fundamental contention . . . that no State has any authority under the equal-protection clause . . . to use race as a factor in affording educational opportunities."[77] There was, Chief Justice Roberts wrote, "no ambiguity in that statement."[78] Chief Justice Roberts found additional support in *Brown II* (1955),[79] an opinion addressing the question of how to implement the earlier ruling in *Brown*.[80] He highlighted *Brown II*'s directive to admit children to the public schools on a "nondiscriminatory" and "nonracial basis."[81] Along these lines, Chief Justice Roberts might have added statements from Chief Justice Warren's memoirs, where *Brown*'s author described the "fundamental principle" of the historic opinion in this way: "any kind of racial discrimination in public education is unconstitutional."[82] Touching on the question of individual versus group rights, Chief Justice Roberts underscored Chief Justice Warren's language in *Brown II*: "At stake is the personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis."[83] Chief Justice Roberts concluded his opinion with a catchy phrase that aptly sums up the antidiscrimination position: "The way to

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74. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007).

75. *Id*.

76. *Id*.

77. *Id*. at 2767–68. Opponents of affirmative action have cited this quotation previously. *See* Brief for Petitioner at 18, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). Carter went on to explain that one reason for the contention was that "where public school attendance is determined on the basis of race and color, that it is impossible for Negro children to secure equal educational opportunities." PHILIP B. KURLAND & GERHARD CASPER, 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 281 (1975).

78. *Parents Involved*, 127 S. Ct. at 2768.

79. *Id*.

80. Brown v. Bd. of Educ., 349 U.S. 294, 299–301 (1955).

81. *Parents Involved*, 127 S. Ct. at 2768.

82. WARREN, *supra* note 38, at 287. Also, it may be noted that at the Justices' first conference on Brown (before Chief Justice Warren's appointment to the Court), Justice William O. Douglas stated that "[n]o classifications on the basis of race can be made. [The] 14th [A]mendment prohibits racial classifications." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 296 (2004).

83. *Parents Involved*, 127 S. Ct. at 2768 (quoting *Brown*, 349 U.S. at 300).

stop discrimination on the basis of race is to stop discriminating on the basis of race."[84]

Besides rejecting Chief Justice Roberts's position on what constitutes a compelling interest, Justice Kennedy also disagreed with Chief Justice Roberts's reading of *Brown*. Justice Kennedy stated that he did not join Chief Justice Roberts's opinion where he considered it to be "inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause."[85] Significantly, Justice Kennedy did not join Chief Justice Roberts's argument making use of Chief Justice Warren's language in *Brown II* and the NAACP lawyers' statements.[86] Dismissing Chief Justice Roberts's "[t]he way to stop discrimination . . ." quotation, Justice Kennedy explained that the problem school districts face today is not susceptible to such an "easy" fix.[87] Justice Kennedy indicated that racial isolation resulting from de facto resegregation was at odds with *Brown*'s goal of equal educational opportunity.[88] He sought to tone down what the Court made of Justice Harlan's "color-blind" Constitution, which he classified as an aspirational goal rather than a "universal constitutional principle," especially when used to block race-conscious measures designed to provide equal educational opportunity.[89] In the end, Justice Kennedy's concern about the individual kept him from going further in the dissenters' direction.[90] He perceived the programs under review as an affront to individual dignity, and he believed that racial classifications by individual typing would renew "divisiveness."[91]

A more pointed rebuke to Chief Justice Roberts's interpretation of *Brown* came from the dissenters, whose position, in contrast with Chief Justice Roberts's antidiscrimination outlook, reflected the antisubordination principle. Note Justice Breyer's language: *Brown* had to be read against the background of Jim Crow's "caste system rooted in the institution of slavery and 80 years of legalized subordination."[92] He said that "[t]he Equal Protection Clause . . . has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races."[93] In a separate dissenting opinion, Justice Stevens stated flatly that

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84. *Id*. *Cf.* Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1222 (9th Cir. 2005) (en banc) (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race."); Reynolds, *supra* note 67, at 1003 ("More discrimination is simply not the way to end discrimination.").

85. *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

86. *Id*.

87. *Id*. at 2791.

88. *Id*.

89. *Id*. at 2791–92.

90. *Id*. at 2796–97.

91. *Id*. at 2797.

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

93. *Id*. at 2834–35.

Chief Justice Roberts "rewrites the history of one of this Court's most important decisions."[94] Certainly "[b]efore *Brown*, schoolchildren were told where they could and could not go to school."[95] However, Justice Stevens noted, as if in disbelief that he had to point out the obvious distinctions, they were all African-Americans.[96] For Justice Stevens, it was significant that the racial classifications in *Parents Involved* did not "stigmatize or exclude" as did the segregation policies considered in *Brown*.[97] There was a "lesson of history," Justice Breyer added, but it was not to equate "efforts to continue racial segregation" with "efforts to achieve racial integration."[98] Justice Breyer said it was "a cruel distortion of history" to compare contemporary integration policies to Jim Crow segregation of the 1950s.[99] Likewise, Justice Stevens detected a "cruel irony" in Chief Justice Roberts's use of *Brown*.[100] Had the dissenters pointed to Chief Justice Warren's memoirs, they could have noted his description of *Brown* as having "lashed at three centuries of slavery and its remnants based on the white supremacy theory . . . ."[101]

Justice Thomas filed a separate concurring opinion primarily to respond to Justice Breyer.[102] Like Chief Justice Roberts, Justice Thomas quoted from the NAACP's briefs and oral arguments in *Brown*.[103] Noting that the NAACP lawyers had stated "that the Constitution is color blind is our dedicated belief," Justice Thomas also linked the dissenters' position in *Parents Involved* to their "rejection of the color-blind Constitution."[104] Justice Thomas considered Justice Breyer's approach comparable to the one taken by "the segregationists" in *Brown*.[105] "What was wrong in 1954," Justice Thomas said, "cannot be right today."[106]

III. INTERPRETING *BROWN*

As much as the debate in *Parents Involved* revolved around *Brown*, none of the Justices reviewed Chief Justice Warren's rationale in detail. Chief Justice Roberts said that *Brown* held that "segregation deprived black children of equal

94. *Id*. at 2798 (Stevens, J., dissenting).
95. *Id*. at 2797–98 (quoting plurality opinion).
96. *Id*. at 2798.
97. *Id*.
98. *Id*. at 2836 (Breyer, J., dissenting).
99. *Id*.
100. *Id*. at 2797 (Stevens, J., dissenting).
101. WARREN, *supra* note 38, at 306.
102. *Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).
103. *See id*. at 2782. "The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone." *Id*. (quoting Brief of Petitioner-Appellants at 5, Brown v. Bd. of Educ., 347 U.S. 483 (1952) (No. 1), 1952 WL 82041).
104. *Id*.
105. *Id*. at 2783–85 (drawing parallels between their arguments on local conditions, disruptive consequences, and longstanding precedent).
106. *Id*. at 2786.

educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority."[107] He went on to explain that the Court had relied on "the fact of legally separating children on the basis of race" rather than unequal facilities "to find a constitutional violation in 1954."[108] It was at this point that Chief Justice Roberts recited statements made by Chief Justice Warren and the NAACP lawyers, for example, that school districts must "achieve a system of determining admission to the public schools on a nonracial basis."[109] Chief Justice Roberts treated these quotations as conclusive evidence of the Warren Court's understanding of the Equal Protection Clause in 1954. Chief Justice Roberts also used these statements to show that the result the Court reached in *Parents Involved* conformed to *Brown*.[110] "What do the racial classifications in these cases do," he asked, "if not determine admission to a public school on a racial basis?"[111]

In short, Chief Justice Roberts's methodology for interpreting *Brown* was based on scanning the record of that case for statements that appeared to support his position. By placing so much weight on the language by itself, Chief Justice Roberts diminished the importance of other aspects of the relevant history, which indicate that more was going on than he suggested. The story leading to the decision in *Brown* is well-known, but a review of essential points in the Court's reasoning process and the context surrounding the Court's decision reveals the deficiencies in Chief Justice Roberts's historical interpretation.

Although Chief Justice Warren ultimately delivered a unanimous opinion for the Court, the Justices were divided when they first confronted the issue of public school segregation.[112] Indeed, when Chief Justice Warren joined the Court in the fall of 1953, the Justices had already heard arguments in *Brown*, but they had been unable to decide the case, let alone agree on a constitutional rationale.[113] Although almost every Justice considered Jim Crow segregation wrong, it was one thing to say racial segregation was misguided as a matter of policy and another to declare segregation laws unconstitutional and explain why that was the case.[114] Without a clear basis upon which to rule against segregation in the public

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107. *Id*. at 2767 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954)).

108. *Id*. (citing *Brown*, 347 U.S. at 494).

109. *Id*. (citing *Brown*, 349 U.S. at 300–01).

110. *Id*. at 2767–68.

111. *Id*. at 2768.

112. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 613–14 (Random House 1977) (1975).

113. Klarman, *supra* note 82, at 301–02.

114. *See, e.g.*, JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 54–56 (Oxford Univ. Press 2001); Klarman, *supra* note 82, at 292–302 (2004); Kluger, *supra* note 112, at 592–618 (2004); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1907–08 (1991).

schools, the Court under Chief Justice Warren's predecessor, Chief Justice Fred M. Vinson, ordered the parties to reargue the case.[115]

The "separate but equal" doctrine announced in *Plessy* was one of the most significant challenges facing the Court in the *Brown* litigation. Chief Justice Vinson had opened the Justices' initial conference on *Brown* by noting the "[b]ody of law [in] back of us on separate but equal."[116] The idea that separate facilities did not violate the Equal Protection Clause so long as they were equal presented an analytical problem. Any argument against "separate but equal" had to explain how separate facilities that were said to be equal violated the Equal Protection Clause. There were essentially two responses. One was to focus on tangible factors to show that the facilities for African-Americans were not in fact equal to those reserved for whites. In the case of public schools, these tangible factors included teacher salaries, curricula, school supplies, and classroom facilities.[117] The alternative was to show that separate was by its nature unequal—a violation of the Equal Protection Clause—regardless of how tangible factors like teacher salaries or supplies in white schools compared to those for African-American children. That was the approach taken by the NAACP in the *Brown* litigation.[118] That was also the approach Chief Justice Warren embraced.[119] As he framed the issue in his opinion: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."[120]

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115. *See* Klarman, *supra* note 82, at 302; Kluger, *supra* note 112, at 615. The Court directed the parties to address questions regarding the original understanding of the Fourteenth Amendment's Equal Protection Clause. Kluger, *supra* note 112, at 615. This issue has been the subject of ongoing debate. *See, e.g.*, Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955); Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, *passim* (1995); Earl M. Maltz, *A Dissenting Opinion to* Brown, 20 S. ILL. U. L.J. 93, 94–95 (1995); Michael McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMM. 233, *passim* (1996); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953–55 (1995).

116. Klarman, *supra* note 82, at 294 (alteration in original).

117. On these measures, unequal conditions in the schools were manifest throughout the South, but litigants pursuing the so-called "equalization" approach to make black and white schools equal faced numerous obstacles. MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 21–22 (Hill & Wang 1998). Civil rights lawyers had to collect evidence school by school. *Id*. Even if they won individual cases, the most they could hope to obtain was a court order directing the local government to equalize the schools in question. *Id.* Perhaps most disconcerting, the "equalization" strategy left the separate but equal doctrine intact. *Id.*; LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 44 (The Belknap Press of Harvard Univ. Press 2000).

118. *See* ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 122–23 (Univ. Press of Kan. 2003); Horwitz, *supra* note 117, at 21–22.

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

120. *Id*.

If Chief Justice Roberts's methodology is sound, perhaps Chief Justice Warren's reference to "the children of the minority group" should be taken as an important clue to *Brown*'s meaning.[121] That aside, the Court's behind-the-scenes deliberations clarify Chief Justice Warren's thinking. The task the Court faced was to explain why separate was, as Chief Justice Warren put it, "inherently" unequal.[122] At the first conference on *Brown* following reargument, Chief Justice Warren seized on a single idea that formed the basis for the Court's answer. "The more I've read and heard and thought," he told his colleagues, "the more I've come to conclude that the basis of segregation and 'separate-but-equal' rests upon a concept of the inherent inferiority of the colored race."[123] Thurgood Marshall, the head of the NAACP's legal team, had done his best to make the case turn on that point. "[T]he only way that this Court can decide this case in opposition to our position," Marshall emphasized at the oral arguments, "is to find that for some reason Negroes are inferior to all other human beings."[124]

It is difficult to read Chief Justice Warren's short opinion in *Brown* without noticing the prominent part this idea of inferiority played in his argument.[125] Before referring to inferiority, however, Chief Justice Warren established equal educational opportunity as the right at stake.[126] Recounting the importance of education in modern American society, Chief Justice Warren doubted whether "any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[127] He stated that once the states got in the business of providing public education, educational opportunity became a "right which must be made available to all on equal terms."[128] Public school segregation deprived African-American schoolchildren of that right because of its "detrimental effect" on "their educational opportunities."[129] Chief Justice Warren traced that detrimental effect to the "feeling of inferiority" segregation produced.[130] In his view, the problem was particularly acute for young schoolchildren: "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be

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121. *Id*.

122. *Id*. at 495.

123. Patterson, *supra* note 114, at 64; *see also* Klarman, *supra* note 82, at 302 (quoting Chief Justice Warren, "separate but equal doctrine rests on [the] basic premise that the Negro race is inferior").

124. KURLAND & CASPER, *supra* note 77, at 522–23.

125. *See, e.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9 (1976); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350 (1987). *But see* Missouri v. Jenkins, 515 U.S. 70, 119 (1995) (Thomas, J., concurring).

126. *Brown*, 347 U.S. at 493.

127. *Id*.

128. *Id*.

129. *Id*. at 494.

130. *Id*.

undone."[131] To demonstrate the effect of segregation, Chief Justice Warren quoted approvingly from the findings of fact entered by the district court in Kansas.[132] This "sense of inferiority," according to the lower court, undermines learning (affecting the child's "motivation") and tends to retard "the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[133]

One reason Chief Justice Warren emphasized this point about inferiority in his opinion was to repudiate the analysis of *Plessy v. Ferguson*. The Court in that case specifically addressed the view that Jim Crow laws marked African-Americans as inferior.[134] The "underlying fallacy" of Homer Plessy's argument, wrote Justice Henry Billings Brown, was to assume that "the enforced separation of the two races stamps the colored race with a badge of inferiority."[135] This result was not due to the segregation law, Justice Brown continued, "but solely because the colored race chooses to put that construction upon it."[136] Chief Justice Warren felt compelled to reject this language explicitly.[137] In his opinion in *Brown*, he discredited the *Plessy* Court's basis for that conclusion by contrasting the primitive state of "psychological knowledge" at that time with "modern authority."[138]

Given the importance of this idea of inferiority in Chief Justice Warren's equal protection analysis, it would have been surprising if Chief Justice Roberts had failed to take any notice of it. In fact, when Chief Justice Roberts summarized *Brown* in *Parents Involved*, he stated that the Warren Court had declared public school segregation unconstitutional "because government classification and separation on grounds of race themselves denoted inferiority."[139] At first glance, this statement may appear to be a straightforward rendition of Chief Justice Warren's thinking on inferiority. Chief Justice Roberts even borrowed Chief Justice Warren's phrasing, evidently pulling those last words—"denoted inferiority"—from the statement in *Brown* quoting the district court's findings of fact ("the policy of separating the races is usually interpreted as denoting the inferiority of the negro group").[140]

However, Chief Justice Roberts's use of the words "government classification" merits scrutiny. It is easy to see why Chief Justice Roberts would

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131. *Id.* Chief Justice Warren had originally written "puts the mark of inferiority" instead of "generates a feeling of inferiority," but he accepted Justice Felix Frankfurter's suggested change. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 96–97 (N.Y. Univ. Press 1983).

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

133. *Id.*

134. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

135. *Id.*

136. *Id.*

137. *Brown*, 347 U.S. at 494–95.

138. *Id.* at 494.

139. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007).

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

choose that specific phrase to describe the holding in *Brown*. By inserting these words in his case summary, Chief Justice Roberts left the impression that Chief Justice Warren, proceeding from a general concern about race-based government classifications, believed that any such government classifications denote inferiority. This impression would support Chief Justice Roberts's antidiscrimination interpretation of the Equal Protection Clause.

Because Jim Crow segregation laws can be categorized as government classifications based on race, that reading of Chief Justice Warren's opinion may look plausible.[141] Yet, as a logical proposition, the fact that Chief Justice Warren found some race-based classifications in violation of equal protection because they denoted inferiority does not mean that he believed all such government classifications denoted inferiority and were, on that basis, constitutionally objectionable.

Although Chief Justice Roberts summarized Chief Justice Warren's reasoning in terms of both "government classification" and "separation" on grounds of race,[142] that was not, to be precise, what Chief Justice Warren had said in *Brown*. Whenever Chief Justice Warren referred to what denoted the inferiority of African-American schoolchildren or led them to feel inferior, segregation (the act of separating by race, not just classifying by race) emerged as the critical factor. To recite his words, "[t]o separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community."[143] This same point appears in Chief Justice Warren's summary of the district court's findings. It was "the policy of separating the races [that was] usually interpreted as denoting the inferiority of the negro group."[144]

Thus, while Chief Justice Warren had left his readers contemplating how segregation put African-Americans in a position of inferiority, Chief Justice Roberts recast *Brown*'s equal protection analysis at a more general level. When speaking in the abstract about all racial classifications signifying inferiority, as Chief Justice Roberts did, there is a tendency to overlook the concrete realities surrounding the concept of racial inferiority in 1954. There is also a tendency to overlook why Chief Justice Warren and many of his contemporaries would have understood segregation to denote the inferiority of African-Americans. Perhaps the explanation is so obvious that it is easily passed over. Yet with the question in *Parents Involved* revolving around the meaning of *Brown* when it was decided, it bears emphasizing that the Warren Court was not dealing with just any sort of racial classification by the government, but with one that was the cornerstone of one of history's most oppressive racist regimes.[145]

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141. *Parents Involved,* 127 S. Ct. at 2767.

142. *Id.*

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

144. *Id.*; *see also* 49 KURLAND & CASPER, *supra* note 77, at 279 (opening argument of Robert L. Carter) (equal protection denied "because the act of separation and the act of segregation in and of itself denies . . . equal educational opportunities").

145. *See, e.g.*, GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 101 (Princeton Univ.

To say in the Jim Crow South that African-Americans were inferior was to say that they were not human or somehow less human than whites. As A. Leon Higginbotham, Jr. observed, this belief was the fundamental "precept" underlying the social system in the South dating back to colonial slavery.[146] The idea received memorable expression in the *Dred Scott* case when the Supreme Court described African-Americans as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations[,] and so far inferior, that they had no rights which the white man was bound to respect."[147] That view, persisting after slavery was abolished, aptly sums up the racist ideology upon which Jim Crow was built, not to mention the political domination, hate, and violence that flowed from the misguided notion of white supremacy. The parallels in the concepts of racial inferiority that held sway in Nazi Germany and the Jim Crow South were evident when *Brown* came before the Supreme Court less then ten years after the conclusion of World War II. Justice Hugo L. Black made that point clear to the other Justices in 1950 when he described segregation as "Hitler's creed—he preached what the South believed."[148] This was the context in which Chief Justice Warren related that the more he had "read and heard and thought, the more" he had "come to conclude that the basis of segregation and 'separate-but-equal' rests upon a concept of the inherent inferiority of the colored race."[149]

In that light, the meaning of *Brown* runs more deeply than Chief Justice Roberts indicated in *Parents Involved*. While Chief Justice Roberts generalized *Brown's* rationale in terms of governmental classifications, segregation was Chief Justice Warren's specific concern. Chief Justice Warren's equal protection analysis was based on the perception that Jim Crow segregation was inextricably linked to the idea of racial inferiority. Chief Justice Roberts mentioned inferiority when summarizing *Brown*, to be sure, but he based his interpretation of that case on statements made by Chief Justice Warren and the NAACP lawyers (e.g., no state can "use race as a factor" when providing educational opportunities; admission to schools must be done on "a nondiscriminatory basis").[150] Yet in the 1950s, no one in the *Brown* litigation thought of applying those principles to block voluntary integration. In the final analysis, the problem with relying solely on the words Chief Justice Roberts quoted is that their meaning is shaped by the

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146. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 9 (Oxford Univ. Press 1996).

147. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857). *See also* THOMAS R. DEW, REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832 87, 103 (1832); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 46 (Harper & Row 1971).

148. Tushnet & Lezin, *supra* note 114, at 1888.

149. *See* Patterson, *supra* note 114, at 64; *see also* Klarman, *supra* note 82, at 302; Kluger, *supra* note 112, at 682.

150. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).

rationale provided in *Brown* and by the historical and legal context in which those words were used.

IV. APPLYING *BROWN*

Although the legal analysis in the Seattle Schools case revolved around the question whether the student assignment plans were narrowly tailored to achieve a compelling governmental interest, the plurality by all appearances wanted the decision in *Parents Involved* to be seen to follow naturally from *Brown*'s rationale regarding stigmatic injury. Chief Justice Roberts indicated that the student placement programs under review promoted "notions of racial inferiority."[151] He offered a general explanation: "it demeans the dignity and worth of the person to be judged by ancestry" rather than the "essential qualities" and "merit" of the individual.[152] During the oral argument concerning Louisville's schools, Justice Scalia gave a more specific explanation.[153] He suggested that the student assignment plans were based on the "stigmatizing" assumption that "predominantly" or "overwhelmingly black" schools "cannot be as good" as "predominantly" or "overwhelmingly white" schools.[154]

With these comments in mind, it is possible to conduct a thought experiment to examine how *Brown* applies to the facts presented in *Parents Involved*. Put aside, for the moment, the contemporary analysis of strict scrutiny (for example, whether diversity in grades K-12 is a compelling governmental interest). Focus instead on the rationale Chief Justice Warren articulated in *Brown*—the idea of racial inferiority and the right to equal educational opportunity.[155] Were Chief Justice Roberts and Justice Scalia correct when they suggested that the student assignment plans promoted notions of racial inferiority and stigmatized African-Americans?[156] Did the Seattle School District's racial tiebreaker deprive students of equal educational opportunity? To answer such questions, this Section of the Essay tests the assertions made by Chief Justice Roberts and Justice Scalia and finds that their broad claims actually highlight important distinctions between *Parents Involved* and *Brown v. Board of Education*.

The plurality's allusions to stigmatic injury are striking, perhaps most of all for the apparent ease with which these Justices were willing to embrace untested assumptions about complex social phenomena.[157] When Chief Justice Warren

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151. *Id.* at 2767 (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989)).

152. *Id.* (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

153. Transcript of Oral Argument at 31, Meredith v. Jefferson County Bd. of Educ., 548 U.S. 938 (No. 05-915).

154. *Id.* at 30. During oral arguments, the Justices certainly test the arguments presented to the Court by expressing views contrary to their own beliefs; in this instance, however, Justice Scalia said that the policies were "based on an assumption that it seems to me is stigmatizing." *Id.* at 31.

155. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

156. *Parents Involved*, 127 S. Ct. at 2767–68; Transcript of Oral Argument, *supra* note 153, at 30.

157. *Parents Involved*, 127 S. Ct. at 2767–68.

discussed the idea of racial inferiority in *Brown*, he carried the equal protection analysis into a complicated setting having to do with the psychological state of children in elementary and secondary public schools, not to mention their inner feelings about racial identity.[158] Whether Seattle's student assignment program actually promoted notions of racial inferiority and demeaned the dignity of individuals raises questions that cannot be resolved by speculative assertion.

The plurality in *Parents Involved* did not clarify who was victimized by the Seattle School District. Who, to use Chief Justice Roberts's words, was "judged" by race and "demean[ed]" by Seattle's student assignment plan?[159] In *Brown*, Chief Justice Warren's stance was clear: public school segregation had a detrimental effect on "children of the minority group."[160] No one contemplated segregation leading white children to feel inferior. To the contrary, according to the NAACP's filings, segregation gave "children of the majority group" a false sense of superiority which in turn led them to "direct their feelings of hostility and aggression" against minorities who were "perceived as weaker than themselves."[161]

Unlike Chief Justice Warren, Chief Justice Roberts did not specify whose sense of inferiority was at stake in *Parents Involved*. His opinion can be interpreted to mean that the student assignments denoted the inferiority of African-Americans, but not that of white children. However, he did not foreclose the possibility that the student assignment plan denoted the inferiority of all students who were denied their choice of schools by the racial tiebreaker, regardless of their racial identity.[162] The latter interpretation would not correspond to the view Justice Scalia expressed at oral argument, which indicated that the policies denoted the inferiority of African-Americans by virtue of the underlying assumption about the quality of schools.[163] Justice Thomas, in his concurring opinion, advanced yet another view: that "every time the government uses racial criteria . . . someone gets excluded, and the person excluded suffers an injury solely because of his or her race."[164] By tying the injury to the act of exclusion in this way,[165] Justice Thomas suggested that the idea of racial inferiority was irrelevant and that the racial tiebreaker denied equal protection to all students it affected.

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158. *See Brown*, 347 U.S. at 493–94.

159. *Parents Involved*, 127 S. Ct. at 2767 (citing Rice v. Cayetano, 528 U.S. 485, 517 (2000)).

160. *Brown*, 347 U.S. at 493. He reiterated this concern when reciting the district court's findings that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children," and legal segregation "has a tendency to [retard] the educational and mental development of negro children . . . ." *Id.* at 494.

161. KURLAND & CASPER, *supra* note 77, at 48.

162. Another interpretation is that Chief Justice Roberts meant that only African-American children denied their choice of schools were stigmatized.

163. Transcript of Oral Argument, *supra* note 153, at 30.

164. *Parents Involved*, 127 S. Ct. at 2775 (Thomas, J., concurring).

165. *Id.*

Whatever inconsistencies mar the plurality's understanding of who was stigmatized, even more revealing is the question of how Seattle's student assignment policies promoted notions of racial inferiority. This question would seem to be a critical point, but Chief Justice Roberts barely implied an answer. Assuming that Chief Justice Roberts had African-Americans in mind (or perhaps minority children more broadly), but not white schoolchildren, one explanation that can be drawn from his opinion is based on his implicit analogy to affirmative action programs.[166] Opponents of affirmative action argue that, when viewed as preferential treatment for racial minorities, such programs fuel conceptions of the beneficiaries' inferiority because race, rather than ability or experience, is seen to be the decisive factor in awarding jobs or college admissions. Chief Justice Roberts did not apply that argument explicitly to the student placement policies, although the phrase he used—"notions of racial inferiority"—came from Justice Sandra Day O'Connor's opinion in *City of Richmond v. J.A. Croson*, a major affirmative action case.[167]

The analogy to student placement policies is misconceived. Public school systems administering grades K-12 do not ordinarily place children in one school or another based on ability.[168] What stood out in the placement process, as Justice Souter noted during oral argument, was the absence of any criteria for allocating students among different schools based on "ability as shown in test scores, grade point averages, things like that."[169] Thus, the reason why affirmative action programs might be seen to promote conceptions of racial inferiority is not present in these student assignment plans.[170]

That leaves Justice Scalia's suggestion that the student assignment policies were based on the "stigmatizing" assumption that a "black" school "cannot be as good" as a "white" school.[171] This suggestion may attest to his skills in argumentation, but it does not accord with the record in the Seattle Schools case.[172] Of the city's ten public high schools, five were oversubscribed but not all had predominantly white student populations.[173] Franklin High School, termed by the district judge the "city's popular predominantly minority school,"[174] was among these highly regarded schools. Without taking race into account in student

166. *Id*. at 2751–55.

167. *Id*. at 2767 (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989)).

168. *See* Transcript of Oral Argument, *supra* note 3, at 10.

169. *Id*.

170. *Id*. at 11 (arguments advanced by Justice Scalia and Justice Souter over characterizing the benefits received from the school district as affirmative action).

171. Transcript of Oral Argument, *supra* note 153, at 30-31.

172. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1226, 1231 (W.D. Wash. 2001); Joint Appendix, *Parents Involved* at *310, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2468696. Nor did the facts in the Louisville case support Justice Scalia's conjecture.

173. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1226, 1231 (W.D. Wash. 2001).

174. *Id*. at 1231.

assignments, its incoming ninth-grade class in 2000 would have been 79.2% nonwhite.[175] Garfield, also among the most popular five, had a student population which was 53% nonwhite.[176] Moreover, the idea that the Seattle School District promoted stigmatizing assumptions about black schools is hard to square with the fact that the school district operated an African-American Academy for grades K-8 dedicated to "[a]cademic excellence." [177]

Indeed, when it comes to concrete details showing exactly how the Seattle School District promoted "notions of racial inferiority," the Roberts plurality left pertinent questions unanswered. Did the record indicate how children attending Seattle schools looked upon these policies, let alone if anyone suffered psychological injury? Did African-American schoolchildren in Seattle actually feel stigmatized by the school district's student assignment policies? How did notions of racial inferiority manifest themselves in Seattle? Did African-American students or their parents believe that the Seattle student assignment policies marked them as second-class citizens? Did the stigmatic injury, if any, correlate with the number of cases in which children were denied their choice of oversubscribed schools? If so, would the stigmatizing effect be eliminated if, in a given academic year, no schools were oversubscribed and all students attended schools of their choice? Or did the student placement plan promote feelings of racial inferiority simply by virtue of its existence? The record in the Seattle Schools case, submitted on cross motions for summary judgment, did not address specific questions such as these.[178]

By contrast, the record in *Brown* reflected an effort by the NAACP lawyers to furnish evidence to demonstrate how segregated schools made African-American schoolchildren feel inferior.[179] Certainly the NAACP's lead lawyer did not believe he could rest his case on mere assertions about feelings of inferiority among African-American schoolchildren.[180] "I told the staff that we had to try this case just like any other one in which you would try to prove damages to your client," Thurgood Marshall recalled.[181] "If your car ran over my client, you'd have to pay up, and my function as an attorney would be to put experts on the stand to

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175. *Id*. at 1226. The overall enrollment for 1999-2000 at Franklin High School was 34.6% African-American, 38.5% Asian-American, and 21.4% white. The overall enrollment at Garfield was 34.7% African-American, 12.5% Asian-American, and 47.2% white. Joint Appendix, *Parents Involved* at *310, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2468696.

176. Brief of Petitioner at 5, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

177. 127 S. Ct. at 2777 (Thomas, J., concurring).

178. An amicus brief filed jointly by the American Psychological Association and the Washington State Psychological Association noted that students in schools populated with children from diverse backgrounds reported "greater feelings of self-worth" than those in racially isolated schools. Brief of the Am. Psychol. Assn. et. al. as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

179. KURLAND & CASPER, *supra* note 77, at 44.

180. *See* Kluger, *supra* note 112, at 316.

181. *Id*.

testify to how much damage was done. We needed exactly that kind of evidence in the school cases."[182]

In line with that strategy, the NAACP lawyers produced a succession of experts to testify in the lower courts about the psychological effects of school segregation.[183] Fourteen expert witnesses took the stand in the Delaware cases.[184] One was Kenneth Clark, a social psychologist who had conducted the famous doll tests where he showed African-American children two white dolls and two brown dolls and then asked them to identify such things as "the doll you like best," "the doll that is the nice doll," "the doll that looks bad," "the doll that is a nice color," and "the doll that looks like them."[185] The results were more equivocal than the NAACP lawyers might have liked, but Clark felt he had a sufficient number of African-American children who identified the white doll as nice, the brown one as bad, or were simply "reduced to crying" to conclude that the children associated their skin color with inferiority.[186] Regardless of its flaws, Clark's testing produced the "kind of evidence" Marshall wanted "on the record."[187]

While several of Marshall's colleagues remained skeptical of this and other social science evidence, the NAACP lawyers attached an appendix to their opening brief entitled "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement."[188] Signed by leading sociologists, psychiatrists, and psychologists, the appendix noted that there were, besides legal and moral questions presented, "factual issues" about which "certain conclusions seem to be justified on the basis of the available scientific evidence."[189] The appendix directly addressed the question of how minority children "learn the inferior status to which they are assigned."[190] For the answer, the appendix pointed to a report issued by the Mid-century White House Conference on Children and Youth.[191] The report suggested that as African-American children "observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole – they often react with feelings of inferiority and a sense of personal humiliation" and many "become confused about their own personal worth."[192] As a result, they "often react with a generally defeatist attitude and a lowering of personal ambitions."[193] Moreover, this result was "reflected in a lowering of pupil morale and a depression of the educational aspiration level among minority group children in

182. *Id*.
183. *Id*. at 439.
184. *Id*.
185. *Id*. at 317-18.
186. *Id*. at 318.
187. *Id*. at 316.
188. KURLAND & CASPER, *supra* note 77, at 44.
189. *Id*.
190. *Id*. at 46.
191. *Id*.
192. *Id*.
193. *Id*.

segregated schools."[194] A key factor, according to the report, was "awareness of social status difference" reinforced by "the fact of enforced segregation."[195] Though recognizing the unusual character of their evidence, the NAACP lawyers nevertheless attempted to lay a foundation with this appendix for the Supreme Court to conclude that segregated public schools did indeed lead African-American students to consider themselves inferior, to the detriment of their educational development.[196] In his opinion for the Court, Chief Justice Warren did not rely on assertions that segregation laws produced feelings of inferiority among African-American schoolchildren.[197] Rather, he pointed to evidence in the record, notably the findings of fact entered by the district court in Kansas.[198] In a footnote of the opinion, Chief Justice Warren cited several studies by social scientists.[199] He has been criticized over the years for this footnote, though he apparently regarded the district court's factual findings to be more significant than the social science studies for the purposes of his argument.[200]

This history of the *Brown* litigation highlights the absence of any detailed explanation—and the paucity of evidence—on stigmatic injury in *Parents Involved*. Justice Scalia and Chief Justice Roberts threw these "notions of racial inferiority" and "stigmatizing" assumptions around as if they had a talismanic quality.[201] Chief Justice Roberts stated plainly that "such classifications promote 'notions of racial inferiority . . . .'"[202] Interestingly, when Justice O'Connor penned those words in *Croson*, she was careful to say that governmental classifications "*may* in fact promote notions of racial inferiority" and that there was only a "danger of stigmatic harm."[203] Justice O'Connor, in turn, cited as authority Justice Lewis F. Powell, Jr.'s statement in *Regents of the University of California v. Bakke* that "preferential programs *may* only reinforce common stereotypes."[204] By subtly altering Justice O'Connor's statement, Chief Justice Roberts implicitly acknowledged that the Seattle Schools case called for more than simply raising the possibility of stigmatic harm.

In *Brown*, moreover, the point about inferiority was a necessary step in Chief Justice Warren's argument, but not the end of the analysis. The constitutional question was whether African-American schoolchildren had been denied equal protection of the laws, and Chief Justice Warren felt obliged to answer by saying

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194. *Id*. at 47.

195. *Id*. at 50.

196. *Id*.

197. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

198. *Id*.

199. *Id*. at 494–95 n.11.

200. "It was only a note, after all," Chief Justice Warren later remarked. Kluger, *supra* note 112, at 706.

201. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007); Transcript of Oral Argument, *supra* note 153, at 30–31.

202. *Parents Involved,* 127 S.Ct. at 2744.

203. City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (emphasis added).

204. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (emphasis added).

that they had been deprived of equal educational opportunity.[205] The concept of racial inferiority was the predicate for explaining why that was the case. Given the way in which Chief Justice Roberts framed the issue in *Parents Involved* around *Brown*, he invited an inquiry into how Seattle's student assignment plan denied students equal educational opportunity.

This raises the question of which students, if any, were denied equal educational opportunity. If the analogy to *Brown* holds such that the only students denied equal educational opportunity were African-American (or perhaps other minority children), then it follows that white students denied their choices by the racial tiebreaker were not deprived of equal educational opportunity. Yet that conclusion would contradict the essence of the plaintiffs' claim against the Seattle School District. They surely did not limit their complaint to allege that only African-American schoolchildren were denied equal protection.[206] Indeed, any realistic appraisal of the case would suggest that plaintiffs' underlying concern revolved around the idea that African-American schoolchildren were obtaining opportunities that would have otherwise been afforded white children, not that African-American students were denied them.[207]

Suppose, on the other hand, that all students denied their choices by the racial tiebreaker were deprived of equal educational opportunity. Arguably, strictly applying *Brown*'s rationale of stigmatic injury would put Chief Justice Roberts in the position of contending that Seattle's racial tiebreaker made white children feel inferior and thereby affected their educational development.[208] That does not appear to be his position. Another possible line of argument for Chief Justice Roberts to take would be that the Seattle School District deprived students, including white students, of equal educational opportunity for reasons unrelated to stigmatic injury. Such a move, by itself, represents a significant departure from Chief Justice Warren's mode of analysis (which hinged on connecting the idea of inferiority with equal educational opportunity). That said, the question now reduces to what other reasons justify the conclusion that Seattle's racial tiebreaker denied students equal educational opportunity.

One way to analyze that question is to focus on the students who were actually assigned to schools by the racial tiebreaker. In the last year Seattle's student placement program was used, the racial tiebreaker blocked fifty-two students from attending high schools they preferred.[209] Were these students, in a

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

206. *See* Petition for Writ of Certiorari at 2-5, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

207. *See, e.g.*, *It's Ballard or Bust*, SEATTLE TIMES, June 24, 2000, http://community.seattletimes.nwsource.com/archive/?date=20000624&slug=4028453.

208. Following the analysis laid out by the district court in Kansas, Chief Justice Warren concluded that segregated public schools deprived African-American schoolchildren of equal educational opportunity by fueling their "sense of inferiority," which, in turn, diminished their motivation to learn and impaired their "educational and mental development." *Brown*, 347 U.S. at 494.

209. *Parents Involved*, 127 S. Ct. at 2760.

constitutional sense, denied equal educational opportunity? Significantly, the student assignment plan permitted each of these students to transfer after one year without taking race into account,[210] so the question arguably boils down to the effect of that one academic year on their educational opportunities. There has been a longstanding national debate over how to measure equal educational opportunity,[211] but several factors might be considered here. Did students placed in schools by the racial tiebreaker show a measurable deficiency in cognitive development or academic performance as a result of their placement? Were they less motivated to attend college? Did the student assignment program have the effect of diminishing their confidence in their own abilities? Was their command of required subjects less than it otherwise would have been? What of the subsequent career experiences of students assigned to schools based on the racial tiebreaker? The answers to some of these questions might have been developed further if the case had not been submitted on cross motions for summary judgment. As it stood, questions like these remained unanswered by the record in the Seattle Schools case.

Though not couched in terms of *Brown*'s analysis of equal educational opportunity, one of the plaintiffs' central claims in *Parents Involved* was that Seattle's high schools differed in quality.[212] Whether, following *Brown*, general distinctions among the high schools amounted to a constitutional deprivation of equal educational opportunity for the students affected by the racial tiebreaker is another matter, however. The record in the case was not particularly well developed on this issue. While the plaintiffs claimed that "[Seattle's high] schools var[ied] widely in quality, program offerings, and popularity,"[213] the Seattle School District countered that "[e]ach [high school] offered a similar array of educational and extracurricular programs . . . ."[214] The school district explained that it used the same formula for per-pupil spending throughout the entire school system.[215] Had the case gone to trial, the parties could have clarified various measures of resources, including, for example, faculty training, teacher verbal ability, facilities like science laboratories, and volumes per student in school libraries. The record submitted to the Supreme Court included some data on student aptitude and achievement such as SAT scores and Advanced Placement courses, but the record left many questions unanswered.[216] Expert

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210. *Id.* at 2806 (Breyer, J., dissenting).

211. *See generally.*, JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION (Westview Press 1990) (providing background information and theory on equal opportunity in education); ON EQUALITY OF EDUCATIONAL OPPORTUNITY (Frederick Mosteller & Daniel P. Moynihan eds., Random House 1972) (discussing the extent of inequality of educational opportunity among different races and ethnicities).

212. Brief of Petitioner, *supra* note 176, at 3–5.

213. *Id.* at 4.

214. Brief of Respondent at 6, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

215. *Id.*

216. *See* Joint Appendix, *supra* note 175, at *142a, *147a.

testimony at a trial could have yielded a more sophisticated analysis of the statistical significance of relative academic achievement.[217] Meanwhile, Chief Justice Roberts paid little attention to evidence indicating that the school district could have achieved its goal of enhancing opportunities for minority students without adversely affecting white students.[218]

In sum, while Chief Justice Roberts purported to rely on *Brown* to justify the Court's decision in *Parents Involved*, factual details undermine his position. He dutifully gestured towards the notion of racial inferiority, which was such a critical part of Chief Justice Warren's reasoning. Yet Chief Justice Roberts's opinion left his readers to guess how the Seattle School District's pupil placement promoted such notions. As for the issue of equal educational opportunity, perhaps it is sufficient to close with a basic comparison. In Seattle's case, the racial tiebreaker affected a small number of students, all of whom were permitted to transfer after one year. In *Brown*, the Supreme Court confronted seventeen states operating Jim Crow schools that no one today, it seems fair to say, would seriously consider to have afforded African-American schoolchildren equal educational opportunity, by any measure.[219]

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217. To take one example, what were the Justices supposed to make of the summary of SAT scores reported in the Joint Appendix? This summary showed eight of the ten public high schools ranking below the Washington state average. The differences between the scores of seven schools did not appear to be substantially different. The summary itself did not provide any explanation of the statistical significance of the different scores. Another document in the Excerpts from the Record purporting to show the standard deviation in SAT scores left much to be desired, still leaving unclear whether the differences were statistically significant, whether the sample was representative, and what would have been the result if tests for statistical significance had been run without Garfield, the top ranking school in SAT scores by a wide margin. Incidentally, Garfield had the second highest percentage of African-American students (34.7%) among Seattle's public high schools. *See id.*; Excerpts from Record, *Parents Involved*, at 435-38, 440, 127 S. Ct. 2738 (2007) (No. 05-908).

218. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1236 (W.D. Wash. 2001). Evidence suggested how racially diverse schools enhanced the opportunities for minority students, particularly with better "opportunity networks" for postsecondary education which lead to "more prestigious" and "higher paying" occupations. *Id.* Testimony cited by the district court also suggested that white students as well as minority students "experienced improved critical thinking skills" in more desegregated schools, in terms of the "ability to both understand and challenge views which are different from their own." *Id.* This line of thought was bolstered by an appendix to an amicus brief filed in the Supreme Court by a number of social scientists. Brief of 553 Social Scientists as Amici Curiae Supporting Respondents at App. 1, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (2007) (No. 05-908). Their documentation suggested that diverse classrooms improved "critical thinking" skills, raised "black achievement scores without adversely affecting white achievement scores," and created greater "life opportunities" for minority students with access to "social and professional networks." *Id.* at App. 12, App. 17, App. 20, App. 21. *But cf.* 127 S. Ct. at 2755 (explaining why impact of racial diversity was unnecessary to decision); *id.* at 2776-77 (Thomas, J., concurring) (discussing conflicting studies).

219. Chief Justice Warren recorded in his memoirs that the decision in *Brown* "was aimed at affording all children an equal opportunity for a good education, nothing more." WARREN, *supra*

V. CONCLUSION

No doubt the Supreme Court's decision in *Parents Involved* is important as a statement of policy concerning contemporary issues in public education. Yet perhaps more than anything else, *Parents Involved* will loom large in the years ahead as a contest over the meaning of *Brown v. Board of Education*. Something more than a statement of the law, *Brown* has come to symbolize an archetypal principle in American thought, arguably ranking in significance with the most revered state papers in U.S. history, from the Declaration of Independence onward. At the heart of the Justices' debate in *Parents Involved*—what led to their exceptionally sharp exchange—was the question of what the Warren Court meant when it decided *Brown*.

Nothing prevented the Roberts Court from deciding *Parents Involved* without raising historical questions about *Brown*, especially when viewing the student assignment policies on the grounds on which the Court based its decision, as a test of whether those policies were narrowly tailored to serve a compelling governmental interest. Even after *Brown* was brought into the analysis, it was open for Chief Justice Roberts to say that, whatever the Supreme Court had intended to accomplish in 1954, Chief Justice Warren and his colleagues could not have foreseen how things would stand a half-century later and that, as one commentator said, it was time to recognize that *Brown* was "out of step" with the problems public schools face today.[220] Arguably, Chief Justice Roberts would have been on stronger ground if he had confined his interpretation to the Equal Protection Clause without bringing *Brown* into the analysis. Evidently unwilling to let slip the opportunity *Parents Involved* presented, Chief Justice Roberts sought to establish his interpretation of equal protection as authoritative by tracing its lineage to Chief Justice Warren's historic opinion.

Chief Justice Roberts read *Brown* as a general prohibition against governmental classifications based on race including, as in *Parents Involved*, integration policies voluntarily adopted by public school systems. Significantly, for Chief Justice Roberts, this is not only what *Brown* means today but also what the Supreme Court and Chief Justice Warren meant in 1954. Chief Justice Roberts expressed this view with more conviction than rigorous analysis. The only evidence he cited to support his historical claim came from a handful of statements made in the course of the *Brown* litigation by Chief Justice Warren in *Brown II* and the NAACP lawyers (as if Thurgood Marshall, of all people, directed his staff to state repeatedly the principles of equal protection so that the

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note 38, at 298. His point that "nothing more" was required was his way of responding to the opposition to *Brown* during the controversy over school busing in the 1970s. *Id.* Chief Justice Warren was arguing against efforts to whip up public fears that the courts would "wrench children from their neighborhoods and put them on buses for hours every day all over America." *Id.* at 297–98. He expressed concern about proposals to have Congress strip the federal courts of jurisdiction over school desegregation. *Id.* at 298.

220. Juan Williams, *Don't Mourn* Brown v. Board of Education, N.Y. TIMES, June 29, 2007, at A29.

Supreme Court, fifty years hence, could declare voluntary integration programs unconstitutional). The fundamental and seemingly obvious difficulty with Chief Justice Roberts's historical interpretation of *Brown* is that the language used by Chief Justice Warren and the NAACP attorneys derives its meaning from the context in which they made those statements. No one in the *Brown* litigation contemplated public school systems assigning students based on race for purposes of voluntary integration. Confronting a rigid social hierarchy defined by the racist doctrine of white supremacy, Chief Justice Warren did not base his equal protection analysis on generalities about government classification but rather on segregation's presumption of African-American inferiority, a point he emphasized in the Justices' deliberations and in his opinion for the Court.

There is nothing new in noting the two indispensable points Chief Justice Warren used in *Brown* to conclude that segregated schools violated the Fourteenth Amendment's Equal Protection Clause: first, that public school segregation engendered feelings of inferiority among African-American schoolchildren; and second, that these feelings resulted in the loss of equal educational opportunity for African-Americans. In their attempt to apply the idea of racial inferiority to contemporary student assignment plans almost in passing, the Roberts plurality unintentionally highlighted pertinent distinctions between *Parents Involved* and *Brown*. Stigmatic injury is a complex social phenomenon. Stigma depends on perception, and perception depends on context. The absence of any evidence supporting the Roberts plurality's assertions about stigmatic injury is striking. Using the Seattle School District as a baseline for analysis, it remains unclear who suffered stigmatic injury and how that was accomplished. Chief Justice Roberts's barely implied parallel to affirmative action was inapt. The record did not substantiate Justice Scalia's hypothesis that the Seattle School District perpetuated stigmatizing assumptions about the quality of predominantly black schools. Similarly, the idea that the Seattle's student assignment policies deprived persons of equal educational opportunity was undeveloped, to say the least.

Perhaps there is no better indication of how far Chief Justice Roberts strayed from *Brown* than to ask, finally, what Chief Justice Warren would think of the Supreme Court's decision in *Parents Involved* if he had the opportunity to review it today. No doubt Chief Justice Warren's times were different. Yet it seems likely, after considering his life and achievements, that he would have been deeply disappointed to find widespread resegregation in public schools a half-century after *Brown*; that he would have been troubled by the Roberts plurality's efforts to deprive *Brown* of operative effect while professing to be faithful to that landmark case; and that he would have been mystified by Chief Justice Roberts's announcement that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[221] as if the obvious solution had been there all along.

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221. *Parents Involved,* 127 S. Ct. at 2768.