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INTRODUCTION

Bad history in legal opinions is understandable, if most of the time not excusable. Bad legal analysis in Supreme Court opinions is not. Judges are not trained historians. They are trained lawyers. They should know how to do law. This essay is about bad lawyering at the Court. Specifically, this essay is about the shoddy misuse of *Brown v. Board of Education,*[1] the canonical case in which the Supreme Court finally began to use the 14th

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1. Brown v. Bd. Of Educ., 347 U.S. 483 (1954).

Amendment to protect Black people,[2] in *Students for Fair Admissions v. Harvard*.[3]

Chief Justice Roberts, Justice Thomas and Justice Sotomayor all cite general language from *Brown* as if that case established broad rules on the use of race under the Equal Protection Clause, broad rules that tell us how the *Harvard* case should come out.[4] At first glance, that seems unlikely. *Brown* was about a policy distinctly different from the one at issue in the *Harvard* case. *Brown* was about a policy that hurt Black people, and sent a strong message that Black people were inferior. The *Harvard* case was about a policy designed to help Black people. The Court spent the twelve years between 1978 and 1990 deciding if race discrimination designed to help should be treated the same way for constitutional analysis as race discrimination designed to hurt.[5] That would hardly have seemed necessary (or appropriate) if *Brown* had set the rules that would govern affirmative action in admissions.

With a closer look, the use of *Brown* in those three opinions is, to put it kindly, just wrong. *Brown* was about the legitimacy of "separate but equal" as constitutional doctrine. "Separate but equal" was a bizarre legal doctrine that had no connection to the conventional equal protection analysis which applied to the *Harvard* case. On the contrary, its main selling point was that it avoided conventional equal protection analysis altogether. After disposing of separate but equal, *Brown* could have, as the plaintiff's lawyers anticipated it might, make a ruling on the constitutionality of using race in school assignment apart from separate but equal.[6] But the decision didn't do that, instead holding that segregation was always a violation of equal protection. The *Brown* opinion can't be honestly understood to suggest anything about racial classifications in other contexts, much less in the context of classifications designed to help Black people.

2. I asked the Journal editors to allow me to capitalize both the words "Black" and "White" in this Article, and they graciously agreed. While everything can be political, that's not what this was about for me. I think the words should be capitalized when used as proper nouns, as descriptions of a discrete group of human beings and not as descriptions of color (which are pretty wide of the mark). Whatever one may think in most contemporary contexts, a principle justification for segregation was the preservation of a distinctly "White" culture from alteration by "Black" culture. "White," was not a residual category for all cultures not "Black." "White" was largely thought of as a culture distinct from all those not "White." Anti-miscegenation laws often captured this well. See former VA. CODE ANN. § 20-54 as quoted in Loving v. Virginia, 388 U.S. 1 (1967).

3. Students for Fair Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

4. *See*, *e.g.*, *id*. at 202-04, 233, 239, 241-42, 255-56, 265, 318 (By my count, there are 89 mentions of *Brown* in the *Harvard* case).

5. From Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) to City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

6. Statement as to Jurisdiction at 12-16, Brown v. Bd. Of Educ., 347 U.S. 483 (1954) (No. 436).

You may think the *Harvard* case is right, you may think it is wrong, but the outcome does not stem from *Brown.* That case, maybe the most important ever from the Supreme Court, deserved better from the heirs of those who decided it.

To understand why the *Harvard* case is such a gross misuse of *Brown,* you need to understand just what "separate but equal" was and just what *Brown* held in striking it down. Then you can see how these Justices abused it in the *Harvard* case.

I. UNDERSTANDING SEPARATE BUT EQUAL

In the early years after the adoption of the 14th Amendment, the Supreme Court struggled to develop doctrine to enforce it. In *Strauder v. West Virginia,*[7] the Supreme Court appeared to hold that any statute which explicitly treated Black people differently, at least in terms of the ability to protect life, liberty and property, was simply invalid. The Court made no inquiry into the connection between the classification and the overall purpose of the law (*Strauder* gets mangled almost as much as *Brown* does in the *Harvard* case).[8]

Taking a different tack, in *Powell v. Pennsylvania,*[9] the Court appears to adopt the extraordinarily narrow view that all equal protection requires is that everyone who is treated differently be treated differently in the same way.[10] Along a related if different line, some courts appeared to hold that as long as *the courts* treat everyone covered by a law the same way, equal protection is satisfied (more on this below).[11] Other decisions seem to say that a classification violates equal protection only if it doesn't conform to "natural" classifications.[12]

In that early mix, though, was the doctrine that came to be the accepted way to apply the equal protection clause. Equal protection, the Court decided, requires the state to treat the same (equally) all those who are similarly situated in terms of the purpose of the law.[13] More through holdings

7. Strauder v. West Virginia*,* 100 U.S. 303 (1879).

8. *Id.* at 306-08.

9. Powell v. Pennsylvania*,* 127 U.S. 678 (1888).

10. *Id.*; *see* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345 (1949).

11. *See*, *e.g*. Roberts v. City of Boston, 59 Mass. 198, 206 (1849) based on equality provisions in Art. 1, §§ 1 and 6 of the Massachusetts constitution. The critical passage from *Roberts* is quoted with approval in Plessy v. Ferguson, 163 U.S. 537, 544 (1896), though the *Plessy* Court likely doesn't take quite this minimalist view of federal equal protection. See the text following.

12. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346, n.13 (1949).

13. Billings v. Illinois, 188 U.S. 97, 101-02 (1903); and see, for a rudimentary version, Barbier v. Connolly*,* 113 U.S. 27, 31-32 (1885). *See also*, Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 155 (1891). This approach is firmly accepted as the general approach by the early 20th century. *See* Royster Guano v. Virginia, 235 U.S. 412, 415 (1920).

than explanations, we learn that "similarly situated in terms of purpose" is about whether treating people the same or differently helps accomplish an overall purpose of a law. If treating one group of people helps accomplish the purpose, that group is not "similarly situated" to everyone else in terms of that purpose. Since they are not similarly situated, the government can treat them differently. If treating the group differently does not help advance the purpose, that group is "similarly situated" to everyone else and the government cannot treat them differently.

And so we come to conventional equal protection: does the classification (different treatment) advance a valid purpose. If so, the government can do it. If not, it can't.[14] The heart then of equal protection analysis is an examination of the relationship between the different treatment, the classification and the purpose, of the law, the end; classifications/ends analysis.

"Separate but equal" is a short circuit around "classification/ends" analysis. The idea is that if the state is already giving Black people and White people the same treatment, there is no need to do any equal protection analysis. The state has already met the obligation equal protection would impose on it if Black and White people were similarly situated in terms of the law's purpose.[15]

14. In their groundbreaking article on equal protection, Tussman and tenBroek argue that this is a rough accommodation between the principle of equal treatment and the essential need of government to classify, to treat as different things that are different. I've suggested elsewhere that it is also essentially what we mean day to day by equal treatment (the same in terms of purpose). *See* Matthew Coles, *Equal Protection and the Anti-Civil-Rights Initiatives*, 55 OHIO ST. L.J. 563, 564, n.3 (1994). No matter the justification; it is the doctrine. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

15. The U.S. Supreme Court never gave either an unambiguous description of the doctrine or a straightforward explanation of the reasoning behind it. The District Court in Briggs v. Elliot 98 F. Supp. 529 (E.D.S.C. 1951), one of the four cases that made up the *Brown* decision at the Supreme Court, gave a succinct description of how it worked: "It is equally well settled that there is no denial of the equal protection of the laws in segregating children in the schools for the purposes of education, if the children of the different races are given equal facilities and opportunities." No need to ask how segregation advances education; if the opportunities are equal, there is no problem. Morrison v. State, 116 Tenn. 534, 95 S.W. 494, 497 (1906) does a fair job of explaining it: "[i]t does not discriminate against either race, but applies to both with equal force and effect. Both are subject to the same restraints, and afforded equal privileges and accommodations . . . ." There is a backhanded explanation in the U.S. Supreme Court case that adopts "separate but equal," McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161-62 (1914). There the Court says, referring to a black traveler, "if he is denied by a common carrier acting in a manner under the authority of state law a facility or convenience . . . which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." The reverse is that if he is provided "substantially equal facilities" there is no constitutional claim. For some roughly contemporary explanations, see Notes, *Constitutionality of a Statute Compelling the Color Line in Private Schools*, 22 HARV. L. REV. 217 (1909); Notes, *Statutory Discriminations Against Negros with Reference to Pullman Cars*, 28 HARV. L. REV. 417 (1915).

The critical difference between "separate but equal" and regular equal protection is that "separate but equal" directs the analysis away from the connection between different treatment and the law's purpose, and focuses it instead on the similarity of the treatment. It's a switch that doesn't really make much sense. How "separate but equal" worked in practice shows you why. No two tangible things in life are exactly the same in all respects. The courts got that, so they developed the doctrine of "substantial equality," which said that separate but equal required that things be roughly the same only in the aspects that matter.[16] That, of course, begs the question of what matters. To decide what mattered, courts then looked to the purpose of whatever it was that the state was doing (regulating trains, educating, etc.) and asked how the difference related to that purpose.

Applying separate but equal to a world where nothing is exactly the same meant then that courts had to decide both what the differences in treatment actually were, and whether they made a difference to a good education (or comfortable and efficient transportation, or whatever was at issue). So in education, federal courts found for example that "prescribed courses" needed to be the same, that the educational qualifications of teachers needed to be roughly the same and the physical plants needed to be "comparable."[17] Facilities were not comparable enough where the Black high school had no "gymnasiums," no "shower or dressing rooms," "no cafeteria, no teacher's rest room and no infirmary," "inadequate" science facilities and "no industrial art shop," all things the White school had. The curricula were not "substantially equal" where the White high school had courses in physics, world history, Latin, "advanced typing and stenography," "wood, metal and machine shop, and drawing" but the Black high school did not. Black schools were also entitled to a "fair share" of "newer" school buses.[18] Longer distances to get to school, on the other hand, were more often thought to be unimportant. The Missouri Supreme Court found there was no difference that mattered between in-state and out-of-state law schools.[19] Courts also shied away from getting too in the weeds on building comparability. If the same facilities were available, it might not matter if one was better than another; buildings were built at different times.[20] As the trial judge put it in *Belton v. Gebhart,*[21] the Delaware case that was part of *Brown,* the equality question could be even more difficult than it appeared, because some factors could not be reduced to numbers, and in some circumstances,

16. See Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 344 (1938), for an example of the U.S. Supreme Court invoking the "substantial equality" doctrine.

17. Brown v. Bd. of Educ., 98 F. Supp. 797, 798 (D. Kan. 1951).

18. Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., 103 F. Supp. 337, 340 (E.D. Va. 1952).

19. State *ex rel.* Gaines v. Canada, 342 Mo. 121, 134-35 (1937).

20. Gong Lum v. Rice, 275 U.S. 78 (1927). *But see,* Belton v. Gebhart, 32 Del.Ch. 343, 357-58 (1952).

21. *Belton,* 32 Del.Ch. at 355.

some things might be better in a Black school, some better in a White school. At least that was possible in theory.

If the differences didn't affect the school's capacity to achieve the state's purpose in having a school system, the differences didn't matter, and the state could go on as it was, treating people differently. If differences did matter, segregated education was not equal.[22]

In practice then, "separate but equal" did not get the Courts out of the business of deciding if there was different treatment, and if so, did it advance or retard the goals the state said it had. Courts evaluated the connection between the different treatment and the states' purpose for every difference they found that they said mattered. Every difference that is—but one. That exception was the one difference in treatment that was actually required by law: that only Black students would be present in one school and only White students in others. That's why "separate but equal" never made any sense. It didn't avoid evaluating the rationale for different treatment; it got rid of analyzing the rationale for the difference at the heart of the system, the law that required all the other differences. When you get down to it, separate but equal said the state was not required to explain differences in treatment it mandated by law, as long as it explained other differences the state did not require by law. A neat trick.

But perverse as it may seem to rule there is equality without explaining the only legal difference in treatment, the doctrine's survival likely rested on not having to explain how segregation served the purposes of education (or any other activity segregated by law). Well before *Plessy,* the Court held in *Strauder v. West Virginia*[23] and *Yick Wo v. Hopkins*[24] that the equal protection clause did not allow discrimination to be justified by racial prejudice. If the purpose of segregation was to treat Black people as inferior, it would violate equal protection. In 1896, the *Plessy* majority maybe could get away with pretending that segregation was designed to promote the "comfort" and "protection" of both Black people and White people.[25] Justice Harlan didn't buy it. After *Plessey*, the Court carefully avoided ever talking about the rationale for segregation, much less how it served some legitimate overall purpose of the laws in question.[26] Facing up to the real rationale for

22. In most cases, that meant not that the state had to integrate but that it had to bring the Black schools up to the level of White schools in terms of those differences. *See*, *e.g.*, Briggs v. Elliott*,* 98 F. Supp. 529, 537-38 (E.D.S.C. 1951). *But see Belton,* 32 Del.Ch. at 358-59.

23. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879).

24. Yick Wo v. Hopkins*,* 118 U.S. 356 (1886).

25. Introducing the 14th, the *Plessy* Court says that the amendment was not intended to "enforce . . . a commingling of the two races upon terms unsatisfactory to either." In a later famous passage the Court insists the law did not stamp " . . . the colored race with a badge of inferiority," except to the extent Black people insisted on seeing it that way. Plessy v. Ferguson*,* 163 U.S. 537, 544, 551.

26. *See* McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 160 (1914); *See also*, Berea College v. Kentucky, 211 U.S. 45 (1908); Gong Lum v. Rice, 275 U.S. 78, 85-86 (1927).

segregation would mean recognizing sooner or later that Justice Harlan in dissent was right; that would doom it.[27]

Plessy v. Ferguson is usually cited as the case that established "separate but equal" as an alternative way to comply with equal protection. It's a bad rap; well, at least a wrong rap. At most, it only did half the job. In one of the less-famous passages the *Plessy* court says that to satisfy equal protection, different treatment had to be a reasonable means for "the promotion of the public good." The classification cannot, it says, have been adopted "for the annoyance or oppression of a particular class."[28] In deciding how to apply that standard, the Court says, "there must necessarily be a large discretion on the part of the legislature."[29] In its essentials, that is conventional equal protection as it was done then and pretty much as it is done today under "rational basis review"[30] Using this analysis, the *Plessy* Court then decides that the Louisiana law complies because, in light of the "established usages, customs and traditions of the people" segregation is a reasonable way to promote their "comfort" and to preserve "public peace and good order."[31]

The Plessy majority may have understood at some level that this part of *Plessy* was, as Harlan put it, "wanting in candor." Less than three years later Harlan suggested for a unanimous Court in *Cumming v. Richmond Board of Education* that school segregation might be based on hostility to Black people and as such would be vulnerable to an equal protection attack. 175 U.S. 528, 545 (1899). The Court in *Cumming* upheld the dismissal of a challenge to closing a Black high school while maintaining some high school options for White Students because the Plaintiffs had asked for the wrong remedy. If this seems like hollow formalism, well, it was a pretty formal Court. It's also easy to say something supportive when you are finding against a party, so maybe the suggestion that segregation in education could be attacked in a better constructed case shouldn't be given too much emphasis.

27. The Court does own up to the rationale briefly in Buchanan v. Warley, 245 U.S. 60 (1917). The Court in *Buchanan* struck down a Louisville, Kentucky ordinance that prohibited Black people from residing in blocks where the other residents were predominantly White, and vice versa. In refusing to follow *Plessy,* the Court said that the laws had to give ". . . a measure of consideration" to feelings of "race hostility" that the law was "powerless to control." But the Court said the "solution" could not be ". . . depriving citizens of their constitutional rights . . . ." This statement came in the Court's discussion of equal protection. But ultimately, the case appears to strike the ordinance as an ". . . interference with property rights . . ." in violation of the due process clause. It's hard not to think that this Court simply took the protection of property under the due process clause more seriously than the protection of liberty or equality.

28. *Plessy*, 163 U.S. at 550.

29. It's possible the *Plessy* court viewed "reasonableness" as a requirement of the due process clause, and thought equal protection required only equal treatment in judicial proceedings. See the approving quotation of this idea from Roberts v. City of Boston, 59 Mass. 198, 206 (1849) in *Plessy* 163 U.S. at 544. But this may be a finer distinction than the Court had in mind. The Court in those days often didn't draw distinctions among the privileges or immunities, due process and equal protection clauses.

30. *See*, *e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the State wide latitude (citation omitted) and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.") and at 448 (accommodating negative attitudes and fear are not legitimate state interests).

31. *Plessy*, 163 U.S. at 550. The Court was not entirely right about customs and traditions. Segregation by law was a comparatively new thing in the 1890s. Segregation by policy and practice

The Court then had to deal with the problem identified by Justice Harlan: the "comfort" of the people achieved by deferring to their "customs and established usages" was to "exclude colored people from coaches occupied by or assigned to white persons."[32] *Yick Wo* would have controlled had the Court agreed. In a much more famous passage, the Court simply denies that this is true, saying in effect that it's all in Black peoples' heads.[33]

This is a pretty "toothless" version of classification/ends analysis coupled with a fantasy about a legitimate purpose. But if this is faithless to the equal protection clause and the Court's earlier interpretations of it, it is nonetheless not the separate but equal short circuit. Plessy does consider how segregation advances some overall purpose of regulating railroads. And in explaining why the Louisiana law is constitutional, the Plessy decision doesn't say that the Constitution requires equal accommodations. The equality requirement in *Plessy* comes not from the Court but from the statute, which required "equal but separate accommodations."[34] *Plessy* never says that equality is essential to the decision. It simply says segregation is a legitimate way to achieve the legitimate aims of "referencing . . . the established usages, customs and traditions of the people" to promote "their comfort and the preservation of the public peace and good order."[35]

Most of the laws we call "Jim Crow"—laws which required segregation—were passed in the last decade of the 19th and the first two of the 20th centuries.[36] Most of them, at least in the early years, included the same "equality" requirement as Louisiana's law. The first "equal but separate" laws appeared in Tennessee in 1881 and in Florida and Mississippi in 1887 and 1888.[37] The motivation that drove the passage of the first laws

has a longer heritage, but it gained steam after 1877 and was by no means as pervasive as it became until the start of the 20th. *See* C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 67-109 (Oxford Univ. Press ed., 3rd ed. 1974), esp. Ch. 3.

32. *Plessy*, 163 U.S. at 577 (Harlan, J., dissenting).

33. *Id.* at 551.

34. Act of July 10, 1890, no. 111, § 1, 1890 La. Acts 152-54 (1890) (the "Louisiana Separate Car Acts").

35. *Plessy*, 163 U.S.at 550.

36. C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 96-102 (Oxford University Press ed., 3rd ed. 1974).

37. There were segregation sections in at least three of the Black Codes passed immediately after the Civil War. *See* GILBERT STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 208-09 (Appleton, New York and London, 1910). Those laws were largely suspended by the War Department. Tennessee passed a railroad car segregation law in 1881. Laws of Tenn., 1881, pp. 211-12. Stanley J. Folmsbee argues that shouldn't be seen as a Jim Crow law since it was passed with some Republican and Black support as an improvement over an 1875 law that seemed to authorize excluding Black people from railroads altogether. He says the first real Jim Crow law was a Mississippi "separate car" act of 1888. Stanley J. Folmsbee, *The Origin of the First "Jim Crow" Law*, 15 J.S. HIST. 244 n.2 (1949); *see also*, Laws of Miss., 1888, at 45, 48. The Mississippi law is reprinted in Louisville, New Orleans and Tex. Ry. Co. v. Mississippi, 133 U.S. 587, 587, 591 (1890), upholding the law in the face of what would today be called a dormant commerce clause challenge. Stephenson says Florida beat Mississippi to it by a year, and he appears to be correct.

is complex. For some, they served to keep Black people away as policies excluding Black people from public accommodations completely came under attack (by the short-lived federal civil rights law, among other things). Separate but equal was a way to maintain separation. But separate but equal laws also got support from Republicans and some Black leaders as an improvement on laws which allowed exclusion. Ultimately, though the "but equal" requirement was a way to insulate segregation laws from attack under the equal protection clause and the 1866 Civil Rights Law.[38]

In any event, "equality," or at least lip service to it, was built into the statute in question in *Plessy.* While *Plessy* made general statements about "equality before the law" at the start of its discussion of the 14th Amendment and at the close of the majority opinion, it didn't mention equality at all in the part of its opinion actually upholding the law. Nowhere did it say the Constitution required equality.[39]

Although *Plessy* didn't use the "separate but equal" short circuit for equal protection analysis, it may as well have. Its use of a flabby review standard and its willingness to allow fiction to establish a purpose and rationale meant for all intents and purposes virtually any segregation law would survive constitutional review. As later courts saw, if "comfort" of the (White) people were enough of a rationale for segregation on this railroad, it would be enough on any railroad. And it would be enough in schools, in waiting rooms, at water fountains, in restaurants, and on and on and on. Many, perhaps most, of the laws passed after *Plessy* had the superficial "equality" provision, and most of them, doubtless at least in part because of *Plessy*, went unchallenged.[40]

Stephenson, *Ibid.*, at 217; and *see* Laws of Fla., 1887, ch. 3743, §§ 1-2, at 116. In any event, Folmsbee may well be right that it was the Supreme Court decision upholding the Mississippi law that encouraged other states to adopt similar laws, an encouragement perhaps greatly enhanced by *Plessy.*

38. Howard N. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations,1865-1890*, 63 J. OF AM. HIST. 325, 325-350, 332-333, 334-335 (1976). And *see generally*, C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW (Oxford University Press ed., 3rd ed. 1974), esp. Ch. 3. The plaintiffs in Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., 103 F. Supp. 337 (E.D Va. 1952), *rev'd sub nom* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (one of the four cases that make up Brown) provide some strong evidence that by early in the 20th century, leaders in Virginia and Georgia at least were pretty frank about doing their best to evade the 14th Amendment. The plaintiffs in the four cases in a consolidated brief on reargument make the historical argument that inequality and evading the civil war amendments was the central purpose of segregation. Brief of Appellants on Reargument at 50-65, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 436).

39. *See Plessy,* 163 U.S. at 543 ("legal equality"); *id.* at 544 ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law.").

40. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 96-102 (Oxford Univ. Press ed., 3rd ed. 1974). *See* GILBERT STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 207-36 (Appleton, New York and London 1910). Segregation in schools appears to go back much further. *See* Stephenson, *Ibid.,* 154-206.

The case that finished establishing the "separate but equal" short circuit was *McCabe v. Atchison, Topeka & Santa Fe. Railway Co.*[41] When it came to sleeping and dining cars, the railroads and the Oklahoma legislature felt even nominal equality was too much. In 1907, Oklahoma passed a separate car law which required railroads to provide "separate coaches or compartments" for Black and White passengers, but which allowed White-only sleeping, dinning and "chair" cars.[42] The lower court bought the state's argument that those were "luxuries" for which there was little demand among Black people,[43] so they didn't need to be provided. Writing for the Court, then-Justice Hughes begins by confirming that the effect of *Plessy* was to hold that segregation, at least in railroads, is legal across the board. But, he goes on to explain, the equality requirement is a constitutional requirement. The right to equal protection, the Court says, is "personal," so that if a railroad decides there is enough demand to provide "luxuries," it has to provide "substantially equal" facilities for both Black and White passengers.[44] This is also where the idea of "substantially equal," which becomes critical in the school cases, makes its first appearance at the Court.

And there it is. As long as "substantially equal" accommodations are required, segregation is legal without any inquiry about how treating Black people and White people differently achieves the purpose of the law; without, that is, any explanation of the reason for different treatment.

II. WHAT BROWN V BOARD OF EDUCATION DID

The *Brown* opinion ultimately is the best measure of what *Brown* holds. In their opinions in the *Harvard* case, both Chief Justice Roberts and Justice Thomas explain what *Brown* means by relying on arguments made by the plaintiffs' lawyers. To put the *Brown* opinion in context, and to deal with claims about the plaintiffs' lawyers, we'll start with the trial court decisions and the issues they posed for review, take a look at the arguments framed by the plaintiffs at the Supreme Court, and then turn to the *Brown* opinion itself.

A. The trial court decisions.

The trial court decisions are a little complicated. The decision that is *Brown* resolves four lawsuits, *Brown v. Board of Education*,[45] from Kansas,

41. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914).

42. By its terms the law also allowed the Railroad to provide Dinning cars etc. for Black passengers only. The Court of Appeals thought that established that the law was nondiscriminatory. McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 186 F. 966, 970 (8th Cir. 1911).

43. *McCabe*, 186 F. at 970. For the state's argument, *see* McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161 (1914).

44. *McCabe,* 235 U.S. at 161-62. The Court went on to dismiss this case for having sought the wrong relief, so technically what the opinion says about separate but equal is dicta.

45. Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951).

Briggs v. Elliot,[46] from South Carolina, *Davis v. County School Board,*[47] from Virginia, and *Belton v. Gebhart*,[48] from Delaware. The trial courts in the first three upheld segregated school systems.[49] The trial court in the Delaware case ordered that the schools be integrated.[50]

Three of the four decisions—*Briggs, Brown* and *Gebhart*—rest on "separate but equal." That is, they don't ask whether segregating Black students from White students advances some acceptable purpose. Instead all three say equal protection is satisfied despite the different treatment as long as the different treatment is "substantially equal" or in the language of the District Court in *Brown*, "comparable."[51] The *Brown* trial court says the Black schools are "comparable," so there is no violation.[52] The *Gebhart* court says they are not and orders integration.[53] The *Briggs* court also finds the schools are not "substantially equal," but instead of striking down the segregation policy, it orders the state to make them "equal." It explains this order as a form of judicial modesty. [54]

Two of the cases though do a conventional equal protection analysis. The *Briggs* opinion offers a conventional equal protection analysis as something of an alternative holding. Its conventional equal protection analysis explicitly uses the most deferential form of rational basis review.[55]

The *Davis* decision, though, says it isn't based on "separate but equal" at all. The opinion describes the trial court decision in *Briggs* and the D.C. Circuit decision in *Carr v. Corning*,[56] (upholding segregation in District of Columbia schools) as "apt and able" precedent, on which it "might ground" its conclusion. Both cases uphold segregated schools on the basis of "separate but equal."[57] But instead of relying on the "separate but equal

46. Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951).

47. Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., Va., 103 F. Supp 337 (E.D. Va. 1952).

48. Belton v. Gebhart, 32 Del.Ch. 343 (1952), *aff'd*, 33 Del.Ch. 144 (1952).

49. In these 3, the trial court decisions are the only lower court decisions. From 1910 to 1975 cases seeking to enjoin state laws as violations of the federal constitution were heard by three judge courts, with a direct appeal to the U.S. Supreme Court. *See* Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court*, 72 CASE WESTERN RESERVE L. REV. 909 (2022).

50. A fifth case, Bolling v. Sharpe, was argued and decided alongside the *Brown* cases. *Bolling* generated a separate opinion on different issues, and it plays no role in the *Harvard* case.

51. *Brown*, 98 F. Supp. at 798, 800; *Briggs*, 98 F. Supp. at 531, 532, 534; and Gebhart v. Belton, 33 Del.Ch. 144 (1952).

52. *Brown*, 98 F. Supp. at 798, 800.

53. *Belton*, 32 Del.Ch. at 351-362. The judge wrote that the state could come back at some future date to argue that it had made the schools equal. *Belton*, 32 Del.Ch. at 359.

54. *Briggs*, 98 F. Supp. at 537-38.

55. *Briggs*, 98 F. Supp. at 536 ("It has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it.") (quoting N.Y. Rapid Transit Corp. v. City of N.Y., 303 U.S. 573, 578).

56. Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

57. A footnote in the *Davis* opinion giving the citations for *Briggs* and *Corning* mentions that both cases cite *Plessy, Gong Lum* and *Cumming*. Oddly though, the *Davis* decision actually invokes

cases," *Davis* says, "the facts proved in our case . . . and perhaps peculiar here, so potently demonstrate why nullification of the cited sections of the statutes and constitution of Virginia is not warranted, that they should speak our conclusion."[58]

Perhaps the reference to facts "peculiar here" in *Davis* was an attempt to preserve segregation in Virginia should the Court invalidate it in *Briggs* or *Brown,* both of which were already on their way to the Court. In any case, *Davis* goes on to uphold segregation in Virginia using conventional equal protection. The court starts by detailing the analysis it will use: equal protection requires that "the regulation be reasonable and uniform."[59] The Court then says that it "indisputably appears from the evidence" that school segregation in Virginia "rests neither on prejudice nor caprice," eliminating the argument that the purpose was illegitimate. Finally, it concludes that the legitimate purpose school segregation serves is that it "declares one of the ways of life in Virginia."[60] Racial segregation, the Court says, "has for generations been a part of the mores of her people."[61] Integrating schools, the Court finds, "would severely lessen the interest of the people of the State in the public schools, lessen the financial support and so injure both races."[62] Given the tradition of segregation and potential public opposition to integrated schools, the Court explains that it "cannot say" school segregation in Virginia is "without substance, in fact or reason.[63]

The decisions in *Brown, Briggs, Davis* and *Gebhart* then give the Court at least three potential issues to decide:

1. Is "separate but equal" with no inquiry into the purpose served by segregation, still an acceptable way to comply with the equal protection clause of the 14th amendment? *Brown, Briggs* and *Gebhart* all pose the question.
2. If it is, what's the proper remedy for unequal schools? *Briggs,* and *Gebhart* both pose the issue, with opposite suggested answers.

the two lower court opinions as authority and not the three Supreme Court decisions. Davis v. Cnty. Sch. Bd. of Prince Edward Cnty.,Va., 103 F. Supp. 337, 339 (E.D. Va. 1952).

58. *Davis*, 103 F. Supp. at 339. One wonders if the use of the term "nullification" was accidental.

59. *Davis*, 103 F. Supp. at 339-40. The trial court opinions in both *Davis* and *Briggs* missed an important change in equal protection doctrine. By 1950, the standards the Court used in conventional equal protection analysis of race discrimination had changed. Gone was *Plessy's* "reasonable" standard. In Korematsu v. United States, 323 U.S. 214 (1944), and Oyama v. California*,* 332 U.S. 633 (1948), the Court held that all racial classifications were "suspect," to be "subject to the most rigid scrutiny" and upheld only in "the most exceptional circumstances." *Korematsu*, 323 U.S. at 216; *Oyama*, 332 U.S. at 646.

60. *Davis*, 103 F. Supp. at 339-40.

61. *Id.*

62. *Id.*

63. *Id.*

3. If "separate but equal" is no longer acceptable, can segregation nonetheless be justified under classic "classification/ends" equal protection analysis? *Davis* poses the issue squarely, though a "no" answer to the first question implicitly poses this question in the other cases, with *Briggs* and *Davis* having actually addressed it.

B. The plaintiffs' arguments

In 1950, Thurgood Marshall and the other lawyers working for the NAACP decided they would never again base an argument on separate but equal; that is, they decided not to argue Black schools under segregation needed to be equalized. The only acceptable argument going forward would be one that attacked segregation.[64] The jurisdictional statements, the merits briefs and the consolidated brief filed after the Court ordered reargument, all from the NAACP Legal Defense and Educational Fund, offered the Court virtually every possible argument that segregation itself always violated equal protection. [65] The principal argument in all four cases before the reargument is the one the Court ultimately bought: segregated education never is and never can be equal because segregation delivers the message that Black people are inferior. That message, the plaintiffs argued, made Black people feel inferior, insecure, persecuted. As a consequence, Black kids failed to develop, emotionally and intellectually. [66]

64. In June 1950, the NAACP resolved that after *Sweatt* and *McLaurin,* "pleadings in all future education cases would be 'aimed at obtaining education on a non-segregated basis and that no relief other than that will be acceptable.'" RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION 290-94 (New York, Vintage, 1975).

65. *Brown, Briggs* and *Davis* were federal court challenges to the federal constitutionality of state laws. Under then governing statutes, they were heard by three judge federal courts with a direct appeal to the US Supreme Court. So instead of a petition for cert, appeal was triggered by a jurisdictional statement. *See* Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court*, 72 CASE WESTERN RESERVE L. REV. 909 (2022). *Gebhart* was brought in state court and was appealed to the Delaware Supreme Court, so it got to the Court via a cert petition. Merits briefs were filed in all four cases. The cases were argued together in 1952. The Court then ordered reargument and directed the parties to argue a series of specific questions. On reargument, the plaintiffs filed one consolidated brief in all four cases. The questions on which the Court ordered reargument appear in n.2 of *Brown II,* Brown v. Bd. of Educ.*,* 349 U.S. 294, 298, n.2 (1955).

66. Statement as to Jurisdiction at 6-12, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 436); Brief for Appellants at 8-13, *Brown,* 347 U.S. 483 (No. 8); Statement as to Jurisdiction at 13-20, 32-33, 37-39, Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) (No. 273); Brief for Appellants at 12-21, 26-28, *Briggs*, (No. 101); Statement as to Jurisdiction at 12-16, Davis v. Cnty. Schl. Bd., 103 F. Supp. 337 (1952) (No.191); Brief for Appellants at 13-15 (as noted in the text, *Davis* devotes much more space to conventional equal protection analysis, unsurprising since that was the basis of the District Court decision in *Davis.* Records and briefs from the *Brown* cases can be surprisingly hard to find. While most of the Brown briefs are mostly available through the major legal databases, finding the papers from the other cases can be challenging.

The argument builds on the Supreme Court's decisions in *Sweatt v. Painter*[67] and *McLaurin v. Oklahoma State Regents.*[68] In *McLaurin,* Oklahoma required a Black student studying for a doctorate in education to sit in a row reserved for Black students in classes, to sit at a Black student table in the library and to eat at a Black student table in the cafeteria. The state had removed most maybe all of the possible arguments that there was any difference in the physical facilitates or the curriculum for McLaurin. Nonetheless, the Court said, by setting McLaurin apart, the state had kept him from getting an effective graduate education because it inhibited his ability to study, engage in discussions and exchange views.[69]

In the *Brown* cases, the plaintiffs argued that *Sweatt* and *McLaurin* established that "educational benefits" included intangibles. Pointing to the trial court records they'd built (and laboring to get out from under adverse factual findings in *Davis),* the plaintiffs focused mostly on intangible harm.[70] The evidence established, they said, that segregation inflicted serious "personal injury" on Black children because it carried the message that Black people were inferior. That was a more serious injury at the elementary and high school level than it was in the graduate programs involved in *Sweatt* and *McLaurin,* they argued*,* both because it conveyed that message in a child's formative years and because many more Black people went to elementary and high school than went to professional schools.[71]

Since segregation always conveys the message that Black people are inferior, and since that message always damages Black people and so denies them an equal education, the arguments went, segregated education is never equal education. Putting the logic or legitimacy of the "separate but equal" short circuit aside, the plaintiffs argued, because of the message it carries it can never work and is therefore not a way of complying with the equal protection clause.[72]

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

68. McLaurin v. Oklahoma State Regents*,* 339 U.S. 637 (1950).

69. *McLaurin,* 339 U.S. at 641.

70. This was essential in *Brown* itself, where the District Court had held that while the tangible aspects of education were equal in Topeka, segregation nonetheless did significant damage to Black students. *See* Transcript of Record, "Findings of Fact and Conclusions of Law" of the District Court at 244, Brown v. Bd. of Educ., 347 U.S. 483 (No. 8), and especially at 245, finding VIII, where the Court finds segregation harms Black children. This is the only finding that does not appear in the opinion published in the Federal Supplement.

71. *See*, *e.g*., Brief for Appellants at 13-20, *Briggs*, 98 F. Supp. 529 (No. 101) and Statement as to Jurisdiction at 5-7, *Brown*, 347 U.S. 483 (No. 436); *See also* Statement as to Jurisdiction, at 12-15, *Davis*, 103 F. Supp. 337 (No. 191).

72. Statement as to Jurisdiction, at 6-12, Brown v. Bd. of Educ., 347 U.S. 483 (No. 436); Brief for Appellants at 8-13, *Brown*, 347 U.S. 483 (No. 8); Statement as to Jurisdiction at 13-20, 32-33, 37-39, Briggs v. Elliot, 98 F. Supp. 529 (E.D.S.C. 1951) (No. 273); Brief for Appellants at 12-21, 26-28, *Briggs*, 98 F. Supp. 529 (No. 101); Statement as to Jurisdiction at 12-16, Davis v. Cnty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952) (No. 191); Brief for Appellants at 12, *Davis*, 103 F. Supp. 337 (No. 191).

That argument—that segregation is never equal—while it was the argument the Court accepted,[73] wasn't the only argument the plaintiffs made. They had to make a more conventional equal protection argument in *Davis,* since the decision there said it was based on a conventional "rational basis" analysis and not on separate but equal. But the plaintiffs made other arguments in the other three cases as well. That was good lawyering. Even if the Court were to strike down the separate but equal short circuit, it might well say that left unanswered the question of whether segregation could nonetheless be thought to promote an acceptable government purpose. It could have sent that question back to the lower courts or could have taken it on itself. The lawyers likely wanted to be sure the Court did not think they'd left the question open. So all the briefs in all the cases answered.

All the briefs in the first two rounds (the jurisdictional statements and merits briefs) frame the conventional equal protection arguments in terms of the connection between the classification and an acceptable purpose. As the *Brown* merits brief puts it, the "constitutional standards" "may be generally characterized as a requirement" that the different treatment be "reasonable."[74] "Reasonableness," the brief argues, depends on whether the rationale for different treatment relies on differences in people that are "real" and "pertinent to a lawful legislative objective."[75]

All the briefs give essentially three reasons why segregation in education is not "reasonable." The first comes close to a colorblindness argument. The plaintiffs say race distinctions are the "epitome" of "impermissive" "arbitrariness," and that race is a "constitutional irrelevance." They say the Japanese internment was an exception only allowed because it occurred during a time of "national peril." No state could ever make a similar showing of need.[76] This isn't quite Harlan's "colorblind" constitution, where the government can take no account of race; but it isn't far off.[77] The jurisdictional statement in *Briggs* offers a fascinating variation on that argument. Equal protection, the plaintiffs argue there, requires that any right or privilege a state gives to White people be given to black people on the same basis. It reads colorblind, but only to make sure White people aren't being favored.[78]

73. Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954).

74. Brief for Appellants at 6, *Brown*, 347 U.S. 483 (No. 8).

75. *Id.*

76. Brief for Appellants at 6-8, Brown v. Bd. of Educ., 374 U.S. 483 (1954) (No. 8); Brief for Appellants at 11, Davis v. Cnty. Sch. Bd. 103 F. Supp. 337 (E.D. Va. 1952) (No. 191); Brief for Appellants at 22-23, Briggs v. Elliot, 98 F. Supp. 549 (E.D.S.C. 1951) (No. 101); Consolidated Brief for Appellants on Reargument, at 21-31, *Brown*, 347 U.S. 483 (No. 1).

77. *Plessy*, 163 U.S. at 554.

78. Statement as to Jurisdiction at 27-28, Davis v. Cnty. Schl. Bd., 103 F. Supp. 337 (1952) (No. 191). The argument picks up on a one sentence suggestion in Charles Fairman, *Does the 14th Amendment Incorporate the Bill of Rights,* 2 STAN L. REV. 138-39 (1949) and echoes the Civil

The second argument is that segregation was motivated by racial prejudice based on belief in the "inherent inferiority" of Black people, that they were "not fit to associate with White people."[79] Harkening back to *Yick Wo*, the argument is that prejudice is not a proper purpose, and so segregation to advance it is unconstitutional. The argument doesn't appear in *Brown* itself at this point, and it makes a fairly brief appearance in the other cases.

The argument apart from "separate is never equal," to which the plaintiffs gave the most play before reargument, was basic equal protection: segregation does not in fact advance a valid purpose. There were two closely related parts to it: (1) in terms of intellectual ability (and thus, the capacity to benefit from education) there in fact is no difference between Black people and White people; (2) the state's purposes for its education system are not in fact advanced by segregation.[80] The argument doesn't use the terminology of modern strict scrutiny; although the briefs invoke *Oyama* and *Korematsu*,[81] when they get to laying out this argument, they generally stick to the older "reasonableness" language. But in one critical way, the briefs are very much in line with modern "strict scrutiny:" they insist that it is the state's responsibility to show both a real difference between Black and White students, and that the difference "subserves" a real educational objective.[82]

After hearing argument in December 1952, the Court ordered that all four cases be reargued the following October.[83] In the order, the Court asked the lawyers to address five questions, focused on the impact on schools the 14th Amendment was thought to have at the time it was adopted, judicial power to end school segregation, and the appropriate type of relief.[84] The

Rights Act of 1866. The argument is not renewed in the merits brief. A very similar argument though takes up much of the consolidated Brief on Reargument. *See* below.

79. Statement as to Jurisdiction at 8-9, 12, *Davis*, 103 F. Supp. 337 (No. 191); Brief for Appellants at 12, *Davis*, 103 F. Supp. 337 (No. 191). The argument gets less space and is urged less strongly in the *Davis* merits brief than it was in the jurisdictional statement.

80. Statement as to Jurisdiction at 12-15, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 436); Statement as to Jurisdiction at 30-32, Briggs v. Elliot 98 F. Supp. 529 (E.D.S.C. 1951) (No. 273); Brief for Appellants at 23-26, *Briggs*, 98 F.Supp.529 (No. 101); Statement as to Jurisdiction at 7-8, Davis v. Cnty. Sch. Bd. 103 F. Supp. 337 (E.D. Va. 1952) (No. 191), Brief for Appellants at 10, *Davis*, 103 F. Supp. 337 (No. 191). The Appellants' Brief in Brown only makes the "almost colorblind" and "segregation is never equal" arguments.

81. In Korematsu v. United States, 323 U.S. 214 (1944), and Oyama v. California*,* 332 U.S. 633 (1948), the Court held that all racial classifications were "suspect," to be "subject to the most rigid scrutiny" and upheld only in "the most exceptional circumstances." *Korematsu*, 323 U.S. at 216; *Oyama*, 332 U.S at 646.

82. Brief for Appellants at 21-26, Briggs v. Elliot, 98 F. Supp. 529 (E.D.S.C. 1951) (No. 273); Brief for Appellants at 15-26, Davis v. Cnty. Sch. Bd. 103 F. Supp. 337 (E.D. Va. 1952) (No. 191). The *Davis* case had a tougher row to hoe given the District Court's findings that segregation didn't harm Black children. *See Davis*, 103 F. Supp. at 340-41.

83. *Brown*, 347 U.S. at 488.

84. The four questions are set out in footnote 2 of *Brown II,* the remedies case. Brown v. Bd. of Educ.*,* 349 U.S. 294 (Brown II), 298 n.2. The consolidated brief for the plaintiffs in the four cases also sets out the reargument order, Consolidated Brief for Appellants on Reargument at 13-14, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1).

plaintiffs, filing one large, consolidated brief, seized the opportunity to reframe their legal arguments along with answering the Court's questions. In the new briefing, the argument that separate was never equal because of the impact segregation had on Black children took a back seat. The plaintiffs renewed it, but almost in passing, briefly nodding to what they'd already written.[85]

The reargument brief opens with a longer version of the "almost colorblind" argument that as a matter of existing doctrine, the 14th Amendment does not allow the use of racial classifications except in the most extreme circumstances.[86] The example is the Japanese internment.[87] States, the argument continues, could never make the required showing.[88]

The brief then offers lengthy legal arguments which, while continuing many of the points the plaintiffs made in earlier papers, significantly changes the focus of the equal protection claim. At the heart of these arguments are two propositions: (1) that the purpose of the 14th Amendment was to protect Black people from discrimination; (2) that the purpose and effect of segregation was to keep Black people unequal, replicating the effects of slavery as much as possible. Segregation is unconstitutional, the brief argues, because it is at war with the purpose of the 14th Amendment.[89]

To make the first point, about the purpose of the 14thAmendment, the brief relies heavily on the *Slaughter House Cases*[90] and *Strauder v. West Virginia.*[91] The brief quotes *Slaughter House* at length. The purpose of all three amendments, the Court said there, was "the freedom of the slave race."[92] The amendments were passed, the brief quotes *Slaughter House* saying, to forbid laws that discriminated "with gross injustice" against "newly emancipated negroes." The brief finishes with the famous (if much neglected of late) prediction by the *Slaughter House* Court that any action of a state not "directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[93]

The brief then turns to and quotes at length similar language from *Strauder*.[94] The slightly different take in *Strauder* echoes the 1866 Civil Rights Act: the purpose of the 14th amendment, according to the Court, was

85. It really only appears in the same form in the Summary of Argument. Consolidated Brief for Appellants on Reargument at 16-17, *Brown*, 347 U.S. 483 (1954) (No. 1).

86. *Id.* at 21-31. The plaintiffs use *Sweatt* and *McLaurin* here to argue that the Court has never really allowed the use of race outside of the Japanese internment.

87. *Id.*

88. *Id.*

89. *Id.* at 31-50.

90. Slaughter-House Cases, 83 U.S. 36 (1873).

91. Strauder v. Virginia, 100 U.S. 303, 305 (1879).

92. *Id.*

93. Consolidated Brief for Appellants on Reargument at 32-33, *Brown*, 374 U.S. 483 (No. 1).

94. *Id.* at 33-35.

to assure that Black people had the same rights as White people.[95] The consolidated brief goes on to highlight two more points from *Strauder:* (1) that discrimination against Black people was an assertion of their inferiority; (2) that the amendments changed the relationship between the states and the federal government and empowered federal courts to protect the rights of Black people.[96]

This new argument moves on to a more aggressive attack on *Plessy* as indefensible under *Slaughter House* and *Strauder*. Though that argument does quote Justice Harlan's famous insistence that "[o]ur Constitution is colorblind," it does so at the end of an argument that Harlan's objection to the majority was that segregation put Black people in a lower caste.[97] The brief then takes on *Plessy's* reliance on "custom and usage" and "peace" to justify segregation, still important since that was at the heart of the *Davis* decision in the trial court and an alternate holding in *Briggs.*[98] The plaintiffs say the "very purpose" of the Civil War amendments was to make a "complete break" with the "usages, customs and traditions" of race relations and to destroy the idea of Black inferiority.[99]

The plaintiffs make the second part of the argument, that segregation was designed to relegate Black people to an inferior position in the United States, with a history of segregation. There is very little law in the argument, which is supported mostly by the writing of historians and with primary sources.[100]

The briefs of the plaintiffs in the four cases we came to know as *Brown* then essentially offered the Court four ways to rule that segregation violated the 14th Amendment. They were:

1. That separate was never equal because segregation damaged Black people by branding them as inferior. It wasn't an attack on the constitutional theory behind the separate but equal short circuit as much as an insistence that in the real world, segregation never did and never could deliver equality.
2. That the Constitution was "almost" colorblind; racial classifications were never allowed except for a pressing national "need" like a war, a standard state and local government could never meet.
3. That segregation could never measure up under conventional equal protection, either because it was driven by an illegitimate purpose to harm Black people, or because segregation simply didn't accomplish any legitimate purpose.

95. *Id.*
96. *Id.*
97. *Id.* at 38-41.
98. *Id.* at 42-45; *see* Davis v. Cnty. Sch. Bd. of Prince Edward Cnty, Va., 103 F.Supp. 337, 339-40 (E.D. Va. 1952); Briggs v. Elliott, 98 F. Supp. 529, 535–36 (E.D. S.C. 1951).
99. Consolidated Brief for Appellants on Reargument at 34-45, *Brown*, 374 U.S. 483 (No. 1).
100. *Id.* at 50-65.

4. That the purpose of the 14th Amendment was to protect Black people assuring them all the rights of White people, and that segregation was, in design and practice, antithetical to that purpose.

C. The Court.

There isn't really much room for doubt about what the Brown case decided. Here's what the Court says is the question presented:

> 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?[101]

Pretty plainly, the Court's answer is that segregation is unconstitutional because, separate under segregation as practiced in America is never equal:

> 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 reasonof the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[102]

The Court accepted the plaintiffs' original main argument; it held that segregated school facilities were inherently unequal. Because of that, the Court rejected the "separate but equal" short circuit as an acceptable way to comply with equal protection.

There's just no ambiguity about that holding. The Court sums up the plaintiffs' argument as a claim that " segregated schools are not 'equal' and cannot be made equal."[103] The Court says the three lower courts that upheld school segregation did so on the basis of "the so-called 'separate but equal' doctrine announced by the Court in *Plessy v. Ferguson*."[104] The *Plessy* doctrine, the Court says, holds that "equality of treatment is accorded when the races are provided substantially equal facilities, even though these

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

102. *Id.* at 495.

103. *Brown,* 347 U.S. at 488.

104. *Brown*, 347 U.S. at 488. That of course is not what the *Davis* court said it was doing. But the Court can be forgiven for not crediting that part of the *Davis* decision. In its remedy section, the *Davis* Court required the state to "equalize" the Black schools. Davis v. Cnty. Sch. Bd. of Prince Edward Cnty, Va.,, 103 F. Supp. 377, 340–341 (E.D. Va. 1952). That remedy is only consistent with "separate but equal." If segregation was justified as a reasonable means to promote the "customs, the mind, and the temper of both races," *id.* at 340, the equal protection clause would be satisfied by the schools as they were, and no remedy would have been necessary.

facilities be separate."[105] While the Court in recent cases had "reserved" decision on the continuing validity of *Plessy,* the Court says, in this case "that question is directly presented."[106] Restating the question again, the Court asks

> 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?[107]

The Court provides a plain answer:

> We believe that it does.[108]

The Court explains:

> Separate educational facilities are inherently unequal. Therefore we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws.[109]

The Court could then have addressed the question of whether, bereft of "separate but equal," segregation could nonetheless be justified as different treatment which advanced some legitimate purpose. That would have meant taking up the validity of distinctions based on race outside the context of separate but equal. But the Court didn't do that. Finding that separate but equal was no longer considered a legitimate way of satisfying equal protection, the court simply stuck the segregation laws down. [110]

105. *Brown*, 347 U.S. at 488.

106. *Id.* at 492.

107. *Id.* at 493.

108. *Id.*

109. *Id.* at 495.

110. As the plaintiffs' lawyers anticipated in the Jurisdictional Statements and the merits briefs, abandoning the "separate but equal" doctrine technically left an open question: could segregation be justified as a way of achieving some legitimate end. That it could be is what *Plessy* actually held, and it is very much what the *Davis* Court said and the *Briggs* court suggested. I think the Court can be forgiven for not tying up this loose end. Sixty-eight years earlier (and ten years before *Plessy*) *Yick Wo* held that different treatment couldn't be justified by one race's hostility to another. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). The *Plessy* majority tried to dress up segregation as the ". . . established usages, customs and traditions of the people . . . " designed to "promote their comfort." But as Justice Harlan insisted in his *Plessy* dissent, "everyone" knew that the comfort to be promoted was the comfort of White people who wanted to keep Black people away. Plessy v. Ferguson, 163 U.S. 537, 550, 557 (Harlan, J. dissenting). The lower courts in *Davis* and *Briggs* offered much the same justification as the *Plessy* majority had. As the plaintiffs' lawyers pointed out in their *Davis* and *Briggs* briefs, that justification remained nothing more than a fig leaf for racial hostility. Statement as to Jurisdiction at 21, Briggs v. Elliott, F. Supp. 529 (E.D. S.C. 1951) (No. 273); Brief for Appellants at 13, Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., Va.,

It is true that in one passage, the Court comments on how the equal protection clause applies generally to classifications based on race. But the comment suggests neither strict scrutiny for classifications that benefit Black people nor a generally colorblind constitution. Citing the *Slaughter House Cases* and *Strauder,* the Court says

> In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[111]

Not a ban on all race discrimination; not treating all race discrimination as suspect; the Court says its first decisions suggested any action discriminating against Black people was proscribed. Apart from that single comment, *Brown* is about nothing but the validity of segregation under the "separate but equal" short circuit.

II. THE *HARVARD* CASE

A. The majority opinion

Brown then holds that segregation against Black children is unconstitutional because it brands them as inferior and damages their ability to learn. But in *SFFA v. Harvard*, Chief Justice Roberts tries subtly to cast it as a case which holds that all or almost all *discrimination* based on *any race* is unconstitutional. [112]

The rhetorical shift from segregation to all different treatment comes in the Chief's first reference to *Brown*. "In that seminal decision," he says, "we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by States and the Federal government."[113] In one sense, it's not wrong here to use "segregation" and "discrimination" as if they were interchangeable terms.[114] The *de jure* discrimination that existed 58 years after *Plessy* was pretty much segregation and its kissing cousin, anti-

103 F. Supp. 337 (E.D. Va. 1952) (No. 191); Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Reargument at 42–45, Brown v. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1). There really was no other justification for segregation.

111. *Brown*, 347 U.S. at 490.

112. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 203–06 (2023).

113. *Id.* at 203–04.

114. In fact, *Brown II* (the enforcement decision, 349 U.S. 294, 298 (1955)), in summing up and incorporating the *Brown I* opinion (347 U.S. 483, 495–96 (1954)), uses the term "discrimination" instead of "segregation." But there's not a word in the opinion to suggest it meant to change the scope of *Brown I.*

miscegenation laws.[115] When Roberts then goes on to illustrate the "firm path" on which the *Brown* Court set the judiciary "for good," all of the cases he cites are segregation cases except for *Yick Wo* and *Loving*.[116] The Chief then finishes the job by writing "[t]hese decisions reflect the 'core purpose: of the Equal Protection Clause: 'doing away with all governmentally imposed discrimination based on race.'"[117]

More about the "core purpose" claim in a moment. The cases Roberts cites simply are not about "all governmentally imposed discrimination based on race." They are all (with the exception of *Yick Wo)* about segregation, segregation that had relied for its claim to legitimacy on separate but equal. These cases did not deal with any other discrimination. They were based on *Brown's* ruling that "separate but equal" was unconstitutional because it in fact created a caste and not parallel equality. They were not based on a separate doctrine about all race discrimination.

Black people also pretty much disappear from Robert's discussion of *Brown.* At the start, he does say the school district (there was more than one) argued segregation was "lawful because the schools provided to black students and white students were of roughly the same quality." [118] But from that point on in the Chief's telling, *Brown* was all about "racial" discrimination in education, not discrimination against Black people. So, quoting *Brown,* Roberts writes: "[t]he mere act of separating 'children . . . because of their race' we explained, itself 'generated feelings of inferiority.'"[119] The *Brown* Court said that. It then explained, quoting the trial court, that "[s]egregation of white and colored children has a detrimental effect upon the colored children. Not all children. The "colored" children.

In a very similar vein, Roberts writes

> The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms."[120]

115. Anti-miscegenation laws had a superficial "equality" quite similar to the superficial equality of "separate-but-equal." The idea there was that everyone got treated alike: Whites couldn't marry people of color and people of color could not marry Whites. The Court struck these types of laws down in McLaughlin v. Florida, 379 U.S. 184 (1964), and Loving v. Virginia, 388 U.S. 1 (1967). In *Loving,* the Court finds that anti-miscegenation laws, like segregation laws, were premised on White supremacy. *See id.* at 7, 11–12.

116. *Students for Fair Admissions*, 600 U.S. at 204–06.

117. *Id.* at 206 (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (footnote omitted)).

118. *Students for Fair Admissions*, 600 U.S. at 204.

119. *Id.* (citing *Brown*, 347 U.S. at 494). It's a sloppy quote. The word "children" comes from a different sentence, and "inferiority" isn't the end of the quote.

120. *Id.* (citing *Brown*, 347 U.S. at 493).

The passage quoted is not in fact the conclusion of *Brown* at all; it's a statement of what equal protection requires generally, including under separate but equal. It comes in a set up to the question of whether segregation in fact can provide education "to all on equal terms." The Court's statement of the issue and the Court's conclusion follows the passage Roberts quotes immediately:

> We come then to the question presented: 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.[121]

That's the real conclusion: segregation doesn't deliver equal education because of the way it hurts Black children. Not all children.

The Chief's next step is also a little troubling, for a couple of reasons. First, Roberts suggests the spin he just put on that quote from *Brown* is really the heart of the case because it's what the plaintiffs argued. So he quotes Robert Carter, the NAACP lawyer who did the first *Brown* argument in 1952, as saying "no State has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." The Chief then cites the Brief for Appellants on Reargument and quotes this line from page 65: "That the Constitution is color blind is our core belief."[122]

Carter indeed said what Roberts quotes him as saying, and the consolidated brief has that line. Neither is really a fair characterization of the plaintiffs' arguments though. Most of Carter's oral presentation focused on the argument that ultimately persuaded the Court; not that all racial classifications were bad but that segregation hurt Black children.[123] The line quoted from the consolidated brief comes at the close of a 15 page argument that "separate but equal" nullifies the very purpose of the 14th Amendment, a purpose which the brief spent 19 pages before that argument explaining was to protect the freedom and equality of Black people.[124] Not all people. Black people. To characterize the argument then as an argument about any use of race as opposed to discrimination against Black people is just plain wrong.

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

122. *Students for Fair Admissions*, 600 U.S. at 204. The original of the Brief shows the correction to the right case numbers: 1, 2, 3 and 5.

123. Transcript of Opening Argument of Robert L. Carter, Esq., On Behalf of the Appellants, Brown v. Bd. of Educ., 347 U.S. 483 (1954), https://brown.oyez.org/transcripts/.

124. Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Reargument at 31–50, 50–66, 65, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1).

And, apart from the mischaracterizations, since when does the argument of a party turn the holding of a case into something different than what the Court said it was?

Roberts doesn't actually cite *Brown* for his ultimate claim that the "core purpose" of the equal protection clause was to do away with "all . . . discrimination based on race."[125] But *Brown* is at the heart of the argument leading up to it. He starts the argument earlier, with pre-*Plessy* cases. He leaves out the first case, the *Slaughter House Cases* where the Court said it doubted that anyone other than Black people are protected by the equal protection clause.[126] He does rely on *Strauder* and *Yick Wo,* both of which have "all persons" language which he quotes.[127] Left on the cutting room floor from *Strauder* though is the Court's holding that the "purpose" of the Civil War amendments was to "secure to a race recently emancipated . . . all the rights that the superior race enjoy."[128] Also cut, following the "all persons" language Roberts quotes, is this: "and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"[129] The design wasn't to protect all persons; it was to protect Black people.

The second quote from *Yick Wo* is worse. Here is the Chief's quote: "[I]t is 'hostility to . . . race and nationality'. . . 'which in the eye of the law is not justified.'" Here's the whole sentence from the case:

> No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.[130]

The *Yick Wo* Court didn't say that hostility to race and nationality is not justified in the eye of the law. It said hostility to Chinese nationals was not justified.

At the end of his argument that the "core purpose of the Equal Protection clause" is "doing away with all governmentally imposed discrimination based on race," the Chief cites four modern cases.[131] The first, the source of the quote, *Palmore v. Sidoti,* simply cites *Strauder* and says nothing more.[132]

125. *Students for Fair Admissions*, 600 U.S. at 206 (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (footnote omitted)).

126. Slaughter-House Cases, 83 U.S. 36, 71–72, 81 (1873).

127. *Students for Fair Admissions*, 600 U.S. at 202.

128. Strauder v. West Virginia, 100 U.S. 303, 305 (1879).

129. Another sloppy quote. In the Chief's opinion the quoted sentence is punctuated as if it ends on the word "States;" in fact the sentence continues on to the language about protecting Black people quoted in the text. *Strauder*, 100 U.S. at 307.

130. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1888). Another sloppy quote.

131. *Students for Fair Admissions*, 600 U.S. at 206.

132. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

Two of the cases, *McLaughlin v. Florida* and *Loving v. Virginia,* are cases challenging antimisegenation statutes.[133] The statutes fall under *Yick Wo* in *McLaughlin* because the state effectively offered no justification for treating interracial couples differently, and, in *Loving,* essentially because the purpose was White supremacy.[134] The remaining case, not without a touch of irony, is *Washington v. Davis,* which deals not with whether all use of race is suspect but rather with whether minorities claiming disparate impact have to prove intent (and holding that they do)—there is nothing in *Washington* more than the single sentence quoted by the Chief.[135] The first three cases involved discrimination against interracial couples. The last involved discrimination against Black people. None involved a system that arguably advantaged Black people.[136]

By the time the *Harvard* case was decided, the Supreme Court had held that all racial classifications should be analyzed the same way, using equal protection "strict scrutiny." That was *City of Richmond v. Croson* in 1989 and *Adarand v. Pena* in 1995.[137] But the original equal protection cases never got to that. And neither did *Brown v. Board of Education*.

B. Justice Thomas's concurrence

Justice Thomas set himself a more difficult task than the Chief's. He claims that *Brown* adopted Justice Harlan's dissent in *Plessy* and "embraced" the "colorblind constitution" doctrine.[138]

Justice Thomas's first citation to *Brown* is a mostly correct statement of its holding that segregation is unconstitutional, though he curiously says it required that schools "desegregate with all deliberate speed or else close their doors."[139] It's *Brown II*, not *Brown I*, that requires desegregation and uses the

133. McLaughlin v. Florida, 379 U.S. 184, 194 (1964); Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

134. *McLaughlin*, 379 U.S. at 194; *Loving*, 388 U.S. at 11–12.

135. Washington v. Davis, 426 U.S. 229, 239 (1976).

136. *See* Palmore v. Sidoti, 466 U.S. 429 (1984); McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967); Washington v. Davis, 426 U.S. 229 (1976).

137. Richmond v. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

138. In practical terms, there may not be much daylight, if any at all, between Chief Justice Robert's version of "strict scrutiny" and Justice Thomas's "colorblind constitution." Justice Thomas allows that in situations exigent enough, the constitution may actually see color. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 265 (2023) (Thomas, J., concurring) (citing Johnson v. California, 543 U.S. 499 (2005)). He also appears not to have walked away from the idea that a history of institution specific discrimination can be addressed with remedies that use race. *Students for Fair Admissions*, 600 U.S. at 251. At the same time, after *Students for Fair Admissions, Johnson* appears to be the only case not overruled which upheld any use of race.

139. *Students for Fair Admissions*, 600 U.S. at 231–32.

expression "all deliberate speed." The second part—"or else close their doors"—doesn't appear in either opinion.

Justice Thomas stakes his central claim soon after. He argues that the Constitution forbids all legal distinctions based on race or color, citing to a Justice Department brief in *Brown.*[140] He then goes on:

> This was Justice Harlan's view in his lone dissent in *Plessy,* where he observed that "[o]ur Constitution is color-blind." [citation omitted]. It was the view of the Court in *Brown,* which rejected "'any authority. . . to use race as a factor affording educational opportunities.'[141]

Remarkably though, while characterizing *Brown* Justice Thomas provides a quote from and a citation to not *Brown* but to Chief Justice Roberts' opinion in *Parents Involved v. Seattle School Dist. No. 1.*[142] In the *Parents Involved* passage Thomas quotes, Roberts in turn was quoting Robert Carter's 1952 oral argument in *Brown.* Roberts also quoted the plaintiffs' consolidated brief on reargument, this time the summary of argument.[143] This is the same line from Carter's argument and another part of the same brief that the Chief cited in the majority opinion in the *Harvard* case. In the *Harvard* case, he uses it to support his claim that *Brown* required that "public education must be made available to all on equal terms."[144] And the Carter and consolidated brief quotes have the same problems in *Parents Involved* as they have in the majority opinion in the *Harvard* case. A worse problem actually. In *Parents Involved*, the Chief uses the quotes to support the claim that "the position of the plaintiffs in *Brown* was spelled out in their brief [sic] and could not have been clearer."[145] But Carter spent most of his time on another argument entirely—that segregation could never be equal because of the way it damaged Black children. And the plaintiffs spent most of their reformulated legal argument in the consolidated brief arguing that the 14th Amendment was intended to protect Black people, not everyone, and that segregation, undeniably a form of discrimination against Black people, was designed to nullify it.[146] This is just not an argument that all consideration of race was forbidden.

140. *Id.*

141. *Id.* at 233.

142. *Students for Fair Admissions*, 600 U.S. at 233; Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007).

143. *Parents Involved*, 551 U.S. at 747.

144. *Students for Fair Admissions*, 600 U.S. at 204 (citing *Brown*, 347 U.S. at 493).

145. *Parents Involved*, 551 U.S. at 747.

146. Transcript of Opening Argument of Robert L. Carter, Esq., On Behalf of the Appellants, Brown v. Bd. of Educ., 347 U.S. 483 (1954), https://brown.oyez.org/transcripts/; Consolidated Brief for Appellants on Reargument at 31–50, 50–66, *Brown*, 347 U.S. 483 (1954) (No. 1). As noted in the text, in *Parents Involved*, Roberts cites to the Summary of Argument instead of the line on page

And again: since when does the argument of a party change what a Court says in its opinion about what it is holding and why?

Justice Thomas makes his central claim about *Brown* a second time. He begins by focusing again on the parties and the lawyers, telling us they "embraced the equality principle, arguing that "[a] racial criterion is a constitutional irrelevance."[147] At this point, Justice Thomas is using the term "equality principle" interchangeably with "color blind constitution." Justice Thomas drops a footnote after this description of the parties' argument. In the footnote, Justice Thomas says that the Jurisdictional statements in *Davis* and *Briggs* "stated the colorblind position forthrightly."[148] The *Davis* Jurisdictional Statement makes the strong statement he quotes, making it as the opening of an "almost colorblind" argument. That sentence follows an argument that segregation fails conventional equal protection because there is no real difference between Black and White students. The almost colorblind argument in turn is followed by an argument that segregation is based on hostility to Black people and violates equal protection for that reason. And that is followed by the longest argument, the "separate can't be equal," argument that the Court accepted.[149] In context then, colorblindness wasn't the only thing the plaintiffs argued. Justice Thomas doesn't quite say that it was, but he never allows anywhere that the plaintiffs argued anything else.

The *Briggs* Statement as to Jurisdiction he cites is much the same; it makes all the arguments the plaintiffs were making. It also has one more. It argues that even if segregation is rational, it is unconstitutional because history shows that the measure of equal protection is whether Black people have the same rights as White people.[150] Certainly not a colorblindness for White people theory.[151]

As is all too clear at this point, while the plaintiffs' lawyers "embraced" the "almost colorblind" argument, they embraced quite a few others as well, embraced them at greater length, with arguably more persuasive force and undoubtedly with more success.

Then Justice Thomas gets to the *Brown* opinion itself. Referring to what he said was the plaintiffs' argument for a colorblind constitution, he writes

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65. But that's hardly better. In laying out their arguments in the part of the Summary that follows, the plaintiffs make the "almost colorblind" argument, but they also make the conventional argument that segregation does not reasonably advance any legitimate purpose, that segregation is of necessity in fact unequal, and, most strongly, that segregation was designed to nullify the purpose of the 14th Amendment, that purpose being to protect Black people. *See id*. at 15–17.

147. *Students for Fair Admissions*, 600 U.S. at 264.

148. *Id.* at 265 n.6.

149. Statement as to Jurisdiction at 6–9, 12-16, Davis v. Cnty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952) (No. 191).

150. Statement as to Jurisdiction at 28, Briggs v. Elliot, 98 F. Supp. 529 (E.D. S.C. 1951) (No. 273).

151. *See id.* at 20–21.

> Embracing that view, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place" and "[s]eparate educational facilities are inherently unequal."[152]

The quote is solid. But saying that rejecting separate but equal is embracing the colorblind constitution does not make it so. The *Brown* Court could have invalidated school segregation by adopting the colorblind constitution theory. But it didn't. There isn't a word in the opinion to suggest that it did, and Thomas doesn't cite to one.

Justice Thomas turns to *Brown* again three times. First, arguing that any "alleged" benefits of educational diversity cannot justify using race in admissions, he writes: "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown v. Board of Education.*"[153]

The *Brown* opinion however never discusses any alleged educational benefits of segregation. It could have. John W. Davis, arguing for South Carolina in *Briggs* argued that segregation was good for Black children. The trial Court said that was a policy argument.[154] The trial court in *Davis* found the evidence of harm didn't "over-balance" the defendants' evidence of benefit.[155] But the Supreme Court in *Brown* simply never discussed any benefits of segregation at all.

Justice Thomas says the NAACP's lawyers argued for a colorblind constitution because allowing the use of race even to help Black people ran too much of a risk of something that would do harm.[156] His support is the same "[t]hat the constitution is color blind is our dedicated belief" quote that Chief Justice Roberts used in the majority.[157] And like the Chief, he fails to mention that it comes as the summation of two sections covering 34 pages that argue that segregation violates the 14th Amendment because it "nullifies" the purpose of the amendment, to protect Black people.[158] Hardly the colorblind argument.[159]

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152. *Students for Fair Admissions*, 600 U.S. at 265 (Thomas, J., concurring).

153. *Id.* at 256.

154. Brief for Appellees at 19-37, Briggs v. Elliot, 98 F. Supp. 529 (E.D. S.C 1953) (No. 2).

155. Davis v. Cty. Sch. Bd., 103 F. Supp. 337, 339 (E.D. Va. 1952).

156. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 268 n.7 (2023) (Thomas, J., concurring).

157. *Id.* at 204 (majority opinion).

158. Consolidated Brief for Appellants on Reargument at 31–50, 50–66, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1).

159. Justice Thomas then invokes Judge Constance Baker Motley's reflection on Thurgood Marshall's admiration for Harlan's opinion in *Plessy*, which she says he regarded as his "bible." The reference is difficult to track down. Parts of the Proceedings of the Supreme Court Bar honoring Justice Marshall after his death, to which Thomas cites as the source for Judge Motley's remarks, are reprinted in volume 510 of the US reports. Judge Motley's remarks don't appear there. Judge Motley's remarks were recorded by C-SPAN. *See Memorial to Thurgood Marshall*, CSPAN (Nov. 15, 1993), https://www.c-span.org/video/?52457-1/memorial-thurgood-marshall (last visited

Finally, Justice Thomas sums up his basic claim one last time. He writes that the Universities' policies are "plainly—and boldly—unconstitutional" because they "fly in the face of our colorblind Constitution," citing *Brown II*'s[160] characterization of *Brown I*.[161] *Brown II* does switch the nomenclature from "segregation" to "discrimination"—hardly surprising since segregation and antimisegentaion laws were pretty much the extent of facial race discrimination in 1955. But there isn't a word in *Brown II* to suggest that the Court meant to expand the holding of *Brown I* beyond segregation and beyond the damage to Black children. And there is not a word about a "colorblind" constitution.

That may be the most remarkable thing about Justice Thomas's opinion. Justice Thomas relies on *Brown* as the case that establishes the "colorblind" constitution in case law.[162] But while *Brown* discusses and explicitly overrules *Plessy,* it never once mentions Justice Harlan's famous dissent. It never once uses the word "colorblind." And while he refers to *Brown* throughout his opinion, Justice Thomas only quotes or pin cites the opinion once, in a passage that faithfully reflects that the decision is about segregation and concludes that under segregation, separate is never equal.[163]

C. Justice Sotomayor

Justice Sotomayor lays out her thesis about what *Brown* means at the start of her dissent. "In *Brown v. Board of Education*," she tells us, "the Court recognized the constitutional necessity of racially integrated schools in the light of the harm inflicted by segregation and the 'importance of education to our democratic society.'" [164] Like Chief Justice Roberts, her argument turns on a subtle rhetorical shift: the Constitution, in her telling of *Brown,* required not desegregation but integration. Integration might often be the result of desegregation. It's something else though to say that the Constitution requires integration.

Justice Sotomayor begins with a mostly accurate description of what *Brown* said and did. *Brown* overruled *Plessy,* she tells us, and held that

August 27, 2024). Her remarks begin at 9:30. She discusses Harlan's opinion at 20:00-21:17. She does say Harlan's opinion was Justice Marshall's Bible. She does not mention Harlan's use of the term or the concept of a "colorblind constitution," and neither the phrase nor the idea were the part of his work to which the plaintiffs' lawyers in *Brown* devoted most of their attention. *See* Plessy v. Ferguson, 163 U.S. 537, 544, 551 (1896); *See* Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 21–31, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 5).

160. *Students for Fair Admissions*, 600 U.S. at 287 (Thomas, J., concurring) (citing *Brown*, 349 U.S. at 298).

161. *Id.*

162. *See id.* at 233, 264–265.

163. *Id.* at 265.

164. *Students for Fair Admissions*, 600 U.S. at 318 (Sotomayor, J., dissenting).

segregated education was inherently unequal and thus a violation of equal protection.[165] The shift comes with her description of *Brown II* (the enforcement decision), where she says the Court "ordered segregated schools to transition to a racially integrated system of public education"[166] But what the *Brown II* Court says it was doing was requiring "the transition to a system of public education freed of racial discrimination," and to "racially nondiscriminatory school system."[167]

Justice Sotomayor goes on to say that the Court ordered that transition "with all deliberate speed . . . ordering the immediate admission of [Black children] to schools previously attended only by white children." This is a pretty egregious mischaracterization of *Brown II*. *Brown II* famously left it to lower courts to decide how to fashion an implementation remedy. The thrust of the *Brown II* opinion was that while the Court wanted the lower courts and school districts to move expeditiously, it was not ordering that Black children be immediately admitted to previously White schools.[168] The Court did uphold the lower court orders in *Belton v. Gebhart*, (which the Court refers to as "the Delaware case") and those orders did require the immediate admission of Black children into the White schools in Wilmington.[169] But the Supreme Court didn't order that, and that was the effect of the decision in *Brown* only in Wilmington, not Kansas, South Carolina or Virginia.

Justice Sotomayor goes on to say that "*Brown* was a race-conscious decision that emphasized the importance of education in our society."[170] Fair enough. This is followed by an accurate summary of Harlan's denunciation of segregation as a caste system in *Plessy,* the *Brown* Court's recognition that it was a caste system, and the *Brown* court's emphasis on the importance of education.[171] But then the shift again in her description of the holding:

> In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid.* [in the original].[172]

Sotomayor supports that claim not with anything from *Brown* itself, but instead with the desegregation cases that followed it, principally *Green v.*

165. *Id.* at 327.
166. *Id.*
167. Brown v. Bd. of Educ., 349 U.S. 294, 299, 301 (1955).
168. *See id.* at 299–301.
169. Belton v. Gebhart, 32 Del. Ch. 343, 362 (1952).
170. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 327 (2023) (Sotomayor, J., dissenting).
171. *See id.* at 327–328.
172. *Id.* at 328.

School Board of New Kent County.[173] These cases show, she says, that "the ultimate goal of that seminal decision (referring to *Brown*) was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness."[174] According to the *Green* Court itself, the case involved a county with two schools, both covering elementary and high school.[175] One originally Black, one White, on opposite sides of the county. There was no residential segregation in the county.[176] For 11 years after *Brown*, the schools remained completely segregated using a variety of schemes to avoid desegregation.[177] Once Congress and the federal Department of Health, Education and Welfare adopted rules which would have made the schools ineligible for federal aid due to lack of progress on school desegregation, the County adopted a "freedom of choice" plan which allowed students to choose between the two schools.[178] All of the White students stayed in the White school.[179] Fifteen percent of the black students went to the White school as well.

The Court said the issue it was deciding was whether the plan "constitutes adequate compliance with the Board's responsibility 'to achieve a system of determining admission to the public schools on a non racial basis.'"[180] Not a responsibility to create an integrated school: a responsibility to achieve a system of admissions that was "nonracial." The problem with the plan, the Court said, was that it failed to undo the system of segregation. Again, and again, the court describes desegregation as the goal, a system as the Court puts it, "without a 'white' school and a 'Negro' school, but just schools."[181]

Much the same can be said for the other post-*Brown* school cases Sotomayor cites: they are all about completely dismantling segregation.[182] None talk about an affirmative duty to integrate apart from getting rid of a dual school system once and for all. And while th e descriptions of those cases are mostly fair, the Justice occasionally also cuts quotations short and characterizes them as requiring integration where what they talk about is desegregation. In her parenthetical on *Dayton Bd. of Ed. v. Brinkman,*[183] she says the case says the school board "'had to do more than abandon its prior

173. *Id.* (citing Green v. Cty. Sch. Bd., 391 U.S. 430, 437 (1968)).
174. *Id.*
175. *Green*, 391 U.S. at 432.
176. *Id.*
177. *See id.*
178. *Id.* at 433.
179. *Id.*
180. *Id.* at 432.
181. *See id.* at 435–441.
182. *See* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 189 (1973).
183. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 527 (1979).

discriminatory purpose'; it 'had an affirmative responsibility' to integrate."[184] But what the *Dayton* Court actually said was that it had "an affirmative responsibility to see that pupil assignment policies and school construction and abandonment policies 'are not used and do not serve to perpetuate or re-establish the dual school system.'"[185]

Justice Sotomayor argues strongly that because society in general and education in particular are so unequal today, it ought to be constitutional to use race in college admissions. "Put simply," she writes, "society remains 'inherently unequal.' *Brown,* 347 US at 495, 74 S.Ct. 686."[186] She makes a powerful argument. But *Brown* didn't say "society" was inherently unequal; it said that segregation in schools was. Putting the *Brown* citation after the statement doesn't strengthen the argument. Since that's not what *Brown* said, it makes the argument weaker.

III. TAKING THE NAME *BROWN* IN VAIN.

At first blush, the idea that *Brown* might establish that *all* racial classifications are highly suspect, or that *Brown* said our Constitution is "colorblind," or that *Brown* held the Constitution requires integration all seem at least plausible. All three of those ideas are consistent with *Brown's* holding striking down segregated schools.

Asking old cases to answer contemporary questions, though, can be a fraught business. When John Marshall Harlan wrote of a "colorblind" constitution in 1896, he wasn't looking at the same world that Clarence Thomas was looking at in 2023. Harlan wrote about why he believed the 14th Amendment was colorblind; it took no account of color because it was designed to prevent discrimination against Black people. His opinion is famous at least in part because he called out the real purpose of Louisiana's law: to keep Black people away from White people. He invoked *Strauder* and other early cases saying that the purpose of the amendments was to protect Black people. He likened *Plessy* to *Dred Scott,* and charged that the point of segregation was to impose "aggressions, more or less brutal, against the colored race." The Louisiana law, he said, imposed a "badge of servitude." .[187] The constitution was colorblind for the only laws that took color into account at the time: laws that hurt Black people. [188] Would John

184. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. 600 U.S. 181, 329 (2023) (Sotomayor, J., dissenting) (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 527 (1979)).

185. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460 (1979)).

186. *See Students for Fair Admissions*, 600 U.S. at 337 (Sotomayor, J., dissenting).

187. *See Plessy*, 163 U.S. 537 at 552–553, 555–557, 559–560 (1896) (Harlan, J. dissenting).

188. There is maybe no better example of how "complete equality" in the post war 19th century meant protecting Black people than the text of the Civil Rights Act of 1866. It says "citizens of every race and color" "shall have the full and equal benefit of all laws." But it doesn't stop at "all

Marshall Harlan have written the same thing about the Constitution in a case about a law to help Black people? We'll never know, since we can't ask and there's nothing in the opinion, honestly read, to tell us.

It's difficult though to see the misuse of *Brown* in the *Harvard* case as the result of carelessness about context. There are simply too many chopped-up sentences, too many phrases yanked out of context, too many fragments spliced together to change meaning.[189] It is hardly an accident when you leave off the second phrase of a sentence that explains that "all persons shall stand equal before the law" means "and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."[190]

That the use of *Brown* doesn't seem to be a mistake begs the question: why do this; you're the Supreme Court, you decide what the constitutional rules are. Why go to all this trouble to make it seem like an earlier Court decided this question?

The answer to that rhetorical question is pretty obvious: credibility.[191] Here there is a real difference between the opinion of Justice Sotomayor and the opinions of Justices Roberts and Thomas. In terms of lawyering, her cutting up of quotes and mischaracterizing cases is as bad as theirs. She does less of it, but still. And like them, she is doing it for credibility. But writing in dissent to defend affirmative action, she doesn't need the credibility of *Brown* the way they do.

Almost no one in law argues that *Brown* was wrongly decided. It's an icon. It's an icon not for the reasoning of the opinion, but because after at least 58 years of mostly ignoring its responsibility to use the Civil War amendments to protect Black people, the Court was now going to take the job seriously. And for a time it did. It was the Court finally doing the job it was meant to do. More than that, perhaps in a way unique in American history, the Court pushed Congress and the Executive Branch finally to take their roles in protecting Black people seriously.[192] To someone growing up in the 50s and 60s as I did, the Court seemed to hold the moral compass in

laws." It says the "full and equal benefit of all law . . . as is enjoyed by white citizens." The citizens of "every race" are all citizens who are not White. Civil Rights Act of 1866, 42 U.S.C. § 1981.

189. *See supra* Section III(1).

190. *Compare* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 202 (2023) (majority opinion) *with* Strauder v. West Virginia, 100 U.S. 303, 307 (1879). When you sign your name to an opinion, you take responsibility for what is written.

191. This is hardly the first time the Court has misrepresented its own past cases. Just think for a moment of Justice Scalia's contortions trying to show that the rule announced in Emp't Div. v. Smith, 494 U.S. 872, 882 (1990) wasn't new. Or Justice Kennedy's assurance in United States v. Alvarez, 567 U.S. 709, 719 (2012) that the Court had not previously held that false statements were not protected speech. But doing this to *Brown* is different. This isn't getting out from under an inconvenient precedent. See the text following.

192. *See* BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION 4–7 (2014); *see also* DAVID HALBERSTAM, THE FIFTIES 667–690 (1994) (describing the integration of Little Rock's Central High School and the role of the federal government).

our system, to be the guardian that would tell the rest of us to do what we knew was right when we lacked the courage.

If the Court as our moral conscience had a sacred scripture, it was *Brown*. That a dishonest recounting of it took center stage in the *Harvard* case was a price that seemed worth paying to the majority and Justice Thomas because they really needed its credibility.[193] Resting their decision on precedent like *Adarand*, decided after the Court already had a majority of conservative judges[194] would reinforce the idea that the decision in the *Harvard* case was just another move by (mostly White) conservatives to keep government from helping Black people. So the majority and Justice Thomas turn to *Brown* as justification for what they have done. . To seal the deal, they take the very unusual step of quoting the lawyers who argued *Brown* to explain its meaning. Those lawyers—Marshall, Carter, Nabrit, Coleman, Robinson, Motley, Greenberg—with a level of courage most lawyers never have to muster and a brilliance that dazzles as you read what they wrote 70 years later, made the change that was *Brown* happen. They got the Court to do what was right. They are heroes to the rest of us. If those lawyers argued for an equal protection that made affirmative action unconstitutional, and the *Brown* Court agreed, the *Harvard* case would be no White imposition. It would be the triumph of the Civil Rights movement.

Cynical of the majority, you say. It is. It is worse than that. It is disrespectful of one of the finest moments in American history. And it is heartbreaking that the Court has so little respect for itself and for the things that once made it great.

193. Justice Sotomayor is using *Brown* for credibility as well, mostly to buttress her claim that *Brown* approved of race conscious remedies. She doesn't need it for cover the way the majority and Justice Thomas do since she's deciding in favor of the universities. See the text following this note.

194. *See* Jeffrey Toobin, *The Supreme Court after Scalia*, THE NEW YORKER (Sept. 26, 2016), https://www.newyorker.com/magazine/2016/10/03/in-the-balance. The Justices on the Court when *Croson* was decided were Rehnquist, White, O'Connor, Scalia, Kennedy, (the majority) Stevens (who agrees with the outcome, but not reasoning) and Marshall, Brennan, and Blackmun (the three dissenters). *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 476 (1989).